12-18-2017

A Right to Record: An Analysis of the Legal Issues Surrounding Cell Phone Videos of Police Violence

Katherine E. Milburn

Rochester Institute of Technology

School of Communication

College of Liberal Arts

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by

Katherine E. Milburn

A Thesis presented

in partial fulfillment of the Master of Science degree

in Communication & Media Technologies

Degree Awarded:

December 18, 2017

The members of the Committee approve the thesis of

Katherine E. Milburn presented on November 17, 2017.

_____

Andrea Hickerson, Ph.D.
Associate Professor and Director
School of Communication
Thesis Advisor

_____

Grant Cos, Ph.D.
Professor and Director for Graduate Programs
School of Communication
Thesis Advisor

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Term Degree Awarded: Fall Semester 2017 (2171)

Abstract

Smartphones have become ubiquitous in modern society, increasing the likelihood of being caught on camera. On July 17th, 2014, a cell phone video of Staten Island police officers wrongfully killing Eric Garner reignited a national controversy on the nature of police violence, and set off a wave of citizen-surveillance through cell phones. By reviewing prior 1st and 4th Amendment court cases, I argue that citizens do indeed have a right to record on-duty police officers, and police do not have the right to conduct a warrantless search or seizure of a phone. Although a case involving citizen-surveillance of law enforcement has not yet reached the Supreme Court, based on the current balance of power as well as prior cases, it is likely that these videos would be declared a protected form of speech under the 1st Amendment.

Keywords: cell phones, police violence, Eric Garner, 1st Amendment, 4th Amendment

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Chapter I: Introduction

When Eric Garner was stopped by police on July 17th, 2014, he was familiar with the drill. The Staten Island resident was well acquainted with local law enforcement who had already arrested him twice that year for hawking cigarettes-a common offense in the Tompkinsville neighborhood along with similar misdemeanors. In fact, the police were targeting Garner as part of a crackdown on these types of crimes that, "to the police, Mr. Garner represented" (Baker, Goodman, & Mueller, 2015, para. 13). Although he had previously been let go with only a warning, on this day, Garner's relationship with police came to a violent end.

The video disseminated across America shows Garner being held to the ground in a chokehold by an officer, repeatedly and hauntingly crying, "I can't breathe." It appeared that to local law enforcement, Garner was seen not as one petty offender, but as a symbol of everything wrong with the Tompkinsville neighborhood. Following the release of the video, he quickly became a symbol of protest with the likes of Rodney King.

Eric Garner is just one name on a long list of unarmed black men whose lives have been taken by police. On April 4th, 2015, Walter Scott was gunned down by a police officer in North Charleston, South Carolina, following a routine traffic stop. Scott was pulled over for having a broken tail light, but the confrontation led to a foot chase which was caught on video, as was the moment when Scott was fatally shot (Martinez, 2015; Shapiro, 2016).

This incident was repeated again in Baton Rouge on July 5th, 2016, when Alton Sterling was tackled and held to the ground by two white police officers. A video recorded the officers exclaiming, "He's got a gun!" and subsequently shooting Sterling who died at the scene. The

very next day in Falcon Heights, Minnesota, Philando Castile was shot by police at a traffic stop while reaching for his insurance card and gun permit for the legal firearm that was in his possession. The officer told him not to go for the gun-Castile assured him that he was only reaching for his insurance card. The officer then fired seven rounds into Castile, the disturbing incident filmed and posted on Facebook by his girlfriend who was in the passenger seat (Capecchi & Smith, 2016; Cave & Oliver, 2016).

Overview of Problem

Stories like these have ignited a heated national discussion on the nature of violent policing techniques, particularly against African American communities. The ensuing wave of national protests demonstrated that a large portion of the public considers racial profiling to be a serious unresolved issue within law enforcement. However, the particular cases mentioned above share another connecting factor-*each incident was filmed on a bystander's cell phone.* "Today, nearly every criminal case has a digital component" (Vance, 2014, para. 9), and while surveillance technologies have existed for decades, they are normally used by law enforcement *against* perpetrators. We are now in an era where bystanders have begun videotaping instances of misconduct by *police,* and this trend has been made possible through the use of personal, portable, everyday technological devices. Many of these videos reveal a different narrative from what was reported by law enforcement. For Philando Castile's girlfriend, sharing her grisly video of injustice was as easy as clicking "Post."

Complaints of police using excessive force against citizens is not new, and data on the issue has been collected since the era of Prohibition (Shane, 2016). In 1931, the National Commission on Law Observance and Enforcement (also called the Wickersham Commission) conducted a systematic inquiry into claims of police misconduct, leading to a set of weak

reforms (Hall, 1997; Shane, 2016). The Commission failed to provide a clear definition of the term “brutality,” and all reports of wrongdoing were strongly denied by those in law enforcement. The Commission “only briefly and vaguely discussed possible corrective actions, which may have been a political compromise” (Shane, 2016, p. 3). Since then, the U.S. Commission on Civil Rights has repeatedly stated that police brutality remains a serious issue and has recommended that the Federal Bureau of Investigation begin logging and interpreting the modern data, although the question of what to do with all of it remains unanswered (Shane, 2016). The key, according to these agencies, lies within the empirical data, not just within scattered reports of misconduct and media buzz.

Cell phone videos certainly fall under “The Data” umbrella, but what policies should govern their use in the courts? As of yet, the Supreme Court has not heard a case specifically addressing the rights of citizens to record on-duty police officers. This paper will explore the current legal issues related to cell phone videos, arguing not only for the rights of citizens to record police, but also for the importance of doing so. It will begin with a thorough review of Fourth Amendment law and its application by the Supreme Court to help us understand the circumstances under which a person’s cell phone data can be used as evidence against them, as well as “reasonable expectations of privacy” in the modern tech era. Turning back to the beginning of the Bill of Rights, it is also necessary to review First Amendment law to understand the rights of individuals as the creators of media to publish and disseminate incriminating evidence against the police. The second half of this paper focuses mainly on the technological devices themselves, considering the current trends of both citizens and law enforcement in using technology to the advantage of the public. I will conclude by addressing current policy and suggesting a possible path forward in these complex technological times, as well as providing an

opinion on what the ruling on the issue may be once it inevitably comes before the Supreme Court. It is rational to assume that the prevalence of smartphone technology can lead to changes in police use of force. American citizens must be made aware of their right to record on-duty officers in public, and that this action can benefit law enforcement as well as citizens.

Methods

Regarding methodology, a close reading was conducted to emphasize patterns and similarities among the different court cases, weaving a larger legal narrative into which our current issue is embedded. Cases in each section were analyzed in the order of when they were tried, and they were chosen based on relevance. If this issue were to come before the Supreme Court, it is likely that these particular cases would be drawn upon as establishing precedence.

For the second half of the paper, I researched the use of modern technologies to aid in law enforcement transparency. The purpose of this section is to reveal how complicated the situation is, with no one technology acting as a panacea for curbing police violence. The uses of these technologies, although not without benefit, come with many legal and practical challenges. A few key scholarly articles on the topic, as well as some recent news articles, served as the backbone for this research. Since the issue is current, news sources were valuable in providing the most up-to-date information on these technologies and their effectiveness.

Chapter II: Legal Principles in Bill of Rights and Previous Cases

Before commencing the analysis of relevant First and Fourth Amendment cases and forming an argument in favor of overt protection for citizens recording the police, it is necessary to acknowledge the original wording of the Bill of Rights. The First Amendment states,

Congress shall make no law respecting an establishment of religion, or

> prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. Const. Amend. I)

And the Fourth Amendment, respectively,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Const. Amend. IV)

The finer points of interpretation will continually be debated, but a close reading of the text will provide the groundwork for the analysis of the rights of citizens both to record on-duty police officers, and to refuse to succumb to a warrantless search of cell phone data. Based on the specifics of each case and to establish a proper flow of information, I have chosen to begin with the Fourth Amendment followed by the First.

The Fourth Amendment and Digital Surveillance

The advancement of cell phone technology is so rapid, and the potential for its use in criminal activity so massive, that the courts have struggled to keep up. This is evident by the Supreme Court's recent refusal to hear an appeal of a decision to allow the government warrantless access to a defendant's cell phone data (Ruger, 2015). The 11th Circuit U.S. Court of Appeals ruled that the defendant, a Florida man suspected of armed robbery, did not have a reasonable expectation of privacy when it came to tracking his cell phone, and the Supreme Court declined hearing a challenge to this ruling. Reacting to the legal Pandora's Box that this refusal opens, Senator Ron Wyden (D-Ore.) is pushing for Congress to pass his Global

Positioning System (GPS) Act, requiring law enforcement to obtain a warrant before searching a cell phone: “It's clear the courts won't resolve this question any time soon, so Congress needs to step up and make sure that Americans' cell phones aren't being used as warrantless government GPS trackers” (para. 2).

What is shocking about this refusal is not only that it highlights the Supreme Court’s inefficiency in discerning the technological times, but it also seemingly goes against the previous ruling in *Riley v. California* (2014). It also touches on the issue of privacy as it relates to technology, a controversial and politically charged issue. Although *Riley* has a precedent in multiple cases regarding government surveillance of citizens (e.g., *Katz v. United States, United States v. Jones*), it is directly relevant to the subject of cell phone videos and their effect on law enforcement practices.

Before expounding on *Riley v. California,* it is useful to note the larger context into which *Riley* is embedded by briefly tracing the evolution of Supreme Court decisions involving tech-related searches and seizures. The framers of the Constitution could not have imagined the types of technological advances in the future, and thus could not have foreseen the application of the Fourth Amendment in this electronic age. A good starting point into this matter is *Katz v. United States* (1967), the Supreme Court decision that established the famous “*Katz* test,” a precedent for determining when a search has taken place. What was once a strong rule has been, as Barry Friedman writes in *Unwarranted: Policing Without Permission* (2017), “riddled...with exception after exception, to the point that the warrant ‘requirement’ now looks like a piece of Swiss cheese” (p. 122).

Katz v. United States. In 1967, Charles Katz was charged with transmitting gambling information across state lines-a federal offense-from a telephone. He was ultimately convicted

because the FBI had wiretapped the payphone that he was using to place bets. The Court of Appeals denied that an unlawful search and seizure had taken place because law enforcement had not physically entered Katz's location. The significance of this case is found at the junction of Constitutional law and technology: is the use of an electronic device safeguarded from normal Fourth Amendment interpretation simply because it allows the FBI to spy from a distance? According to a previous Supreme Court decision in *Olmstead v. United States* (1928), yes. The majority opinion in *Olmstead* centered on the historical reading of the Fourth Amendment as it related to physical intrusion. The dissenting opinion voiced by Justice Louis Brandeis, however, anticipated the future complications of this reading in light of technological advances, believing that privacy was on the line (Friedman, 2017).

Almost forty years later, it was Justice Brandeis with whom the *Katz* Court agreed. Although "it would take two generations of utter foolishness to undo the damage to civil liberty that Taft accomplished by allowing the government to spy in any way it wished," (through *Olmstead*) the decision was overturned in *Katz* (Friedman, 2017, p. 217). The Fourth Amendment, according to Justice Stewart, "protects people, not places" (*Katz v. United States*, 1967), so Katz's insistence that the telephone booth was a Constitutionally protected area was unsupported. However, what the Fourth Amendment does protect, according to the *Katz* Court, is one's "reasonable *expectations of privacy*," a phrase that has come to be known as the "*Katz* test." In placing bets from a glass telephone booth, Katz sought "to exclude… not the intriguing eye -- it was the unintended ear" (*Katz v. United States*, 1967).

The requirement of the *Katz* test is twofold: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'" (*Katz v. United States*, 1967). Of course, this ambiguity

can lead to arguments over what places exactly society deems as private, and indeed has confused even the Justices at times as in the case of *United States v. Jones* (2012), another important decision leading up to *Riley*.

United States v. Jones. In *Jones*, a lower court found the defendant guilty of drug possession after police had attached a GPS tracking device to his car, monitoring his location for a month. The resulting data was used against Jones, but the jury found him not guilty because the GPS had been employed with an expired warrant. Jones was tried again under a charge of conspiracy, but prior to that trial, Jones petitioned to suppress the evidence against him since it had been illegally obtained. By applying the *Katz* test, the court rationalized that while driving a vehicle on public roads, citizens do not have a reasonable expectation of privacy regarding their movements (this same line of reasoning was used in a previous GPS data collection case, *United States v. Knotts*, 1983).

Unanimously, the Supreme Court justices affirmed that attaching the warrantless GPS device constituted a "search" that violated Jones' Fourth Amendment rights. What they could not conclude, however, was why. According to Friedman (2017), "the justices had splintered on the question of what exactly the government had done wrong. They could not even say how much GPS tracking was too much" (p. 224). The majority relied not on the *Katz* test, but on the pre-*Katz* physical trespass doctrine: by placing the GPS device on Jones' car, the government was physically intruding upon his private space (McAllister, 2014). When *Katz* overturned *Olmstead*, it was not because *Olmstead*'s definition of a search was wrong; it was just too narrow. *Katz* introduced the issue of electronic privacy under Fourth Amendment jurisdiction. The Court's assessment appears reasonable on the surface, but the pre-*Katz* doctrine neglects to address the

issue of government surveillance without physical trespass, like, for example, through a person's GPS-equipped cell phone (Friedman, 2014). This brings us to *Riley*.

Riley v. California. Much like Walter Scott, David Riley was initially stopped by police for a commonplace traffic violation-that of driving with an expired registration. It was then discovered that his license was suspended, and a search of his car revealed two handguns beneath the hood. An officer conducted a search of Riley's person and found items that he believed connected Riley to the notorious Bloods street gang. The evidence against Riley was quickly mounting and far beyond that of an expired registration, the original reason for the stop, but the real clincher came when officers seized Riley's cell phone. One officer testified that they searched Riley's phone for incriminating data based on the notion that gang members "will often video themselves with guns or take pictures of themselves with the guns" (*Riley v. California*, 2014).

This officer's suspicions proved to be correct, because on Riley's cell phone were videos of young men fighting and using Bloods' symbols, as well as photos of Riley standing in front of a car that was believed to have been involved in a drive-by shooting. Based on this digital evidence, Riley was charged with firing at an occupied vehicle, assault with a deadly firearm, and attempted murder. He was convicted and given the sentence of fifteen years to life in prison. The case was appealed on the grounds of the Fourth Amendment's protection against unlawful searches and seizures, but the original decision was upheld by the California Court of Appeal according to a previous ruling (*People v. Diaz*, 2011), stating that law enforcement has the right to search an individual's cell phone as long as it is directly associated with their person. Noting the legal ramifications of this decision, the Supreme Court granted certiorari.

The rationale used by law enforcement to justify their warrantless search of Riley's cell phone was the search-incident-to-arrest doctrine, a carry-over from English common law (Sandford, 2016). While this doctrine has undergone many revisions, in essence, it allows officers to search an immediate area without a warrant if there is reason to believe that officer safety is at stake, or that evidence could be destroyed (*Chimel v. California*, 1969; *United States v. Robinson*, 1973). It has been expanded to suit law enforcement, "allowing police officers to search areas--in particular, passenger compartments of vehicles--when arrestees have no realistic access to those areas" (Tomkovicz, 2007, p. 1417)

Unfortunately, for the police in this case, the Supreme Court did not agree with the application of the search-incident-to-arrest doctrine. Officer safety and destruction of evidence were of no concern: "There are no comparable risks when the search is of digital data" (*United States v. Wurie,* 2013). If there was a reasonable fear of digital evidence being erased from the phone, officers could have seized the phone while awaiting a warrant. Justice Alito, while concurring in the overall judgment, stated that the search-incident-to-arrest rule should only be applied to the *scene of an arrest*, not the arrestee's person. He also called for the development of legislation to sort out the nuances of search and seizure as it relates to the digital age: "because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate" (*United States v. Wurie*, 2013).

Justice Alito was forthright in admitting that the Court was not up to par with current privacy interests related to cell phones, but he did seem to suggest a broader application of the ruling (Sandford, 2016). Through this interpretation, police are generally required to obtain a warrant before searching a defendant's cell phone, beyond the search-incident-to-arrest doctrine.

This would cover any type of data, including GPS tracking, as long as citizens have a reasonable expectation of privacy regarding the location of their cell phones. Implicit in this reading are certain "extreme hypotheticals" where police could potentially conduct a warrantless search of a device, although it is not clear what these hypotheticals may be (*Riley v. California*, 2014).

Regardless of the Supreme Court's intended reading of *Riley*, most lower courts are favoring the narrow reading which prohibits a warrantless search of a phone during an arrest, upholding the search-incident-to-arrest doctrine. What it does not prohibit are warrantless searches of phones when there is enough probable cause, or when there is a vague warrant that does not describe the data to be searched (Sandford, 2016). "Reading the rule narrowly ignores the plain language of the decision and frustrates the underlying policy articulated by the Court," (p. 938), and these multiple readings of *Riley* reinforce Justice Alito's concern that courts are not yet qualified to sort out the complexities of Fourth Amendment application in the digital age. Although the narrow reading has mainly been applied in the lower courts, the recent refusal to hear the appeal of a warrantless cell phone search is evidence to suggest that the Supreme Court is reverting to this position as well. And further complicating the issue is the question of whether that data, so often used at the expense of citizens, is considered protected speech under the First Amendment.

The First Amendment and Citizen-Surveillance of Police

Although the Fourth Amendment presides over cell phone searches and seizures by law enforcement, it collides with the First Amendment when we consider how bystanders directly use cell phones against police. While the courts waver on how to apply Constitutional law effectively in the tech era, law enforcement capitalizes on the vague regulatory principles outlined in previous cases. Cell phones have been seized on uncertain grounds, and when they

are used to capture video footage of police misconduct, this becomes especially problematic: “Such seizures can function as particularly dangerous prior restraints on speech, and they also chill important First Amendment behavior” (Reardon, 2016, p. 779). This type of speech is meant to hold the government accountable, and it is exactly what the First Amendment seeks to protect.

In a recent sketch on Will Ferrell’s *Funny or Die* website, comedian Jerrod Carmichael satirizes the immediate controversy regarding racism in law enforcement and highlights the use of modern technology to combat it. “The Perfect Phone for Filming Police Brutality” is a spoof on cell phone commercials, with Carmichael acting as salesman to a black family. Expressing their need for a longer battery life, Carmichael comically deduces that they need a phone capable of filming the police: “Exactly!” responds the family in unison. Carmichael continues, “With Onyx by B-Mobile...not only could you film racially-motivated arrests, but also the entire chain of routine police procedure that could inexplicably turn deadly for folks like us!” Although humorous, Carmichael’s sketch succeeds in doing what comedy does best by commenting on a major social issue (Funny or Die, 2015).

The deaths of Eric Garner, Philando Castile, and other black men at the hands of law enforcement may have gone unnoticed by the public had it not been for bystanders who recorded the incidents on their cell phones. The legal question this raises is simply, *do citizens have a right to film police?* Although the answer may seem self-evident following a face-value reading of the First Amendment, various rulings on the issue indicate it is more complex. Many in law enforcement have aggressively opposed the widespread recording and dissemination of videos featuring police activity, but “Police efforts to prevent citizen-surveillance of law enforcement strike at the very heart of our democratic society” (Lautt, 2012, p. 349).

Prior to the Rodney King beating in 1991, law enforcement institutions had greater control over public perception of their image (Lautt, 2012). Mainstream media outlets relied on the first-hand accounts of law enforcement as their main source of information regarding criminal activity, and “Police were therefore able to control the narrative...in a way that reflected favorably upon the force and earned the praise and continued support of the public” (p. 353). Because of this, citizens were rarely given insight into the entire scope of police action and all instances of misconduct were filtered through the insular lens of the media.

Unfortunately, for law enforcement, as technology has advanced, public perception of police activity has taken a turn for the worse. The shift in perspective began in the 1960s with incidents like the Kent State protests, but police brutality became “front and center on the news agenda” following Rodney King (Lawrence, 2000, p. 63). “In many ways, the Rodney King beating, caught on camera by a concerned bystander, was the first viral video,” and it was used by the *Los Angeles Times* to draw attention to an issue that had been plaguing the city for decades (Lautt, 2012, p. 354).

Not only was the Rodney King beating a wake-up call to the public, but also to the Los Angeles Police Department (LAPD). Following the release of the video, police officers were enlightened to the possibility that citizens could record and disseminate videos of their behavior. At the time, that possibility was still considerably far-fetched since most people were not walking around with video cameras; twenty-six years later, almost everyone has a camera-equipped cell phone, instant internet access, “and a healthy skepticism of authority” (Lautt, 2012, p. 354). Evolving technology has led to reform changes within the LAPD where officers are reminded that all of their actions may be caught on camera. Cell phones have provided a deterrent to police misconduct, and these technologies have since been appropriated by the

institution itself, a topic which will be covered in the second half of this paper (Rubin, Blankstein, & Gold, 2011). Regardless, many officers are leery of citizen-surveillance, and the courts have yet to draft a concrete set of laws on the topic.

It is important that they do so, and soon, since more videos of police misconduct have been disseminated since Eric Garner. According to a database created by *The Washington Post*, 995 citizens were shot dead by police officers in 2015, and 963 in 2016 (washingtonpost.com, 2016). Not all of these shootings were unjust or unprovoked, but reducing any form of violence is a worthwhile goal, the achievement of which can be fostered through cell phone videos. To this end, there may be a glimmer of hope. A recent ruling in Texas, *Turner v. Driver* (2015), affirmed a citizen's right to film police, but noted that "this right is not absolute and is not applicable everywhere" (Kravets, 2017, para. 1). It is important to review the facts of *Turner* and its precedent, *ACLU v. Alvarez* (2012), and consider how they may be interpreted should a similar case ever reach the Supreme Court.

***ACLU v. Alvarez*.** There have been multiple cases throughout the country that have laid the groundwork for the *Turner* decision, a prominent example being *ACLU v. Alvarez* (2012). Attempting to push the courts forward regarding tech-related law, the Illinois chapter of the American Civil Liberties Union (ACLU) sought to test the limits of the First Amendment with regard to the recording of law enforcement officers. Initiating a program to deter police misconduct, the ACLU planned to record officers without their consent at two public events: a Chicago Police Department container search program and a protest. The recordings were going to be disseminated to the public and presented as grievances before the government (Lautt, 2012).

Fearing prosecution, however, the ACLU decided not to conduct the recordings. The reason: the Illinois Eavesdropping Act. Plainly stated, the Act makes it illegal for any conversation to be recorded without the consent of all parties involved, regardless of whether or not the conversation is private (Tomei, 2012). And if this law is broken in the context of recording the conversations of on-duty law enforcement, it is a Class I felony, "which is equivalent to a criminal sexual assault conviction, punishable by up to fifteen years' incarceration and possible fines amounting to $25,000" (p. 389). With that type of excessive punishment, it stands to reason that the ACLU cancelled their plans.

While the Illinois Eavesdropping Act may have prevented the ACLU from recording police, its unconstitutionally broad application motivated the organization to file suit against the Cook County State's Attorney, Anita Alvarez, to prevent her from prosecuting violations of the statute ("American Civil Liberties," 2013; Lautt, 2012). The suit was initially dismissed by the Northern District of Illinois on the grounds that no precedent had established a First Amendment right to audio record, and therefore, the ACLU could not prove "a cognizable First Amendment injury" (*ACLU v. Alvarez*, 2011).

The ACLU appealed this decision to the Seventh Circuit court, and it was overturned. The majority based this ruling on the lower court's misunderstanding of a previous case that determined nothing in the Constitution *guarantees* a right to record at a public event (*Potts v. City of Lafayette*, 1997). This does not mean, however, that the First Amendment provides no protection for public recordings at all; only that they are subject to appropriate time, place, and manner restrictions. Placing a ban on public recording would compromise free speech interests, but citizen-surveillance of law enforcement would foster open conversation about the inner workings of government affairs ("American Civil Liberties," 2013).

The court also applied the *Katz* test, stating that the conversations the ACLU sought to record had no reasonable expectation of privacy. Nonetheless, Judge Richard Posner dissented. His reasoning was that the decision swung the issue in question from one extreme to another: "he asserted that the opinion transformed Illinois's legal regime from one requiring all-party consent to one that did not require the consent of even one party" ("American Civil Liberties," 2013, p. 1164). Posner also feared that the decision would threaten public safety by interrupting normal police procedure, as recording devices may "distract officers and discourage attempts to speak with witnesses, victims, and suspects" (p. 1165).

In line with Posner's dissenting opinion, other arguments have been raised about the application of Fourth Amendment standards in a First Amendment case. Broadly speaking, if the Fourth Amendment and the *Katz* test permit the recording of a public conversation without consent, then the government is restrained from protecting the privacy of publicly audible speech and all eavesdropping is permitted ("American Civil Liberties," 2013). The court failed to specify the competing privacy interests of both speakers and listeners in public places, an unfortunate missed opportunity to "adopt a nuanced framework for First Amendment privacy analysis that responds to improved recording technology by recognizing gradations of privacy in public speech" (p. 1162). And since there is no major consensus concerning these finer points of tech-related First Amendment rights, like the ACLU, other activists are pushing the courts to sort out the matter.

Turner v. Driver. In September of 2015, Phillip Turner, working for the Photography is Not a Crime organization, conducted a "First Amendment audit" of a Fort Worth police station (Stern, 2015). Standing on a public sidewalk outside the station, Turner videotaped the routine activities of police officers. After a few minutes, officers approached Turner and asked him to

identify himself. He refused to do so. They then handcuffed him and placed him in the back of a police car where he was lectured by an officer, but he was eventually released without charges (*Turner v. Driver*, 2015).

Stating that the actions of police violated his First, Fourth, and Fourteenth Amendment rights, Turner filed suit. Although Turner believed multiple rights of his had been violated, he was purposefully testing police knowledge regarding citizen-surveillance, so the real point of the lawsuit rested on the First Amendment (Parker, 2016). And to the question of whether citizens have a right to film police, the Texas-based court of appeals ruled in favor. However, since this right had not been clearly established at the time of Turner's arrest, the court determined that police had not acted unlawfully. Apart from reasonable time, place, and manner restrictions, the court ruled,

> Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy. Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing. (Kravets, 2017, para. 10)

This is certainly positive news for the public, but since the issue has not gone before the Supreme Court, it still only covers the circuit's jurisdiction extending to Texas, Louisiana, and Mississippi. None of the circuit courts, however, have denied that citizens have a right to film police, but the disagreement (or in some cases, refusal to take a definitive stance) is over the fact that it is not a clearly established law, and "time, place, and manner" restrictions have not been specifically defined (Kravets, 2017). The "nuanced framework," for First Amendment privacy

cases, as called for in *ACLU v. Alvarez*, may not emerge until the issue eventually reaches the Supreme Court.

The Consequences of Citizen-Journalism

In many of these previously mentioned cases, citizen-journalists have clearly abided by the law in recording police misconduct, but they have been arrested for something else shortly after publishing their recordings. At least this seems to be the unfortunate reality in many of the high-profile police brutality cases. Since the shootings of Eric Garner, Philando Castile, and Alton Sterling (and others), the citizens who recorded and/or uploaded the incidents have each been arrested for "unrelated" crimes (Lartey, 2016). The day after filming the death of Eric Garner, Ramsey Orta was arrested by the New York Police Department (NYPD). He has since been arrested multiple times, finally pleading guilty to charges of drug dealing and possession of an illegal handgun because he was "tired of fighting" (Mathias, 2016, para. 11). He is now in prison and says he felt paranoid in New York following the release of his video. Diamond Reynolds, the fiancée of Philando Castile, was arrested while recording the aftermath of her fiancé's death, separated from her daughter for eight hours while held in a precinct. Reynolds says they treated her like a prisoner (Sutcliffe, 2016).

In another example, Chris LeDay, the citizen who uploaded the video of Alton Sterling, was arrested by nearly a dozen military and civilian officers after reporting to work at Dobbins Air Reserve Base, only twenty-four hours after posting the video. He was placed in a jail cell wearing handcuffs and leg shackles, told to put on an orange jumpsuit, and informed that he would have to wait seven days before seeing a judge. LeDay was charged with "matching a description," although he was not told of whom.

> Then they declared he was wanted on an assault charge. He told them he had never been arrested for assault. Ultimately, after exhausting these attempts at justifying his detention, they said he was being held for unpaid traffic tickets. After 26 hours in police custody, LeDay paid the $1,231 in fines owed and was released. (Sutcliffe, 2016, para. 5)

If tempted to chalk these arrests up to coincidence, consider the more than forty filmmakers who have publicly decried them as examples of blatant systemic injustice. In an open letter to the documentary community, filmmaker David Felix Sutcliffe describes the measures taken by law enforcement to charge these citizen-journalists with crimes, calling for the Department of Justice to conduct a full investigation into their arrests. Sutcliffe states, “it is vital we defend the rights of these individuals to use video as a means of criticizing unjust police activity,” and his letter has been endorsed by over two dozen Oscar nominees/winners (2016, para. 22).

It has been noted that following the terrorist attacks of September 11th, there has been a widespread change in law enforcement practices (Lautt, 2012). Racial profiling, forceful investigative techniques, and an overall militarized approach are now the norm, and this has led to a public attitude of suspicion and distrust toward police. Although the federal government has stopped providing local police forces with military equipment, “demilitarization is but one step in a fight to correct a police culture that reinforces an ‘us against them’ mindset that results in the overreaction, brutality and bullying we’ve seen so much of recently” (Bentley & Rizer, 2015a, para. 4). Many law enforcement agencies see themselves as fighting a war on crime, even using grant money meant for developing “community policing” strategies instead to build a stronger force through new weapons and an increased Special Weapons and Tactics (SWAT) budget (Bentley & Rizer, 2015b).

Because of these increasingly coercive law enforcement tactics, citizen-surveillance through the use of cell phone cameras is a necessary measure of accountability that must be protected through proper legislation. Citizens should be encouraged to use modern technology as a way to promote transparency and ethics within higher institutions, and the recent decision in *Turner* shows that courts are beginning to do so. Unfortunately, the myriad of issues that result from incorporating technological advancements under First Amendment law, such as defining proper time, place, and manner restrictions, will most likely not be sorted out until a case like *Turner* comes before the Supreme Court, at which point the Justices will have to draw conclusions regardless of the extent of their technological expertise.

And considering the Supreme Court Justices are not known for their technological prowess, an example being Justice Elena Kagan famously admitting that the Justices do not use email, this presents a significant concern (Associated Press, 2013). Both the government and the public must be properly educated regarding the workings and developments of technology before instituting policies on how it should, or should not, be used. New technologies are being implemented by both law enforcement and regular citizens with the goal of greater transparency and less misconduct, but questions arise regarding the editing of videos, collection of data, and the reception by law enforcement.

Chapter III: Technological Advancements and Complications

The ACLU continues to challenge any government entity that threatens the obvious Constitutional rights of citizens, as observed through cases like *ACLU v. Alvarez*. Recently, the organization has launched their Project on Speech, Privacy and Technology, an initiative with the purpose of "ensuring that civil liberties are enhanced rather than compromised by new advances in science and technology" ("About the ACLU's Project," 2017). With a team

comprised of lawyers, political analysts, and tech experts, the Project is tackling issues such as freedom of online expression, political protests, and privacy of electronic information.

Similarly, the Electronic Frontier Foundation (EFF) works to defend civil liberties in our tech-saturated world. The EFF is a nonprofit organization specializing in the litigation of cases with a digital component. In its early days, EFF effectively argued that electronic mail deserves the same amount of protection as telephone calls (*Steve Jackson Games, Inc. v. U.S. Secret Service,* 1993), and that written software code is protected speech under the First Amendment (*Bernstein v. U.S. Department of Justice,* 1996). The EFF was founded because at the time, no other civil rights organizations "understood the technology enough to understand the importance of the issues" ("A History of Protecting Freedom," 2017). With the exponential advancements in technology since the EFF's beginning, it is safe to say that many still understand neither the tech nor the issues, and the EFF seeks to educate the public and press through educational guides, workshops, and comprehensive analysis ("About EFF," 2017).

Technologies for Citizens

Another practical way that these types of organizations are assisting the public in their efforts to stop injustice is by designing smartphone apps for capturing police misconduct. Although Jarrod Carmichael's sketch about a cell phone for monitoring police brutality is comedic, it is not far from reality, and with these apps, it is easier than ever to record and disseminate an incriminating video.

The Mobile Justice App was created by the ACLU for this purpose, and it even includes an automatic lock feature so that if an officer confiscates a bystander's phone, he will be unable to bypass the password to view the footage. The unfortunate reality is that even though the ACLU continually reminds citizens that they have a right to record police, those caught doing so

are often subject to illegal searches and seizures, unaware of their established rights (Hess, 2015). With the Mobile Justice App, as soon as a person stops recording, the video is automatically sent to the ACLU for review.

The app also includes the optional "Witness" feature, alerting users if someone else is using the app to record an incident nearby, and where exactly it is taking place ("How it Works," 2015). Many of these app creators push for quality control so that the videos are not "shaky to the point of ambiguity or lacking in metadata that would have helped confirm their veracity" (Shaer, 2015, para. 22). Keeping the camera running during the entire incident will ensure that parts are not taken out of context. Other similar apps, like CopWatch, aim to do the same thing.

Another benefit to using one of these apps is that it builds an online archive of videos. The safe storage of data is a concern when someone is posting a video that casts a shadow on law enforcement procedures, and videos posted to Facebook, YouTube, and other sites can be deleted or lost (Shaer, 2015).

The hope of these app creators was to enable bystanders to effectively record law enforcement misconduct, and then to use the videos as evidence against them in courts. According to the designer of CopWatch, "the expectation has outstripped the reality," and the videos have done little to secure particular outcomes (Hess, 2015, para. 6). Instead, the creators now hope that the videos simply ignite a national conversation about police use of force, and based on the videos of Eric Garner, Alton Sterling, and others, this has certainly been achieved. Cell phones have "opened the eyes of a lot of people who in the past have generally trusted the police over every accused criminal—especially if the accused criminal is a black man," says Jay Stanley, a policy analyst with the ACLU (para. 6).

Technologies for Police

Another technology that has "opened the eyes" of the public are department-mandated body and dashboard cameras. While citizens film on-duty officers with their cell phones, the officers themselves are frequently recording their activities as well. These devices are self-explanatory, but until the recent police violence scandals as well as advancements in technology, they were considered impractical novelties. Now they are mandatory in many jurisdictions and are seen as powerful tools to foster accountability (Goldstein, 2016).

Body and dash cams have been credited with a marked decrease in police misconduct. A 2015 report from the San Diego Police Department stated that police use of force fell by 46.5%, and citizen complaints about officers fell by 40.5% following the adoption of body cameras (Williams, Thomas, Jacoby, & Cave, 2016). In Rialto, California, fifty-four patrol officers were randomly assigned a body camera system to wear while on duty, and the results were seemingly unmistakable: officers without cameras used force twice as many times as officers wearing the cameras ("Considering Police Body Cameras," 2015). These types of studies have caused numerous police departments all over the country to adopt these devices, such as in Chicago, Philadelphia, Los Angeles, and Washington, and the market for police and commercial dash cams is projected to be worth over four billion dollars by 2020 (Goldstein, 2016; Orr, 2015).

The reasons for law enforcement agencies to use body and dashboard cameras comprises a long list; potentially lowering police misconduct and providing an "unambiguous" view of officer-citizen interactions is the most obvious argument ("Considering Police," 2015, para. 10). Had Officer Darren Wilson been wearing a body camera when he fatally shot Michael Brown, the details of the event could have been corroborated or challenged by video footage instead of being presented from Wilson's own memory. A recent survey of lawyers affirmed this high view

of video evidence, as 96% of them said it improved their ability to prosecute cases (para. 17). Body and dash cams would also be useful in officer training, allowing departments to immediately review and correct problematic police conduct. And proponents of these devices frequently cite data like the Rialto Study, claiming that wearing a body camera has a "civilizing effect" on officers as well as citizens when they are aware they are being filmed (para. 12).

Overall, law enforcement agencies that are implementing body and dash cams are viewed favorably by the public, and are seen as taking strides toward transparency and improved community relations ("Considering Police," 2015). This should be enough of a convincing argument for their adoption by agencies who have not yet made the leap, since increased trust between citizens and police benefits all of society. What, then, is preventing agencies like the NYPD from mandating body cameras, despite being ordered to do so by a federal judge after he found their stop-and-frisk practices to be unconstitutional (Goldstein, 2016)? There appears to be just as many arguments against the use of body and dash cams as there are for them (or at least, arguments to their real effectiveness), and these may contribute to the fact that not one NYPD officer wears a body camera today.

One of the immediate issues with body and dashboard cameras is that of data storage. If every officer in a police department was outfitted with a body camera, the data quickly amasses to staggering amounts of recorded footage. For every violent encounter between an officer and citizen captured on camera, there are thousands of hours of non-violent, mundane police activities taking up space at a high cost: "some departments have already spent hundreds of thousands or even millions of dollars managing their data" ("Considering Police," 2015, para. 28). Here in Rochester, NY where the police body camera program was unleashed in March, a month of recording has resulted in 142,000 video files equaling thirty-three terabytes of data

(Sharp, 2017). Right now, the Rochester Police Department is developing a training for supervisors to log and manage all of this footage, eventually creating a digital archive.

The growing presence of camera-fitted police officers also raises another concern: the potential for a surveillance state. Since 9/11, citizens are more accustomed to being watched through pervasive technologies, and while some welcome cameras as a move toward transparency, others view them as another step toward increased police militarization. Misappropriating the technology could enable the police to track certain individuals in a way that impedes individual liberty; it would not be the first time that initiatives meant to benefit the public have instead been used against them ("Considering Police," 2015). Because of these concerns, "proponents should be particularly careful to consider the long-term ramifications of normalizing this technology" (para. 33).

These are valid concerns worthy of deep consideration, and they are the main deterrents preventing more police departments from widely adopting the use of body and dash cams. But there are other arguments against their use that have to do with how the technology prioritizes the viewpoint of the police, and how one "unambiguous" video can promote a slew of differing interpretations.

From a technical point of view, a body cam attached to an officer's uniform creates a shaky aesthetic, bouncing around with every small movement. This causes any type of physical activity or contact with a citizen to appear more involved than it really is, favoring the perspective of the officer who appears to be caught in a threatening situation. In reality, the situation may not have been cause for alarm, but the tendency to see it through the eyes of the officer is known as "camera perspective bias" (Williams et al., 2016). Videos provide powerful evidence in a trial, but when shown footage from a police body cam, jurors are less likely to

question the interrogation techniques or the truth of the confession (“Considering Police,” 2015). All the more reason to encourage citizen-recording on cell phones, since the videos can provide a counter-perspective to those captured on body cams, either to confirm or refute the narrative.

Beyond the camera perspective bias created through technical limitations, viewers are also subject to other subconscious cognitive biases based on cultural influences. When test subjects were shown a series of mock police cam videos, their conclusions were influenced by their previously-held opinions of police: those who generally trusted the police believed more frequently that the officer in the video faced a serious threat compared with those who did not trust the police (Williams et al., 2016). This contradicts the common trope, “seeing is believing.” Instead, “What we see in police video footage tends to be shaped by what we already believe” (para. 34).

It is difficult to argue that body and dashboard cameras are of no positive effect; obviously providing a video account of police-citizen interactions is a benefit regardless of the technology’s, and the viewer’s, limitations. The mistake is to attribute more power to these devices than they afford. They are by no means a cure-all for the problem of police violence, and their use must be regulated through precise legislation addressing complex issues. What, for example, happens if footage is lost or unusable? Who will fund these body and dash cam initiatives? Do citizens have a right to view or delete footage captured by police video? Who has access to the data and for how long? And the list goes on (“Considering Police,” 2015).

Ultimately, the purpose of body and dashboard camera footage is to improve police-citizen relations, and if the benefits of these technologies outweigh the complications of their use, then it is necessary to determine exactly how to use them. The drawbacks, however, reiterate the need for citizen-surveillance through cell phones, since cell phone video evades the pitfalls

common to police body and dash cams. It can be argued that one form of technology necessitates the other, as mentioned before, with cell phone footage providing a counter-viewpoint and a fuller context to police footage. Cell phone video, since recorded by normal citizens, “has the unique ability to empower traditionally powerless individuals to document and expose police abuses within their communities” (“Considering Police,” 2015, para. 39).

Technologically-empowered citizens are pushing law enforcement agencies toward greater transparency and accountability, but does filming police actually change their behavior? How do police react when they know they are being filmed? The Rialto Study, as mentioned previously, points toward cameras having a marked effect on police behavior, with camera-outfitted officers using force much less often (“Considering Police,” 2015). Another study addressed the effect of cell phone cameras on *citizen* behavior, and also came to a positive conclusion: when cameras are present, the bystander effect is attenuated (van Bommel, van Prooijen, Elffers, & van Lange, 2013). In other words, citizens are more likely to intervene in instances of police misconduct when they know they are being watched, and this is due to a desire to be perceived by the audience as heroic. Whatever the motivations, this intervention is a step in the right direction.

Such affirmative results may lead technophiles to conclude that cameras are a magic bullet for curbing police violence. The situation, of course, is more complicated, and some are actually suggesting that citizen-surveillance could make the problem worse (Segan, 2015). The reasoning behind this conclusion is that no one, especially an on-duty police officer, welcomes being filmed without consent. Cell phone cameras may encourage “an adversarial relationship between angry citizens and police who end up feeling persecuted and put-upon” (para. 8), and this could result in police acting more aggressively toward those who are filming their actions.

This does not imply that citizens should stop using cell phone cameras to record law enforcement, but it does serve as a reminder that the importance of cell phone videos lies in their ability to *expose* abuses, rather than immediately halting police use of force (Keller, 2015).

Chapter IV: Current Legal Implications

Policy & SCOTUS Balance of Power

The technological complexities of recording police, through either body/dash cams or citizens' cell phones, must be met with our earlier conversation about Constitutional rights. The previous section emphasizes that case law is currently lagging behind advancements in technology. Although the issue of whether a police officer can confiscate a cell phone without a warrant was seemingly put to rest through *Riley v. California*, other issues related to the effects of recording on police behavior, data storage and management, and the drawbacks of certain technologies will require the creation of specific policies by tech-savvy lawmakers.

While awaiting these more precise policies, however, we can draw some conclusions based on the aforementioned cases. First, regarding Fourth Amendment law, the government must adopt a stance via *Katz v. United States* that citizens have a reasonable expectation of privacy when it comes to cell phone data. A "reasonable expectation" is something that is continually redefined, and with current tech privacy interests, it is not always clear. However, a basic application should cover a person's cell phone and the data therein, treating it as any other personal belonging. Because of this, a warrant is automatically required to search a cell phone for evidence, as was decided in *Riley*. Unfortunately, many lower courts are adopting a narrow reading of the rule, concurring that yes, a warrant is needed to search a cell phone, but that warrant can be vague, neither specifying the actual pieces of data to be searched nor the need to

do so. Or if law enforcement believes there is enough "probable cause" to search a cell phone without a warrant, under this particular reading, they can.

The Supreme Court must not shy away from their broad application of *Riley*, as they seemed to do recently by refusing to hear the appeal of a decision that stated law enforcement could warrantlessly track a cell phone. Since the Court already set precedent with *Riley*, they must uphold that broad reading for the sake of clarity among the lower courts. Policies must be crafted to specify when there are exceptions to this rule, but "courts should carefully scrutinize whether the reasons for a given exception hold up against the privacy interests of cell phones" (Sandford, 2015, p. 938). A refusal to obtain a specific warrant before searching a cell phone for any type of data not only implicates Fourth Amendment law, but also serves to chill First Amendment speech when citizens fear that recording an officer will result in the confiscation of data.

Secondly, regarding the First Amendment, citizens have a right to gather, receive, and record public conduct by government officials, and technological advancements like cell phone cameras must be incorporated into our Constitutional understanding (Tomei, 2012). This assumption is also based on particular cases where the Court "amply defined the broad contours of protected rights under the First Amendment in a way that applies directly to public police-recording" (Lautt, 2012, p. 371). Specifically, the Court has recognized the "right to receive information and ideas" (*Stanley v. Georgia*, 1969), and the "right to gather news" (*Houchins v. KQED, Inc.*, 1978), and it would be hard-pressed to exclude public police-recording from those rights.

The *Katz* test suggests that an officer on the street has no reasonable expectation of privacy, and laws like the Illinois Eavesdropping Act are unconstitutionally broad, as was

decided by the Seventh Circuit court in *ACLU v. Alvarez.* And the recent decision in *Turner v. Driver* serves to further emphasize this right, siding with another lower court that explicitly stated that there is no difference between the rights of individual citizens and the rights of the media (*Smith v. City of Cumming*, 2000).

That being said, the First Amendment does allow for reasonable time, place, and manner restrictions on speech. This is where the issue becomes convoluted, simply because "the circumstances of each case may impact the right," so it is impossible to define a clear set of restrictions applying to every situation (Lautt, 2012, p. 375). When this issue finally reaches the Supreme Court, it is important that they uphold the lower court decisions in *ACLU* and *Turner*, extending the ruling beyond that of small jurisdictions. However, courts will have to carefully analyze each case, determining when and where to apply limitations. Time, place, and manner restrictions are necessary boundaries, but without well-defined legislation, this could be a potential loophole for law enforcement seeking to prevent a citizen from recording.

Technologies like the Mobile Justice App created by the ACLU are beneficial if lower courts continue to narrowly apply *Riley*, or if time, place, and manner restrictions continue to be ill-defined, as demonstrated by *Turner*. Using an app will ensure that files are immediately saved and uploaded to the ACLU's database, regardless of possible cell phone seizures. It is also hard to question a citizen on the legality of their recording the police when they are using an app specifically designed to do so. In other words, the existence of these apps can prompt citizens to more easily assert their rights.

As for body and dashboard cameras, their use, although not without drawbacks, can further serve to hold police and citizens accountable for their behavior. Once again, departments employing this technology have credited it with a marked decrease in police misconduct

(“Considering Police Body Cameras,” 2015; Williams et al., 2016). Since the cameras emphasize the perspective of the police, they would be more effective if used in tandem with citizens’ cell phones, providing a counter-perspective and hopefully a clearer understanding. And this would benefit law enforcement as well, possibly exonerating officers wrongfully accused of misconduct.

Neither technology is a magic bullet for curbing police violence. As previously stated, the real power of cell phone and body/dash cam videos lies with their ability to foster a conversation about police violence, rather than in their immediate effect on police behavior (Keller, 2015). The Supreme Court has the power to create a culture where citizens and police use technological advancements both to reduce violence and to cultivate open communication. The type of expression in question, that of critiquing the government, is precisely why the First Amendment was written, and cell phones have become an important tool in these efforts.

The balance of power in the Court remains slightly skewed toward the Right, following the death of Justice Antonin Scalia and the recent appointment of Justice Neil Gorsuch. Gorsuch has been described as “an advocate of Scalia’s judicial philosophy of originalism,” and has maintained a conservative record as an appellate judge (“Gorsuch test,” 2017, para. 5). Separating Gorsuch from Scalia, however, is one glaring difference: Gorsuch often applies the principles of “natural law” in his decisions, something Antonin Scalia was strongly critical of (“Neil Gorsuch,” 2017).

Simply put, natural law emphasizes the objective goodness of certain values such as knowledge, friendship, religion, and practical reasonableness, implying that these should serve as guideposts for society. While that sounds fair, Scalia disagreed with a natural-law jurisprudence because it allowed justices to “philosophize,” veering from the original wording of the

Constitution, which he believed was unchanging. Gorsuch's natural-law tendencies spell some uncertainty for the Court, although it is still fair to assume Gorsuch will maintain his conservative record based on his decisions in the appellate courts ("Neil Gorsuch," 2017).

If a First Amendment case related to cell phone videos and police recordings were to come before the current Supreme Court, it is my belief that they would maintain the lower court's decision in *Turner v. Driver*, ruling that this is a protected form of speech. While on the 10th Circuit Court of Appeals, Justice Gorsuch held strong views of the First Amendment, and has been even more willing than Scalia "to find not only that the First Amendment has been violated, but also that defendants were not entitled to qualified immunity" (Singh, 2017, para. 1). Alongside Gorsuch are eight other justices, four conservative and four liberal, but a conservative majority should not cause free speech advocates to fear. In the 1970s and 1980s, it was widely assumed that conservative justices were "free speech minimalists," and liberal justices "free speech maximalists." As the Court changed, however, so did this old assumption. In fact, an analysis of the Rehnquist Court found that more of the Republican appointees voted in favor of broad free speech rights than did the Democratic ones (Volokh, 2001). The past two decades have demonstrated that some of the "strongest voices...in favor of free speech rights and against government power now come from conservatives at least as much as from liberals" (p. 1198).

Chapter V: Conclusion

Prior to July 17th, 2014, law enforcement viewed Eric Garner as a symbol of a rundown, crime-infested neighborhood. Ironically, following his death, Garner became a symbol of racial discrimination and fuel for a heated national discussion on law enforcement practices. Without cell phone videos, the stories of Garner, Scott, Sterling, and Castile may have been nothing more than brief spots on local news.

The nature of police violence--its causes and manifestations--is a deep and convoluted social issue. It is not being suggested that cell phone or body and dashboard camera videos are the remedy. They are, however, tools that can serve as checks and balances in our digital society. And for this reason, a citizen who pulls out a cell phone when witnessing an alarming confrontation between an officer and another citizen should be certain of their rights, made explicit through legislation.

The First and Fourth Amendments, although written long before digital technology, must still be aptly applied in our Information Age. Preventing citizens from recording officers in public impinges on their First Amendment right to free speech, and confiscating their cell phone without a warrant on their Fourth Amendment right against unreasonable searches and seizures. Although the facts of each case will vary, and the courts may struggle to determine proper time, place, and manner restrictions, the overall protection is clear. Hopefully, it will not take a Supreme Court ruling before average Americans are confident of this fact.

The nation was rightfully shocked to see the brutality exposed through bystander cell phone videos. We should be further dismayed by the subsequent arrests of the citizens who recorded them, just as we would by any journalistic endeavor impeded by a powerful institution. American citizens must be encouraged to film police, and reminded that by doing so, they are acting as watchmen in the very tradition of the law that they are seeking to reform by providing accountability to a damaged system.

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