

“I Can’t Breathe”: How Recording the Police Can Save a Life and the Justice System

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INTRODUCTION

9 minutes, and 29 seconds – the excruciating length of time during which George Floyd cried out “I can’t breathe” twenty-eight times as he was slowly dying at the hands, or knees rather, of law enforcement.¹ “I can’t breathe” – George Floyd’s last three words, each cry for help more faint than the last, as he gradually lost consciousness, and ultimately, his breath.² These three words, as a plea for life, may have been ignored by law enforcement, and may have gone unknown forever, had they not been recorded. These three words have been echoed around the world taking on a new meaning as a “rallying cry for racial justice and police reform.”³ These three words shot viral shockwaves around the world strictly because George Floyd’s untimely death was recorded by a bystander turned key witness and shared online.⁴

Had Darnella Frazier, now only nineteen years old, not filmed George Floyd’s death, the world may have never known what an excruciating death he endured at the merciless hands of a police officer.⁵ This Note will reveal the power that film can have on reforming the justice system that continues to allow police brutality to be dismissed with no repercussions and will set forth the legislation that we must demand.

Police brutality is a systemic human rights issue prevalent in the United States, which first became more incessant in the early half of the 1900s when Black Americans began to advocate that their human rights and liberties be respected by the federal and local government.⁶ Now more than ever, citizens are becoming more aware of the tactics police use against civilians, “[ranging] from assault and battery (e.g.,

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²10 TAMPA BAY, *RAW: George Floyd Minneapolis Police Body Camera Footage*, (YouTube, Aug. 10, 2020), <https://www.youtube.com/watch?v=0gQYMBALDXc>; see also Amy Forliti, Steve Karnowski & Tammy Webber, *Police chief: Kneeling on Floyd’s neck violated policy*, ASSOCIATED PRESS NEWS (April 5, 2021), <https://apnews.com/article/derekchauvin-trial-live-updates-c3e3fe08773cd2f012654e782e326f6e> (stating the officer charged “[pressed] his knee into the 46-year-old man’s neck for 9 minutes, 29 seconds” which continued even after Floyd became completely unconscious, which ultimately was the direct cause of Floyd’s lack of oxygen and untimely death).

³10 TAMPA BAY, *supra* note 2.

⁴‘I Can’t Breathe’: The Refrain That Reignited a Movement, AMNESTY INT’L (Jun. 30, 2020), <https://www.amnesty.org/en/latest/news/2020/06/i-cant-breatherefrain-reignited-movement/>.

⁵Joe Hernandez, *Read This Powerful Statement From Darnella Frazier, Who Filmed George Floyd’s Murder*, NPR (May 26, 2021), <https://www.npr.org/2021/05/26/1000475344/read-this-powerful-statement-fromdarnella-frazier-who-filmed-george-floyds-murd>.

⁶*Darnella Frazier*, PULITZER PRIZES, <https://www.pulitzer.org/winners/darnellafrazier> (last visited Sept. 22, 2022) (stating Darnella Frazier was a 2021 Pulitzer Prize Winner “[f]or courageously recording the murder of George Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists’ quest for truth and justice.”).

beatings) to . . . unlawful arrests, verbal abuse (e.g., racial slurs) and threats . . . to torture, and murder.”⁷ The growing awareness has stemmed from the use of video recordings, connected with the use of social media, which aids in supporting social change.⁸

Often when an unarmed, Black citizen succumbs to excessive force, or is even killed, by a police officer, the officer responsible walks free, still employed – suspended on paid leave at best – and is ultimately protected by the blanket of qualified immunity.⁹ But, citizens have a First Amendment right to free speech, that includes freedom of the press.¹⁰ With the growing usage of video recordings and posting to social media, sometimes in real time, Americans have been able to view the harsh reality of the systemic human rights issue of police brutality, acquiring knowledge of the Black Lives Matter movement and the need for reform. Such usage has changed opinions, both in the positive and negative.¹¹ Although citizens clearly do not retain the same rights as a journalist, citizens often have better access to newsworthy information, assuming that publicizing an act of police brutality is newsworthy information in recent years.¹² Should qualified immunity be able to supersede our First Amendment rights as a citizen? The circuit courts are split as to whether a unique method of speech – video recording police activity – is even permitted in the first place.¹³

This Note will illustrate the imminent need for the right to record police activity to be a clearly established First Amendment right on the grounds that the desire to publicize such a severe social injustice outweighs a police officer’s safety net of qualified immunity stemming from that police officer’s civil and criminal wrongs. This Note is not intended to encourage video recording of police activity that interferes with police officers performing their official job duties, as the right to record, like

⁷Leonard Moore, *Police Brutality in the United States*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Police-Brutality-in-the-United-States-2064580> (Nov. 6, 2025).

⁸*Id.*

⁹Peter Suci, *Will Social Media Lead To Police Reform Following High Profile Events?*, FORBES (Apr. 12, 2021, 4:36 PM), <https://www.forbes.com/sites/petersuci/2021/04/12/will-social-media-lead-to-police-reform-following-recent-high-profile-events/?sh=4cf493f91b0f>.

¹⁰Adam Liptak, *Cracks in a Legal Shield for Officers’ Misconduct*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/03/08/us/supreme-court-qualifiedimmunity.html>; *see also* Andrea Januta, Jaimi Dowdell & Jackie Botts, *Taking the measure of qualified immunity: How Reuters analyzed the data*, REUTERS (Dec. 23, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunitymethodology/>.

¹¹U.S. CONST. amend. I.

¹²Andrew Perrin, *23% of users in U.S. say social media led them to change views on an issue; some cite Black Lives Matter*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-socialmedia-led-them-to-change-views-on-issue-some-cite-black-lives-matter/>.

¹³Moore, *supra* note 8 (“Although police brutality against African Americans had become a serious problem in many urban areas by the mid-20th century, most whites remained unaware of it until about the mid-1960s, in large part because most large-city newspapers . . . did not consider it newsworthy. In contrast, incidents of police brutality were regularly covered in the Black press from the early 20th century, frequently in front-page articles.”); *see also* Janani Umamaheswar, *Civic Sociology, Policing and Racial (In)Justice in the Media: Newspaper Portrayals of the “Black Lives Matter” Movement*, UC PRESS (Mar. 23, 2020), <https://doi.org/10.1525/001c.12143> (showing that newspapers reported on the Black Lives Matter movement due to celebrity connections, rather than focusing on the actual purpose of the movement itself).

any other protected First Amendment activity, may always be subject to time, place, and manner restrictions.¹⁴ Rather, focusing on the current issues of racial injustice, specifically the raised awareness since the summer of 2020, this Note will answer the question of how transforming the right to record police activity into a clearly established First Amendment right has the power to be a stepping stone for achieving police reform.

Part I of this Note will provide background information about the Black Lives Matter movement, its rise to becoming an international demonstration, and the lasting impact it aims to have on the United States justice system through peaceful protest, social media, and film. Part II of this Note will delineate the history of qualified immunity gifted to law enforcement officers and its negative impact on the justice system. The doctrine, since its creation, has made it difficult for police brutality victims to obtain their right to due process – sometimes despite the incident being captured on video. Part III will illuminate a citizen’s First Amendment rights, specifically the right to free speech in the context of video recording police activity. Part III will then build upon the need for this specified type of video recording to be recognized as a clearly established constitutional right. Part IV will provide insight into the current status of the circuit split regarding this First Amendment issue and the problem with state law the circuit courts face despite their ruling.¹⁵ Finally, Part V will analyze and propose the solution needed to preserve human rights, specifically when human rights are subject to the forcible control of police activity.

For the purposes of this Note, the word “victim” is to bring immediate reference to an unarmed Black man or woman, emphasizing to the reader the significant difference in disparaging treatment applied by a law enforcement officer among different ethnicities.¹⁶ The need for a clearly established right to record police activity is not intended to completely eradicate qualified immunity or limit law enforcement officers from performing their official duties. Rather, it is to recognize that citizens should

¹⁴*Right to record government officials in public*, REP’S COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporters-recording-sections/right-to-record/> (last visited Sept. 22, 2022); see also *Filming the Police*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1550/filming-the-police> (last visited Feb. 15, 2023) (“Federal appellate courts have ruled consistently that citizens have a right to film police.”); Shreya Tewari, *Arizona’s New Law Banning People From Recording Police Violates our First Amendment Rights*, ACLU (Aug. 23, 2022), <https://www.aclu.org/news/free-speech/arizonas-new-law-banning-people-from-recording-police-violates-our-first-amendment-rights> (“[S]even out of 13 circuits – [have] held that this right clearly exists, and most have specified that it applies to law enforcement.”).

¹⁵Tyler Finn, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 483 (2019).

¹⁶Chelsea Curtis, *The Republic joins news organizations challenging Arizona law banning close-range recordings of police*, AZ CENT. (Aug. 23, 2022), <https://www.azcentral.com/story/news/local/arizona/2022/08/23/republic-otherschallenge-arizona-law-banning-recordings-police/7867538001/> (stating Arizona created new legislation scheduled to take effect on September 24 which makes it illegal for a citizen to record police activity if the citizen is within eight feet of the police activity – despite being within a circuit that has ruled in recognition of this right).

not be subject to unnecessary, excessive force – or at risk of losing their life – by a law enforcement officer.¹⁷

I. BLACK LIVES MATTER

A. *How it Started*

Following the acquittal of Trayvon Martin's murderer in 2013, the Black Lives Matter ("BLM") movement was created.¹⁸ On February 26, 2012, Trayvon Martin, an unarmed, seventeen-year-old African American boy made a routine trip to the convenience store and purchased a pack of Skittles and a bottle of juice.¹⁹ On his way home from the store, Trayvon was seen by neighborhood watch patrolman, George Zimmerman, and reported Trayvon as suspicious to a non-emergency line of the local police.²⁰ Zimmerman then followed Trayvon down the street despite the police dispatch advice not to do so. Shortly after, gunshots were fired, and Trayvon Martin was found dead upon police officers' arrival on the scene.²¹ Claiming self-defense, Zimmerman, charged with second-degree murder, was found not guilty and acquitted of all charges on July 13, 2013.²²

What started as fewer than a hundred protestors surrounding the courthouse awaiting a jury verdict in support of Trayvon Martin, shifted into nationwide protests for justice and racial equality filling the streets of hundreds of cities with hundreds of thousands of people.²³ Zimmerman's acquittal sparked national outrage and protests as a rallying cry for justice as it was clear to some that Trayvon Martin was targeted

¹⁷STATISTA RSCH. DEP'T, *Rate of fatal police shootings in the United States from 2015 to September 2022, by ethnicity*, STATISTA, <https://www.statista.com/statistics/1123070/police-shootings-rate-ethnicity-us/> (last visited Feb. 2, 2023) ("Among Black Americans, the rate of fatal police shootings between 2015 and January 2023 stood at 5.9 per million of the population per year, while for white Americans, the rate stood at 2.3 fatal police shootings per million of the population per year.").

¹⁸Editorial, *HERSTORY*, BLACK LIVES MATTER, July 7, 2017, <https://blacklivesmatter.com/herstory/> (last visited Sept. 22, 2022) (reporting in response to the acquittal of George Zimmerman, "three radical Black organizers – Alicia Garza, Patrisse Cullors, and Opal Tometi – created a Black-centered political will and movement building project called #BlackLivesMatter.").

¹⁹Editorial, *Florida teen Trayvon Martin is shot and killed*, HISTORY, May 28, 2025, <https://www.history.com/this-day-in-history/florida-teen-trayvon-martin-isshot-and-killed>.

²⁰*Id.*

²¹*Id.*

²²*Id.*; see also Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvonmartin.html> (reporting the trial against George Zimmerman lasted three weeks, with a six-woman jury returning a not guilty verdict after sixteen hours).

²³Matt Williams, *Trayvon Martin protests being held in more than 100 US cities*, THE GUARDIAN (July 20, 2013), <https://www.theguardian.com/world/2013/jul/20/trayvon-martin-protests-us-cities> (describing the high nationwide tension following the Zimmerman verdict, with President Obama even suggesting that the United States is still not in a "post-racial society," as the verdict raised concerns about the injustice and racial bias within the case.); see Alvarez & Buckley, *supra* note 22 (stating as the end of the trial against Zimmerman was near, about a hundred protestors gathered outside of the courthouse chanting "No justice, no peace!" showing unwavering support of the Martin family, hoping to hear a guilty verdict, affording Trayvon Martin justice); see also HISTORY, *supra* note 19 ("Protest rallies were held in cities nationwide, including New York City, where on March 21 hundreds

as “suspicious,” and then killed, simply because he was Black.²⁴ Zimmerman’s acquittal sent such a shockwave through the nation that President Barack Obama weighed in on the outcome, encouraging support from the nation that proper justice be taken and that recognition of human rights violations be held accountable.²⁵ Zimmerman’s acquittal proved to be a momentous switch in raising awareness of systemic racism and gaining support to achieve social justice within the systemic human rights issue of racial profiling by law enforcement officers that disparagingly affects the Black community.²⁶ Zimmerman’s acquittal sparked a rallying cry that Trayvon Martin did not get the justice he deserved. That Trayvon Martin’s life mattered. That #BlackLivesMatter.²⁷

Although there were no eyewitnesses or videos of the tragic incident between Zimmerman and Trayvon Martin, this is not the first time the Black community was faced with systemic racism in policing.²⁸ Even if there was clear video evidence, the outcome may very well have been the exact same – just take a look back to Rodney King. On March 3, 1991, Rodney G. King was pulled over for speeding after an eight-mile pursuit, turning into multiple police cars surrounding King’s vehicle.²⁹ As King was ordered to exit the vehicle and lay on the ground, officers tried to forcibly push him to the ground, causing King to become resistant.³⁰ Thankfully, however, before Rodney King was finally stopped, civilian George Holliday, could see the commotion from an apartment complex balcony across the street.³¹ George Holliday had a new video camera, and as he witnessed the commotion between the police officers and

of people gathered for the Million Hoodie March and demanded justice for Martin, who many believed Zimmerman had profiled as suspicious and threatening simply because the teen was Black.”).

²⁴Williams, *supra* note 23.

²⁵Alvarez & Buckley, *supra* note 22 (“Even President Obama weighed in a month after the shooting, expressing sympathy for Mr. Martin’s family and urging a thorough investigation. ‘If I had a son,’ Mr. Obama said, ‘he’d look like Trayvon.’”); *see also* Williams, *supra* note 23 (“‘There is a history of racial disparities in the application of our criminal laws,’ the President said. ‘A lot of African-American boys are painted with a broad brush. If a white male teen was involved in the same kind of scenario . . . both the outcome and the aftermath might have been different.’”).

²⁶Racial Profiling: Definition, ACLU, <https://www.aclu.org/other/racialprofiling-definition> (last visited Sept. 22, 2022) (“‘Racial Profiling’ refers to the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin . . . [e]xamples of racial profiling are the use of race to determine which drivers to stop for minor traffic violations (commonly referred to as ‘driving while black or brown’), or the use of race to determine which pedestrians to search for illegal contraband.”).

²⁷Editorial, *See The Hashtag #BlackLivesMatter First Appears, Sparking a Movement*, HISTORY, July 16, 2025, <https://www.history.com/this-day-in-history/blacklivesmatter-hashtag-first-appears-facebook-sparking-a-movement> (“The phrase and the hashtag were then quickly adopted by grassroots activists and protests all around the country . . . Black Lives Matter became a singular rallying cry for the American and global racial justice movements.”).

²⁸*See What 100 Years of History Tells Us About Racism in Policing*, ACLU (Dec. 11, 2020), <https://www.aclu.org/news/criminal-law-reform/what-100-years-of-history-tells-us-about-racism-in-policing>.

²⁹Editorial, *LAPD Officers Beat Rodney King on Camera*, HISTORY (May, 27, 2025), <https://www.history.com/this-day-in-history/police-brutality-caught-on-video>.

³⁰*Id.*

³¹*Id.*

Rodney King, he pressed record.³² As George Holliday videotaped the beating of Rodney King from across the street (“the Holliday tape”), he became a witness to police brutality live in action.³³ As the beating upon Rodney King neared the end, he was finally handcuffed and eventually taken to the hospital – where it was determined he was “struck as many as 56 times with the batons, [causing him to suffer] a fractured leg, multiple facial fractures, and numerous bruises and contusions.”³⁴ The police officers who were involved minimized the level of severity of the incident, as their official police reports stated that Rodney King only suffered minor cuts and bruises – that is, until they learned the entire incident was videotaped and published.³⁵ Ten days following the broadcast of the Holliday tape to local television stations and to Los Angeles television stations, the four main police officers involved were arrested “on charges of assault with a deadly weapon and the use of excessive force.”³⁶

The criminal trial against the four police officers involved in the beating of Rodney King began about a year later on March 4, 1992. Despite clear video evidence of excessive force and police brutality broadcasted nationwide, on April 29, 1992, the jury returned a not-guilty verdict on all counts.³⁷ Following the officers’ acquittals, the city of Los Angeles erupted into a week full of riots, arson, assaults, and murder – becoming “the most destructive U.S. civil disturbance of the 20th century.”³⁸ Although acquitted of criminal charges, two of the four police officers charged were still convicted for violating Rodney King’s civil rights through their use of unreasonable and excessive force – awarding Rodney King \$3.8 million in damages in his civil suit against the Los Angeles Police Department.³⁹

But was this really enough? Looking back twenty-five years after Rodney King’s case, we must consider the lasting effect that these acquittals had on the justice system and how police officers took advantage of their power thereafter.⁴⁰ The publiciza-

³²*Id.*

³³*Id.* (describing the scene of the incident as one officer “administered repeated baton blows to King’s lower body . . . [another officer] stepped roughly on King’s upper back or neck, and King’s body writhed in response . . . [LAPD Sergeant] never made an effort to stop the beating, and only one of the many officers present briefly intervened, raising his left arm in front of a baton-swinging colleague in the opening moments of the videotape, to no discernible effect.”).

³⁴HISTORY, *supra* note 29.

³⁵*Id.* (“George Holliday sold his video of the beating to the local television station, KTLA, which broadcast the footage and sold it to the national Cable News Network (CNN). The widely broadcast video caused outrage around the country and triggered a national debate on police brutality.”).

³⁶Archive Rsch. & Study Ctr., *The Rodney King Case and the Los Angeles Uprising*, UCLA FILM & TELEVISION ARCHIVE, <https://www.cinema.ucla.edu/sites/default/files/RK.LA.pdf> (last visited Sept. 22, 2022) (“March 4, 1991: The Holliday tape is broadcast on local television station KTLA. March 5, 1991: The Holliday tape is broadcast on Los Angeles television stations . . . March 15, 1991: The four police officers involved in the King arrest, Lawrence Powell, Theodore Briesno, Stacey Koon and Timothy Wind are arraigned.”).

³⁷HISTORY, *supra* note 29 (stating the jury verdict as to each officer involved was “not guilty on all counts, except for one assault charge against Powell that ended in a hung jury.”).

³⁸*Id.* (“In three days of violence, more than 60 people were killed, more than 2,000 were injured, and nearly \$1 billion in property was destroyed.”).

³⁹*Id.*

⁴⁰CNN, *The viral video that set a city on fire*, YOUTUBE (Apr. 28, 2017), <https://www.youtube.com/watch?v=1zLA2gzQQ0g> (quoting actor Greg Alan Williams, “When the officers were acquitted, it literally said that you could beat a Black man in the street, the world could

tion of the video of the beating of Rodney King became one of, if not the first, viral video of an incident of police brutality taken by a civilian bystander.⁴¹ As the Holliday tape went viral nationwide, members of the Black community weighed in years later offering what their first reactions were to seeing that viral video – to quote actor Greg Alan Williams, “it was shocking, but at the same time, it was wonderful, because now, we, Americans – we African Americans – we had evidence of our claims of injustice and mistreatment.”⁴²

Though certainly not the only minority group faced with the challenges of police brutality, the BLM movement reflects the disparate treatment African Americans have faced for hundreds of years and moves toward a race for social justice. Twenty years following Rodney King’s case, Trayvon Martin’s murderer walks free – acquitted. If there was clear evidence of excessive force by law enforcement officers twenty years prior, but those officers were acquitted, then certainly, without video evidence of any part of the incident between Zimmerman and Trayvon Martin, Zimmerman would of course be acquitted.⁴³ The difference in recent years, however, may be the citizen bystander’s use of readily accessible cell phone cameras to record police activity.⁴⁴ The growing use of cell phone videos in connection with social media gives the public a “front-row seat” to the many negative interactions between citizens and law enforcement officers, and ultimately, many police brutality incidents.⁴⁵

B. *How it’s Going*

Since its origin, BLM is now an international movement committed to eliminating racial injustice worldwide centered around marginalized groups working to change the course of history toward an ultimate goal where “Black lives are no longer systemically targeted for demise.”⁴⁶ Despite an overwhelming number of fatal police shootings or police brutality cases that have occurred over the years in the United States, police officers are still not being held completely accountable for their horrifying actions. In the summer of 2020, however, a major shift happened that has transformed the way many Americans view the justice system – George Floyd was murdered.⁴⁷ George Floyd made a trip to Cup Foods in Minneapolis on May 25, 2020,

see it, and yet it made no difference. So, it was more than a betrayal, the message it sent, what it said to me was, as that I [a Black man] was worthless.”).

⁴¹CNN, *supra* note 40 (0:55 – 1:22) (“25 years after Rodney King and the LA riots, CNN’s Ryan Young shows how videos have become the voice for many silent Americans who without them, may have never seen justice.”).

⁴²*Id.* (0:24 – 0:38).

⁴³*See, e.g.,* ACLU, *supra* note 28 (describing another case in 1999 when Amadou Diallo, an unarmed Black man, was shot 41 times by four police officers who were all found not guilty).

⁴⁴CNN, *supra* note 40 (1:11 – 1:20) (quoting Robert Thompson, Professor of Television and Popular Culture at Syracuse University, “Now today, cell phone videos of horrible events are things we see nearly every day.”).

⁴⁵Jessica de Perio Wittman, *A Trend You Can’t Ignore: Social Media as Government Records and Its Impact on the Interpretation of the Law*, 31 ALB. L.J. SCI. & TECH. 53, 70 (2021).

⁴⁶BLACK LIVES MATTER, *About*, <https://blacklivesmatter.com/about/> (last visited Sept. 22, 2022).

⁴⁷Evan Hill, Ainara Tiefertler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floydinvestigation.html>, (reporting on May 25, 2020,

to buy cigarettes, but as he made the purchase, a Cup Foods employee's suspicion grew that he had paid with a counterfeit twenty-dollar bill.⁴⁸ After police were called to the scene, it was not long before the interaction between the police officers and Floyd turned sour.⁴⁹ The police officers on the scene had body camera footage of the entire incident, but would the public really have been made aware of the fatal event that occurred, if not for bystander Darnella Frazier?⁵⁰

Darnella Frazier, just seventeen-years-old at the time, performed a simple, yet heroic act; on May 25, 2020 – she pressed record.⁵¹ As George Floyd became quickly curious as to why he was being questioned by police at all, and as additional police officers arrived on scene, he grew visibly anxious by the minute – consistently denying that he did anything criminal or suspicious in the first place.⁵² As George Floyd became more anxious, police officers became more suspicious of him, first trying to place him under arrest in the back of one police car, but eventually dragging him back out of the police car and placing him face down on the ground.⁵³ Derek Chauvin, one of the additional officers to arrive on scene, placed one knee on the back of Floyd's neck and the other knee on the middle of Floyd's back – and he did not move for nine minutes and twenty-nine seconds.⁵⁴ During this time, Floyd repeatedly pleaded out, "I can't breathe," at least twenty-eight times, which every officer blatantly ignored and even mocked.⁵⁵

Despite the differences in reports of just how long Chauvin was kneeling on George Floyd, what matters the most is that in that amount of time, Chauvin took

George Floyd, just seventeen minutes after the first police car arrived on scene, "was unconscious and pinned beneath three police officers, showing no signs of life.")

⁴⁸Sara Snider, *Inside Cup Foods, where it seems George Floyd never left*, CNN (Apr. 10, 2021, 7:19 AM), <https://www.cnn.com/2021/04/10/us/minneapolisgeorge-floyd-cup-foods-sidner/index.html>.

⁴⁹Hill, Tiefenthler, Triebert, Jordan, Willis & Stein, *supra* note 47; *see also* 10 Tampa Bay, *supra* note 2 (stating police body camera footage shows evidence that only twenty minutes passed by from the time the first arriving officer on scene made initial contact with George Floyd, to the time when George Floyd was placed in the back of an ambulance on a stretcher, no longer showing any sign of life).

⁵⁰Hernandez, *supra* note 5 ("Even though this was a traumatic life-changing experience for me, I'm proud of myself. If it weren't for my video, the world wouldn't have known the truth. I own that. My video didn't save George Floyd, but it put his murderer away and off the streets," Frazier, 18, said.)

⁵¹*Id.*

⁵²10 Tampa Bay, *supra* note 2.

⁵³*Id.* (quoting from body camera footage, an officer repeatedly states that Floyd "must be on something" – implying that he was under the influence of illegal substances).

⁵⁴*Id.*; *see also* Nicholas Bogel-Burroughs, *Prosecutors say Derek Chauvin knelt on George Floyd for 9 minutes 29 seconds, longer than initially reported.*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/derek-chauvingeorge-floyd-kneel-9-minutes-29-seconds.html> ("The most important numbers you will hear in this trial are nine, two, nine," Jerry W. Blackwell, one of the prosecutors, said in his opening statement. "What happened in those nine minutes and 29 seconds when Mr. Derek Chauvin was applying this excess force to the body of Mr. George Floyd.")

⁵⁵10 Tampa Bay, *supra* note 2 (quoting from body camera footage, an officer states that it must take a lot of energy and breath for Floyd to say he can't breathe); *see also* Mike Baker, Jennifer Valentino-DeVries, Manny Fernandez & Michael LaForgia, *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (Jun. 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html> (stating these three words uttered by George Floyd were not the first encounter the Black community has heard, as many other police brutality incidents ending in death, more Black men, uttered these same three words right before dying at the hands of law enforcement).

advantage of his policing power to apply unreasonable, excessive force upon George Floyd and to ultimately take George Floyd's life. Thanks to Darnella Frazier's posting of a video of the entire gruesome incident, Chauvin and the other officers involved were charged with murder.⁵⁶ Chauvin was eventually found guilty of murder in the second-degree and guilty of depriving George Floyd of his constitutional rights.⁵⁷ Although the sentencing of Chauvin was considered a "win," the justice system must still be improved. Darnella Frazier's video was a key part of the trial and sparked protests worldwide, preaching for racial justice and police reform.⁵⁸ The BLM movement received an overwhelming amount of support from new faces nationally and worldwide during 2020 because of the extreme injustice upon George Floyd.⁵⁹ What may have been a contributing factor to the difference in outcome – in comparison to the prior history regarding police officers awarded immunity despite their callous actions – is the excruciating length of time Chauvin spent kneeling on George Floyd's neck and back.

Americans were able to clearly visualize the severity of police brutality and became just as outraged as many have been for years prior, encouraging a massive social change.⁶⁰ More people are now aware of the importance and the impact that recording a police officer can do for the country. Now that Americans have been privy to a myriad of video recordings of police brutality, this goal seems easy and realistic, right? Wrong. Qualified immunity is still alive and well.

⁵⁶Shaila Dewan, *What are the charges against Derek Chauvin?*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/20/us/derek-chauvincharges.html> (reporting Chauvin was faced with three charges – second-degree murder, third-degree murder and second-degree manslaughter); *see also*, Tim Arango, *Derek Chauvin faces three charges. Here's how his sentencing could unfold.*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/chauvin-sentence-murder.html>; *see also* Hernandez, *supra* note 5, (noting Darnella Frazier's video clip that went viral became a key piece of evidence in the trial against the killer, Derek Chauvin).

⁵⁷Dep't of Just., *Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of their Constitutional Rights*, U.S. DEPT OF JUST., <https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-sentenced-more-20-years-prison-depriving> (July 7, 2022) (describing that the federal jury also convicted the other officers involved for violating the same criminal civil rights statute as Chauvin, as the other three officers failed to intervene in Chauvin's excessive force).

⁵⁸Hernandez, *supra* note 5.

⁵⁹BLACK LIVES MATTER, *2020 IMPACT REPORT 6* (n.d.), <https://blacklivesmatter.com/wp-content/uploads/2021/02/blm-2020-impactreport.pdf> (last visited Nov. 10, 2025) (stating in terms of gaining online organization and presence, in the second half of 2020, the Black Lives Matter Global Network Foundation was visited by over 24 million people, with the most active visited day being "June 2, 2020, with 1.9 million visitors. This is an almost 5,000% increase compared to our most trafficked day in March 2020.").

⁶⁰BLACK LIVES MATTER, *supra* note 59 ("Black Lives Matter, as a movement, seeks to eradicate the white supremacy that is behind the violence inflicted on Black communities by the State and vigilantes.").

II. THE GATEKEEPER – QUALIFIED IMMUNITY

A. *Its Creation*

The right to record police activity, recognized by only some federal courts, must pass a difficult threshold – qualified immunity. “Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”⁶¹ A police brutality victim may have a cause of action when a law enforcement officer continues with his conduct despite his knowledge that such conduct would violate a victim’s constitutional right.⁶² However, this supposed cause of action against a law enforcement officer is not as easy as it may appear under the doctrine of qualified immunity.

Created officially in 1982, government officials have been granted immunity from civil liability, unless the official violates a “clearly established” statutory or constitutional right.⁶³ The doctrine of qualified immunity is not a privilege, but rather a right to avoid liability based on the objective reasonableness of the officer.⁶⁴ This objective element defeats qualified immunity when an officer knew or reasonably should have known that his conduct would violate a constitutional right of the victim.⁶⁵ The qualified immunity defense is also defeated when an officer acts with “malicious [intent] to cause a deprivation of constitutional rights or other injury.”⁶⁶ However, what the officer knew or reasonably should have known is based upon a determination that the alleged violated constitutional right was “clearly established” at the time the officer’s action occurred.⁶⁷

Although a competent law enforcement officer should know the laws which govern his conduct, the qualified immunity defense will prevail when the law is not “clearly established” because such an officer cannot “reasonably be expected to anticipate subsequent legal developments.”⁶⁸ It is difficult to navigate through the record of qualified immunity without first recognizing the disproportionate pattern it has caused on marginalized groups since its creation.⁶⁹ In 1871, Congress enacted legislation permitting lawsuits against authorities who neglected, or sometimes outright refused, to protect Black citizens “from – or even participated in – racial terror lynch-

⁶¹Qualified Immunity, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/qualifiedimmunity> (last visited Sept. 22, 2022); *see also* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

⁶²Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* 42 U.S.C. § 1983 (“Every person who . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”).

⁶³Harlow, 457 U.S. at 818.

⁶⁴*Id.* at 819.

⁶⁵*Id.* at 815.

⁶⁶Harlow, 457 U.S. at 815.

⁶⁷*Id.* at 818.

⁶⁸*Id.* at 819.

⁶⁹Qualified Immunity, EQUAL JUST. INITIATIVE, <https://eji.org/issues/qualifiedimmunity/> (last visited Sept. 22, 2022).

ings and other acts of racial violence groups like the Ku Klux Klan.”⁷⁰ After almost one hundred years, in response to the growing challenge against police misconduct, the Supreme Court declared a new legal doctrine, qualified immunity, to limit that same right Congress created in the Civil Rights Act of 1871, affording protection to law enforcement officers from frivolous lawsuits.⁷¹

This newly announced legal doctrine brings us to 1982 – when the Supreme Court dramatically expanded qualified immunity.⁷² In *Harlow*, the Court dealt with a narrow form of immunity given to government officials, specifically illegal actions within the White House. However, now the ruling has also been broadly applied to actions of police officers.⁷³ In asserting qualified immunity as a defense, courts conduct a two-step inquiry considering (1) whether the facts alleged by the victim make out a violation of a constitutional right, and, if the victim has satisfied the burden of meeting this first step, (2) whether, at the time of the defendant’s alleged misconduct, the right at issue was clearly established to the extent that a reasonable person would have known it.⁷⁴

“The doctrine of qualified immunity was designed to ensure that officials would not be chilled in the proper exercise of their public duties.”⁷⁵ The burden of proof against qualified immunity rests squarely upon the victim to show that a “clearly established” constitutional right was violated – an extremely difficult burden for victims to meet.⁷⁶ A statutory or constitutional right is not considered “clearly established” if no other court has previously ruled in a case involving an essentially identical set of facts.⁷⁷ The qualified immunity doctrine was created by the Supreme Court of the United States, and its creation has now been justified through the belief that police officers need to be given “breathing room” and the right to make “reasonable but mistaken judgments about open legal questions.”⁷⁸ The Supreme Court has reasoned that qualified immunity is “immunity from suit rather than a mere defense to liability,”

⁷⁰*Id.* (stating police violence, prevalent for years, had first been challenged in 1871 when Americans felt “empowered” to fight for their human rights).

⁷¹*Id.* (“During the period of Reconstruction (1865-1876) that followed the Civil War, thousands of recently emancipated Black people were menaced, lynched, and subjected to indiscriminate violence by white police officers and mobs.”).

⁷²*Id.*

⁷³*Harlow*, 457 U.S. at 806 (holding government officials should be entitled to some immunity from lawsuits for damages, and at common law, a public officer is also entitled to the same form of protection as to prevent any interference with their official duties or any threat to liability).

⁷⁴*Finn*, *supra* note 15, at 448; *see also* *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (holding in every qualified immunity case, the first initial inquiry must be determining whether the plaintiff has alleged a deprivation of a valid constitutional right at all).

⁷⁵*Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992).

⁷⁶The Editorial Board, *End the Court Doctrine That Enables Police Brutality*, N.Y. TIMES (May 23, 2021), <https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutalitymisconduct.html> (“The doctrine, known as qualified immunity, has developed over the years into an impenetrable barrier to relief for many victims of police brutality – or, as in the case of Mr. Floyd, for victims’ families.”).

⁷⁷The Editorial Board, *supra* note 76.

⁷⁸*Id.*

and it is a preventative measure from unnecessary litigation regarding constitutional issues that would merely waste court and parties' resources.⁷⁹

But how much immunity is too much? In 2014, the Sixth Circuit Court of Appeals heard a case where a victim alleged that law enforcement officers used excessive force in violation of the Fourth Amendment by unleashing their police dogs onto him only after he had already surrendered himself by lying down.⁸⁰ The court granted qualified immunity to the officers involved, prevented the victim from receiving compensation, and reasoned that it was not clearly established that the officers applied excessive force in apprehending the victim.⁸¹ The Supreme Court later denied the petition for a writ of certiorari.⁸²

In 2018, the Supreme Court afforded a law enforcement officer qualified immunity because the officer did not violate clearly established law.⁸³ The victim here had a history of suffering from mental illness, and although holding a kitchen knife at her side, she stood completely still in her own driveway when the officers on scene shot her four times.⁸⁴ After filing a lawsuit against the police officer alleging the use of excessive force in violation of the Fourth Amendment, the Supreme Court held that a violation of law was not clearly established.⁸⁵ The Supreme Court reasoned that an officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.”⁸⁶

There seems to be a heavily one-sided approach to qualified immunity, as the doctrine has gifted law enforcement officers with an “absolute shield” of immunity, which deters a victim’s ability to achieve justice for harm already done. Justice Sotomayor, with Justice Ginsburg joining, stated in the dissent that:

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished . . . there is nothing right or just under the law about this.⁸⁷

⁷⁹Pearson v. Callahan, 555 U.S. 223, 237 (2009) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

⁸⁰Baxter v. Bracey, 751 F. App’x 869, 870 (6th Cir. 2018); *see also* EQUAL JUST. INITIATIVE, *supra* note 69.

⁸¹Baxter, 751 F. App’x at 873.

⁸²Baxter v. Bracey, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting) (rejecting the Court’s decision expressing strong doubt about the qualified immunity doctrine arguing the importance to at least consider and revisit the doctrine in this case because it was not until the victim here had already surrendered that the officers involved released the dogs causing injury to the victim).

⁸³Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (stating officers were called to the scene in a neighborhood in Arizona, where an altercation turned fatal after the officer shot the victim believing she was a threat).

⁸⁴*Id.* at 1151; *see also* EQUAL JUST. INITIATIVE, *supra* note 69.

⁸⁵Kisela, 138 S. Ct. at 1153 (“Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness.”).

⁸⁶*Id.* at 1153 (quoting Plumhoff v. Rickard, 572 U.S. 765, 778-79 (2014)).

⁸⁷Kisela, 138 S. Ct. at 1162.

In reforming the one-sided approach that qualified immunity permits, granting citizens a clearly established First Amendment right to record police activity can play a major role in shifting the analysis away from a heavy burden of proof upon a victim of police brutality when violations are so clearly shown on video.

B. Its Demise

C. Its Demise

Qualified immunity is well known to the Black community because statistically, the Black community is the most marginalized group falling victim to police brutality, and the doctrine makes it nearly impossible for victims of police brutality to achieve justice against the police officer for his malfeasance.⁸⁸ In the past two years, since the summer of 2020, concerns regarding the qualified immunity doctrine have been amplified, specifically following the conviction of Chauvin for George Floyd’s murder.⁸⁹

The “shoot first” approach detailed by Justice Sotomayor’s dissent in 2018 explains that policing in the United States has disproportionately impacted Black people who are “killed by police in the U.S. at more than three times the rate of white people.”⁹⁰ “Due process rights do not prevent the investigation, charging, trial, and conviction of a police officer . . . neither does qualified immunity.”⁹¹ Although the Supreme Court created qualified immunity, a new cycle has also now been created – lower courts disagreeing on how to apply qualified immunity in certain aspects.⁹² Specifically, lower courts have been on opposite ends of the spectrum when determining if a clearly established First Amendment right to record police activity exists.⁹³

If the Supreme Court does not resolve the split between the circuit courts, and continues to ignore police misconduct or actions that could be in violation of a constitutional right, it leaves “both cops and civilians without a clear idea of what sorts of violations are considered clearly established.”⁹⁴ Qualified immunity is far too broad a doctrine to be appropriately applied in society’s best interest. Reforming qualified

⁸⁸Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), <https://www.aclu.org/news/criminal-lawreform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable>; see also *Number of people shot to death by the police in the United State from 2017 to 2022, by race*, STATISTA (Feb. 2, 2023), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/>; *Rate of fatal police shootings in the United States from 2015 to September 2022, by ethnicity*, STATISTA (Feb. 2, 2023), <https://www.statista.com/statistics/1123070/police-shootings-rate-ethnicity-us/>.

⁸⁹Adam M. Taylor & Ayanna Alexander, *Calls to End Qualified Immunity Boosted by Chauvin’s Conviction*, BLOOMBERG L. (Apr. 21, 2021), <https://news.bloomberglaw.com/social-justice/calls-to-end-qualified-immunityboosted-by-chauvins-conviction>.

⁹⁰EQUAL JUST. INITIATIVE, *supra* note 69 (stating that Black people are also stopped and frisked without cause at significantly higher rates – often leading to cases of police brutality); see also CHRISTOPHER DUNN & MICHELLE SHAMES, N.Y. CIV. LIBERTIES UNION, *STOP AND FRISK IN THE DE BLASIO ERA* 1-2, 9 (2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfri_sk_singles.pdf.

⁹¹Taylor & Alexander, *supra* note 89.

⁹²The Editorial Board, *supra* note 76.

⁹³*Id.*

⁹⁴*Id.*

immunity or expanding and establishing clear guidelines on a citizen's constitutional right – here being the right to record police – allows citizens to feel comfortable knowing their constitutional rights, while at the same time ensuring that law enforcement officers are held accountable for their wrongful actions.

III. THE NOT SO CLEARLY ESTABLISHED RIGHT TO RECORD

One of many proposed changes for reform to the qualified immunity doctrine is to “eliminate the ‘clearly established’ defense and prevent cops from relying on their own belief that their conduct was lawful.”⁹⁵ Abolishing qualified immunity altogether may aid the circuit courts to reach a uniform consensus of whether citizens have a clearly established First Amendment right to record police activity – but all that is needed is reform, not total elimination. It may seem odd that all the odd numbered circuit courts have ruled that there is a clearly established First Amendment right to record police activity, but it is nothing more than a mere coincidence.⁹⁶

The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”⁹⁷ Generally, the First Amendment allows citizens to speak freely, which reasonably includes the use of social media. The important role that social media plays in this narrow scenario has the potential to transform citizens into journalists as they provide information to the public on social justice issues, which informs the government at the same time.⁹⁸ Social media “relies on public participation and engagement for its platform to thrive.”⁹⁹ Citizens’ use of social media to post about social justice issues has the power to make impactful change to the way that law enforcement officers interact with citizens, especially in the way they interact with a victim.

IV. THE COURTS CANNOT DECIDE

A. *The Circuit Split*

Since the creation of qualified immunity, the doctrine has been expanded to “excuse all manner of police misconduct, from assault to homicide.”¹⁰⁰ As of today, six

⁹⁵The Editorial Board, *supra* note 76.

⁹⁶Colleen Slevin, *Another U.S. appeals court upholds right to record police*, ASSOCIATED PRESS: FREE SPEECH CTR. (Jul. 13, 2022), <https://www.mtsu.edu/firstamendment/post/3187/another-u-s-appeals-court-upholds-right-to-record-police>.

⁹⁷U.S. CONST. amend. I.

⁹⁸Wittman, *supra* note 45, at 61.

⁹⁹*Id.* at 84-85.

¹⁰⁰The Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-GeorgeFloyd.html?action=click&module=RelatedLinks&pgtype=Article> (describing a case whereby the Supreme Court found that “police officers should not face legal liability for enforcing the law in good faith and with probable cause . . . That’s a high standard to meet. But what makes these cases nearly impossible for [victims] to win is the court’s requirement that any violation of rights be ‘clearly established’ – that is, another court must have previously encountered a case with the same context and facts and found there that the officer was not immune.”).

circuit courts have heard cases on whether police officers are entitled to qualified immunity in the context of a First Amendment right to record police, and all have found in favor of the citizen bystander video recording the police activity.¹⁰¹ Among the circuit courts that have ruled there is a clearly established First Amendment right to record police is the Ninth Circuit Court of Appeals.¹⁰² Despite consistent rulings in the Ninth Circuit Court of Appeals, Arizona, a state within the Ninth Circuit, just passed legislation, A.Z. House Bill 2319, placing statutory limits on the very right that has been clearly established by its superior.¹⁰³ Recording police activity gives the public a front row seat to alarming law enforcement activity, allowing for meaningful change within our democracy.¹⁰⁴ If the Ninth Circuit has consistently ruled that there is a clearly established First Amendment right to record, why is the State of Arizona permitted to pass legislation limiting that very right? This is a primary issue with our circuit courts being completely split on whether this right to record clearly exists. Our country will continue to have unresolved matters of law within the issue of something that should be a fundamental right.

Among many police brutality cases over the years, often the incident stems from a “routine” traffic stop. Nowadays, citizens also have their own dashboard cameras within their vehicle, or have a cellphone holder, for the purpose of recording their own traffic stop and interaction with a police officer. Arizona’s new legislation would totally eliminate a citizen’s ability to record a police officer from within their own vehicle without first gaining the officer’s permission. Should a state really be allowed to make laws that completely go against the precedent that the higher court has already set? Should a citizen in one state have broader rights under the First Amendment than a citizen in another state? This problem alone creates a sufficient need for the Supreme Court to address the issue or Congress to create uniform legislation among the United States, clearly establishing a First Amendment right to record police.

In the Seventh Circuit Court of Appeals, the court held that an eavesdropping statute was a burden to a citizen’s right to free speech and subjected the statute to strict scrutiny.¹⁰⁵ Recording the police is a “uniquely reliable and powerful method[] of preserving and disseminating news and information about events that occur in public.”¹⁰⁶ Five out of the eleven circuit courts of appeals have not ruled on whether

¹⁰¹See *Gilk v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011); see also *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (finding that “under the First Amendment’s right of access to information, the public has the commensurate right to record – photograph, film, or audio record – police officers conducting official police activity in public areas” and holding peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation).

¹⁰²See *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020).

¹⁰³*Tewari*, *supra* note 14 (“Arizona recently passed a law that makes it a crime, punishable by up to a month in jail, for people to record videos within eight feet of police activity.”); see also *Unlawful Video Recording of Law Enforcement Activity*, H.R. 2319 55th Leg., 2d Sess. (Ariz. 2022).

¹⁰⁴*Ariz. Broadcasters Ass’n v. Brnovich*, 626 F. Supp. 3d 1102, 1107 (D. Ariz. 2022) (holding an individual recording police exercises their First Amendment right to film matters of public interest as “videos of police interactions with the public have ‘contributed greatly to our national discussion of proper policing.’” (quoting *Fields*, 862 F.3d at 357-58)).

¹⁰⁵*Am. Civ. Liberties Union v. Alvarez*, 679 F.3d 583, 595, 603 (7th Cir. 2012).

¹⁰⁶*Id.* at 607 (finding recording the police has a self-authenticating character and recording the police openly gives the police notice that they are being recorded).

there is a clearly established First Amendment right to record police, and some believe that the Supreme Court would not get involved in making that determination either, unless the circuit courts were on opposite ends of the issue.¹⁰⁷ However, the Supreme Court seemingly has already made their presence known in the realm of making the right to record police activity a clearly established constitutional right.¹⁰⁸

B. *The Supreme Court's Refusal*

In November 2021, the Supreme Court denied a petition for certiorari and refused to hear *Frasier v. Evans*, which would have afforded the Court the opportunity to analyze and rule on this specific issue – the right to record police.¹⁰⁹ The questions presented to the Court for consideration were as follows: (1) “[w]hether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity”, and (2) “[w]hether it has been ‘clearly established’ since at least 2014 that the First Amendment protects the right of individuals to record police officers carrying out their duties in public.”¹¹⁰

The Tenth Circuit Court of Appeals ruled that the officers involved were entitled to qualified immunity in regards to Levi Frasier’s First Amendment retaliation claim, which was a huge shift away from the complete circuit split.¹¹¹ Although many other circuit court of appeals have previously and consistently ruled that there is an established First Amendment right to record police, this recent decision within the Tenth Circuit provides otherwise.¹¹²

The Supreme Court’s denial of certiorari on this matter completely ignores their ability to resolve a clear split in the law, specifically regarding a constitutional right within the nation.¹¹³ The Supreme Court created this legal doctrine that has single-handedly protected law enforcement officers across the board, but more recently, in

¹⁰⁷Slevin, *supra* note 96.

¹⁰⁸Nick Sibilla, *Supreme Court Refuses to Protect First Amendment Right to Film Police Brutality*, FORBES (Nov. 2, 2021), <https://www.forbes.com/sites/nicksibilla/2021/11/02/supreme-court-refuses-to-protect-first-amendment-right-to-film-police-brutality/?sh=5a389fc17d91>.

¹⁰⁹Sibilla, *supra* note 108.

¹¹⁰*Id.*; see also John W. Whitehead, Douglas R. McKusick & Christopher F. Moriarty, *Brief of the Rutherford Institute as Amicus Curiae in Support of the Petitioner*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/DocketPDF/21/21-57/187473/20210813143511599_21-57%20Amicus%20Rutherford%20Supp.%20Petitioner.pdf (last visited Feb. 16, 2023).

¹¹¹*Frasier v. Evans*, 992 F.3d 1003, 1034 (10th Cir. 2021). Levi Frasier video recorded Denver police officers using excessive force upon an arrestee in public – hitting the subject in the face six times rapidly – but after noticing he was being recorded, an officer made his way to Mr. Frasier, followed by multiple other officers, “encircling” Mr. Frasier, demanding that he hand over his tablet that he was recording on, so the officers could delete the video evidence. The officers involved eventually coerced Mr. Frasier into giving up his tablet, and after going through Mr. Frasier’s tablet themselves without consent, the officers returned it and left. *Id.*

¹¹²Sibilla, *supra* note 108 (“Even though Denver had instructed its officers since 2007 about the right to film police, the Tenth Circuit declared that ‘whatever training the officers received concerning the nature of Mr. Frasier’s First Amendment rights was irrelevant to the clearly-established law inquiry.’”).

¹¹³*Id.* (“Failing to prevent police from threatening observers creates a ‘chilling effect’ that undermines the freedom of the press, warned dozens of newspapers, magazines, and media companies in an amicus brief that urged the Supreme Court to take the case.”).

the wake of the rising issue of whether there is a First Amendment right to record police. Therefore, the Supreme Court should be the one to revisit that doctrine in the specific context of the First Amendment. If not the Supreme Court, legislative action from Congress is imminently needed.

V. ANALYSIS

A. *A Gasp for Justice*

This Note proposes either a call on the Supreme Court to visit this narrow issue within the First Amendment, or a call on Congress to take legislative action. “The Supreme Court, having created the problem of qualified immunity to shield police from being held liable for their misconduct, keeps refusing to fix it.”¹¹⁴ It is in the best interest of the public to be granted such a right because the public has a right to know when their constitutional rights are potentially being violated.¹¹⁵ Citizens have the power to inform other citizens. When police misconduct is prevalent, citizens should have the right to be made aware of such a callous event, as constitutional rights and lives are at stake.

B. *Breaking the Cycle – The Citizen Journalist*

Affording citizens a clearly established right to record police activity allows the opportunity to conduct thorough investigations of a multitude of police departments nationwide, in search of a pattern of disparate treatment through the use of excessive force and police brutality against marginalized groups.¹¹⁶ After the events in 2020, even the government has used social media as a resource for themselves, both to make announcements about protestor information and to keep citizens safe.¹¹⁷ A citizen bystander acts as a journalist, *per se*, when they press record on such a vile incident as police brutality, and then post the recording online. In doing so, citizens have the capability to, one by one, conduct a check and balance on police activity and the justice system as a whole – just like Darnella Frazier did.

Frazier’s video recording ultimately led to the arrest and conviction of the officer applying brutal, excessive force upon George Floyd.¹¹⁸ With an established right to

¹¹⁴Radley Balko, *The Supreme Court has abdicated its duty to the Bill of Rights*, WASHINGTON POST (Nov. 4, 2021), <https://www.washingtonpost.com/opinions/2021/11/04/supreme-court-qualifiedimmunity-frasier-evans/>.

¹¹⁵*Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) (finding that “[w]hen the government is a party, the irreparable injury and public interest factors merge. . . it is always in the public interest to prevent the violation of a party’s constitutional rights. . . [w]hen weighing public interests, courts have ‘consistently recognized the significant public interest in upholding First Amendment principles.’”).

¹¹⁶See *What 100 Years of History Tells Us About Racism in Policing*, ACLU (Dec. 11, 2020), <https://www.aclu.org/news/criminal-law-reform/what-100-years-of-history-tells-us-about-racism-in-policing>.

¹¹⁷Wittman, *supra* note 45, at 63-68.

¹¹⁸Jack Karp, *Court Rulings Could Chill Video Recording of Police*, LAW 360 (Jun. 6, 2021), <https://www.law360.com/articles/1390901/court-rulings-could-chill-video-recording-of-police> (describing the recent Tenth and Fourth Circuit Courts of Appeals decisions and the possibility of whether

record police activity, a citizen bystander can raise awareness nationwide to the systemic issue of police brutality in such a quick fashion that the information spreads in a matter of minutes. Citizens, however, should be aware of what their established rights truly entail.¹¹⁹ Since summer 2020, there have been increasing developments and decisions from the circuit courts on whether there is a First Amendment right to record police, but with such inconsistent rulings, it is difficult for a citizen bystander to really know what they might be faced with if they choose to video record police misconduct or any police activity at all.¹²⁰ Some experts and attorneys believe that recent circuit court decisions denying citizens a constitutional right to record police will hinder social efforts in achieving the goal of police reform, as such efforts have “largely been propelled by these videos.”¹²¹

C. *Social Media – Strength in Numbers*

Social media and film can push the United States toward a more reformative justice system, specifically within the context of preventing police brutality.¹²² With the amount of consistent growth both technology and social media have made, it is extremely easy for a citizen to upload videos within minutes of taking the video, if not stream it live.¹²³ Long before the era of social media was Rodney King’s televised beating, but two years ago, when George Floyd was killed, something different happened.¹²⁴ It was not just the reason that the police officers were using excessive force upon George Floyd, but Darnella Frazier’s video broadcasted to the world that the police officers involved knew they were being recorded but still continued with such heinous actions and crimes anyway.¹²⁵

Imagine what a victim can endure when there are no video cameras. In the matter of George Floyd, the police officers involved had body cameras turned on, but how can citizens depend on a police officer to continue to keep their body cameras on if they even have a body camera in the first place?¹²⁶ Even if a law enforcement

the Supreme Court of the United States will consider reforming the qualified immunity doctrine to determine whether there is a constitutional right to record police in public).

¹¹⁹*Id.* (“[T]he rulings, which several of these experts called ‘outliers,’ further confuse an already unclear area of law, and some attorneys worry they could discourage people from recording police misconduct or encourage officer to try and stop those who do press ‘record.’”).

¹²⁰Karp, *supra* note 118.

¹²¹*Id.* (quoting attorney, Emerson Sykess, from the ACLU’s Speech, Privacy, and Technology Project, “We all know that the Black Lives Matter movement and the movement to defund the police would not be anywhere near where they are today without cellphones and other recordings of interactions with the police.”).

¹²²Wittman, *supra* note 45, at 63.

¹²³Reha Kansara, *Black Lives Matter: Can viral videos stop police brutality?*, BBC TRENDING (Jul. 6, 2020), <https://www.bbc.com/news/blogs-trending53239123>.

¹²⁴*Id.* (saying the author of *Bearing Witness While Black: African Americans, Smartphones, and the New Protest #Journalism*, Alissa Richardson states that “[w]hen Black people are picking up their cell phones, they’re not just recording in the wrong place at the right time,” she says. “They’re attempting to connect, historically, dots between atrocities.”).

¹²⁵Kansara, *supra* note 123.

¹²⁶Suciu, *supra* note 9 (“[T]oday it is now possible for such video to be quickly disseminated across social media even as events are unfolding. The question is how such videos shared on social media could lead to social change. . . the battle lines remain firmly drawn on the social platforms.”); *see also*

officer has a working body camera turned on for the entirety of an interaction with a citizen, “[p]olice departments don’t release videos until you’re well into a criminal prosecution of a civil lawsuit.”¹²⁷

It is extremely difficult to rely on police body camera footage for the public to discover potential police misconduct that often occurs because such footage will not be released to the public unless a lawsuit or criminal charges have been filed. Rather, citizens should be free to record police activity in the moment and disseminate that newsworthy information as they see fit. Darnella Frazier’s viral video of George Floyd’s untimely death was certainly not the first video of police brutality to go viral, and it certainly has not been, and will not be, the last.¹²⁸ However, this action by a citizen bystander must be transformed into clearly established law as a constitutional right within the First Amendment. The power to transform the justice system and hold our authorities accountable for blatant misconduct lies within the palm of our hands – and within our cellphones.

CONCLUSION

In 1982, the Supreme Court of the United States created a doctrine placing an expansive safety net around law enforcement officers, which has escaped skepticism until recently.

Qualified immunity functions as a protection for a law enforcement officer from being faced with frivolous litigation, which is obviously reasonable to keep in place. However, it is not reasonable for law enforcement officers to continue to be protected by an absolute shield, specifically in scenarios of police brutality. The nature of qualified immunity, although reasonably protective, sometimes affords too much protection. The United States government should be protecting its citizens just the same.

This Note is not advocating to end qualified immunity once and for all, as some believe is the right choice. This Note, rather, proposes the necessary legislation to make a citizen’s right to record police activity a “clearly established” First Amendment right – one that cannot be evaded by law enforcement officers, and one that cannot be superseded by state laws. Citizens have the unfortunate power to be witnesses to police misconduct in public, but it is what citizens can do with that power that is important in bringing about racial justice and police reform – press record.

Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017) (finding that bystander videos offer a separate, and sometimes better, perspective than that of a police officer’s body camera or police car dashboard camera, as a bystander video provides angles that most police videos do not capture).

¹²⁷Kansara, *supra* note 123 (quoting Tracey Brown, who heads the civil rights and police brutality group at the Cochran Firm in New York City).

¹²⁸Kansara, *supra* note 123 (“‘Black people pick up their cell phones to do two things,’ says Alissa Richardson, ‘to say to the person who is dying, ‘I will not let you die alone,’ and ‘I will carry the message forward to your family – because I know that nobody would believe what happened to you here today.’”).