

TURNING THE CAMERA AROUND

**The Public's Right to
Record in Public**

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I. Executive Summary

The rapid growth of new surveillance technologies such as facial recognition, cell-site location information, and predictive policing have drawn intense scrutiny about the expanding power of the police to surveil the public. Yet, at the very same moment, comparatively little work has focused on the tenuous power of the public to surveil the police themselves.

In this paper, we explore the public’s right to record police officers in public spaces. The proliferation of smartphones and other recording devices have given this longstanding question new prominence. Recordings of police misconduct spark national conversations on criminal justice and can ensure police accountability, reform law-enforcement policies, and safeguard the constitutional rights of victims of police misconduct.

These recordings serve as a vital tool for public accountability, and with the advent of social media, they increasingly spark political mobilizations to hold police accountable for their misconduct. In theory, the First Amendment prohibits officers from restricting individuals’ right to record them; however, the reality frequently falls short of this promise. In response, growing numbers of states, including Colorado, California, and Oregon, are enacting statutory protections to ensure that the public remains free to record the police.

Part II of this paper examines the statutory and constitutional protections for recording police officers. Part III documents instances of police interference with public recorders in New York. Part IV examines measures that other jurisdictions have adopted to protect civilians’ right to record. Part V highlights certain technological solutions that assist in documenting police conduct. Lastly, Part VI proposes recommendations to strengthen public oversight of police activity and the ability of individuals to record police conduct.

Given the social benefits of empowering citizens to record police activity and the limited practical effectiveness of constitutional enforcement, we recommend more widespread adoption of the model of legislation adopted in Colorado, where members of the public are guaranteed a private right of action to sue police officers when their right to record has been violated. As we explain throughout this paper, the First Amendment protections that should, in theory, protect every American’s right to record, will never, on their own, be enough.

II. The State of the Law

In right-to-record cases, civilians often invoke their First Amendment right to photograph, videotape, and otherwise record police carrying out their duties in public.¹ Recordings can help hold officers accountable for violations of federal, state, and local law and promote police transparency. Bystander and arrestee videos can also help balance the narrative power afforded to police body-worn cameras, which naturally align viewers with officers' perspective.² Lastly, footage can help a broader cross-section of society understand the impact of policing practices on historically marginalized communities, thereby improving democratic accountability for police departments.

a. *Federal Law on the Right to Record Public Police Conduct*

1. Overview

There is a growing consensus among federal courts that the First Amendment protects the right of individuals to record the public conduct of police. While protections can vary slightly, six federal appellate courts have decided that the First Amendment protects the right of civilians to record police in public areas.³ Moreover, several district courts outside those jurisdictions have also concluded that the First Amendment encompasses a constitutional right to record police activity in public.⁴ However, until the Supreme Court rules on the matter, protections will vary between jurisdictions, particularly for recordings in limited-public and non-public areas, such as a classroom or airport.⁵ Civilians face even more uncertainty when recordings are made by a suspect or person of interest, in contrast to heightened protections for third-party observers.⁶

¹ The most common type of right-to-record cases involve individuals filing suit under 42 U.S.C. § 1983 arguing that police officers violated his/her constitutional rights by preventing him/her from recording a police officer's public activity.

² Albert Fox Cahn, *How Bodycams Distort Real Life*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/opinion/bodycams-privacy.html>.

³ See *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Fields v. City of Phila.*, 862 F.3d 353, 358–62 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 586–87 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁴ See *Palmer v. Allen*, No. 14-CV-12247, 2016 WL 3405872, at *8 (E.D. Mich. June 21, 2016); *Crawford v. Geiger*, 996 F. Supp. 2d 603, 615 (N.D. Ohio 2014); *Frasier v. Evans*, No. 15-CV-01759-REB-KLM, 2018 WL 6102828, at *1 (D. Colo. Nov. 21, 2018), appeal docketed, No. 19-cv-19-1015 (10th Cir. Aug. 17, 2018).

⁵ *Kushner v. Buhta*, No. 16-CV-2646, 2018 WL 1866033, at *10 (D. Minn. Apr. 18, 2018), *aff'd*, 771 Fed. App'x 714 (8th Cir. 2019) (affirming lower court decision denying First Amendment violation where law school's "rules of decorum" prohibiting police recording in a classroom identified as a limited-public forum were viewpoint neutral); *Mocek v. City of Albuquerque*, 813 F.3d 912, 931 (10th Cir. 2015) (holding that "even if we agreed there is a First Amendment right to record law enforcement officers in public," the right did not necessarily extend to a non-public forum like an airport security checkpoint).

⁶ *Compare Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010) ("[T]he right to videotape police officers during traffic stops was not clearly established and [the officer in question] was entitled to qualified immunity") with *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014) (acknowledging a First Amendment right to openly film police officers at a traffic stop).

Importantly, even where civilians have a First Amendment right to record police conduct, procedural limitations may make it impossible to vindicate that right in court.

2. Barriers to Vindicating the Right to Record Public Conduct of Police

(a) Qualified Immunity

Qualified immunity blocks civil rights lawsuits if officers did not violate “clearly established law.” A “clearly established” law is one sufficiently clear so that a reasonable official would understand that what he/she is doing violates that right.⁷ In jurisdictions where the right to record has not been “clearly established,” courts will often dismiss claims on the basis of qualified immunity without ever reaching the constitutional merits of the case.⁸ That is, courts find that *even if there is* a right to record, that right is not “clearly established,” so qualified immunity applies.⁹ This can create a catch-22, where the right to record is never established because lawsuits are dismissed on the ground there is no clearly established right. Thus, there is an “artificial circuit split” between those circuits recognizing a right to record and those where the right has not been, and likely cannot be, “clearly established.”¹⁰

(b) Retaliatory Arrests

Qualified immunity is the most potent legal barrier civil rights litigation to vindicate a right to record, but the threat of retaliatory arrests is the most significant practical concern. A retaliatory arrest occurs when a police officer files false criminal charges against a civilian in retaliation for lawfully recording police activity. There are

⁷ See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

⁸ When a police officer asserts a qualified immunity defense, courts engage in a two-part analysis, asking: (1) whether the facts alleged by the plaintiff make out a violation of a constitutional right; and (2) whether, at the time of the defendant’s alleged misconduct, the right at issue was “clearly established.” *Glik*, 655 F.3d at 81. Because courts need not conduct their inquiry sequentially, most courts first decide whether the right to record is “clearly established” before addressing whether there is a violation of a constitutional right. See *Pearson*, 555 U.S. at 236 (declaring that the order in which courts analyze the issues in qualified immunity cases would be discretionary rather than mandatory).

⁹ See, e.g., *Szymborski v. City of Norfolk*, No. 2:08CV142, 2008 WL 11259782, at *4 (E.D. Va. Dec. 17, 2008), *aff’d sub nom.*, *Szymborski v. Houck*, 353 Fed. App’x 852, 853 (4th Cir. 2009) (citing lack of “Supreme Court, Fourth Circuit, or Supreme Court of Virginia precedent acknowledging the existence” of the right to record as grounds for avoiding the constitutional question because the right was not “clearly established” and qualified immunity would control either way).

¹⁰ See generally, Gregory T. Frohman, *What Is and What Should Never Be: Examining the Artificial Circuit “Split” on Citizens Recording Official Police Action*, 64 Cas. W. Res. L. Rev. 1897 (2014) (arguing that requiring district courts to make constitutional findings on the record even where qualified immunity may apply “would better facilitate adequate development of constitutional law on important contemporary issues like the First Amendment right to record police”); compare *Fordyce*, 55 F.3d at 439 (holding that there is a First Amendment right to film matters of public interest), and *Smith*, 212 F.3d at 1333 (same), and *Glik*, 655 F.3d at 82–84 (same), and *ACLU of Ill.*, 679 F.3d at 586–87 (same), with *Szymborski v. Houck*, 353 F. App’x 852, 853 (4th Cir. 2009) (holding that a First Amendment right to record police is not clearly established), and *Kelly*, 622 F.3d at 262 (same).

far more examples than can be detailed in this paper, but we include several cases to illustrate the range of retaliation.

In 2015, a New York City Police Department (“NYPD”) sergeant pointed at civilian bystander and said, “grab this guy too.”¹¹ The sergeant subsequently claimed that he had ordered the arrest because the bystander had shoved a bouncer, “[h]owever, surveillance video from the nightclub showed no physical contact between any civilians and the bouncer.”¹² In another 2015 case, a civilian recorded a NYPD vehicle search when an officer approached him, knocked his phone away, and arrested him. The officers charged the civilian with obstructing governmental administration, stating that the civilian was “in the middle of the intersection and prevented officers from safeguarding the car being searched.” The civilian’s recording, however, “showed that he had been standing a full traffic lane away from the car search.”¹³

Although the First Amendment forbids retaliation against individuals for engaging in protected speech,¹⁴ retaliatory arrest litigation will likely fail if there was probable cause at the time of the arrest that the civilian broke any law,¹⁵ even if the officer’s motivation was to retaliate. Therefore, plaintiffs face the burden of proving a lack of probable cause,¹⁶ which can be extremely burdensome, because broad state and local regulations make it easy for officers to find some justification for an arrest.¹⁷ For example, if a person is standing in a traffic lane, an officer may be able to arrest that individual even if the real reason for the arrest was because the civilian was recording police conduct. As illustrated in Section III, officers often use discretionary charges to retaliate against individuals for recording police conduct.

3. The Right to Record Public Conduct of Police as Applied in New York

Some federal district courts in New York have recognized a First Amendment right to record police,¹⁸ but the U.S. Court of Appeals for the Second Circuit—which oversees district courts in Connecticut, New York, and Vermont—has not addressed the

¹¹ Civilian Complaint Review Board, *Worth a Thousand Words: Examining Officer Interference with Civilian Recordings of Police*, 2017, at 28, available at: https://www1.nyc.gov/assets/ccrb/downloads/pdf/20172806_report_recordinginterference.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.”).

¹⁵ Probable cause is the standard that officers must typically satisfy before making an arrest. Probable cause for arrest exists when facts and circumstances within the police officer’s knowledge would lead a reasonable person to believe that the suspect has committed, is committing, or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

¹⁶ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724.

¹⁷ In other words, retaliatory arrests made under the pretext of probable cause are justified through overly broad catchall statutes—for example, disorderly conduct, loitering, and disturbing the peace.

¹⁸ See *Mesa v. City of New York*, No. 09 Civ. 10464 (JPO), 2013 U.S. Dist. LEXIS 1097 (S.D.N.Y. Jan. 3, 2013) (J. Oetken), *Higginbotham v. City of New York*, 105 F. Supp. 3d 369 (S.D.N.Y. 2015) (J. Castel), *Gerskovich v. Iocco*, 2017 U.S. Dist. LEXIS 110640 (S.D.N.Y. July 17, 2017) (J. Berman), *Stolarik v. City of New York*, 2017 U.S. Dist. LEXIS 168096, at *8 (S.D.N.Y. Sept. 7, 2017) (J. Berman).

issue.¹⁹ These cases lay the foundation for the Second Circuit’s likely future recognition of the right in civil rights litigation.

For instance, in 2013, a federal court in New York suggested the First Amendment protects the right to record,²⁰ but ruled against plaintiffs because the right was not “clearly established.” The decision noted that the court was “inclined to agree” with the other circuits that held “that the photography and recording of police officers engaged in their official duties fits comfortably within First Amendment principles.”²¹

Just two years later, another federal court in New York went a step further in finding the right to record police officers—“at least in the case of a journalist who [wa]s otherwise unconnected to the events recorded”—was clearly established.²² The court’s opinion provided a basis for other district courts within the Second Circuit to find the right to be “clearly established.” In 2017, right-to-record jurisprudence evolved again when a New York federal court determined—in two separate cases—that the right was “clearly established” and extended to *all* civilians, not just journalists.²³

New York residents also have the option of bringing suit in state court for violations of their rights under the New York State Constitution. It is well-settled that the U.S. Constitution creates the “floor” but not the “ceiling” of individual rights, and state constitutions may—and often do—afford more expansive rights and greater protections. To date, the issue appears not to have been litigated in New York State courts, so it remains uncertain how they would rule on a right to record claim.²⁴

4. The Right to Record Public Conduct of Police as Applied in New York

¹⁹ See, e.g., *Higginbotham v. Sylvester*, 741 F. App’x 28, 30–31 (2d Cir. 2018) (affirming summary judgment for defendants on other grounds without deciding the First Amendment issue).

²⁰ *Mesa*, 2013 U.S. Dist. LEXIS 1097, at *74–76.

²¹ *Id.* at *75–76 (internal quotations omitted).

²² See *Higginbotham*, 105 F. Supp. 3d at 380.

²³ *Gerskovich*, 2017 U.S. Dist. LEXIS 110640, at *23 (explaining that “under the First Amendment’s right of access to information the public ha[d] the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”); *Stolarik*, 2017 U.S. Dist. LEXIS 168096, at *8 (finding that the right to record police activity extends further to “journalists—if not all citizens.”).

²⁴ New York State has no statutory equivalent to 42 USC § 1983 to create a civil cause of action for state constitutional violations, and which could be used to enforce the New York Constitution’s free speech provision. However, the state’s highest court in *Brown v. State*, 89 N.Y.2d 172 (1996), ruled that the Court of Claims has subject matter jurisdiction to decide “constitutional tort” claims and can establish implied causes of action for damages under the state constitution. New York courts appear not to have decided whether the state constitution creates an implied cause of action for violations of free speech, or whether recording the public conduct of police is protected by the state constitution’s free speech provision. But in light of New York courts’ expansive interpretation of state constitutional protections, and *Brown*’s roadmap for the recognition of implied causes of action, there may be fertile ground in New York state courts for the protection of the right to record. Cf. Howard L. Zwickel, *In Support of an Implied State Constitutional Free Speech Tort in Public Employment Retaliation Cases*, 78 Albany L. Rev. 33 (2015).

Private citizens can also enforce their right to record in the context of criminal proceedings against them, especially in light of recent discovery reform. Under the new criminal discovery rules—which replace the former secretive and defendant-unfriendly “blindfold” law—defendants will automatically receive all of the police’s relevant evidence.²⁵ Previously, this information could be withheld until the very day that a trial started.²⁶ This means that even if police destroy the defendant’s recording of the arrest, the defendant will still have access to other evidence, such as footage from nearby surveillance cameras or police body cameras that show the infringement of the defendant’s right to record.

III. Police Interference with Civilian Recordings in New York

Anecdotal evidence suggests that NYPD officers frequently interfere with individuals’ recording of police conduct, reducing civilians’ constitutional right to a legal fiction. Officers can use a number of broad criminal statutes—i.e., Obstructing Governmental Administration,²⁷ Disorderly Conduct,²⁸ or Resisting Arrest²⁹—to target bystanders and suspects who are attempting to record an incident.

The New York City Civilian Complaint Review Board (“CCRB”), an independent NYPD oversight agency, recorded 257 complaints of officer interference with civilians’ recordings in 2014, 2015, and 2016,³⁰ the most recent years with public data. This amounted to approximately 2% of total CCRB Complaints for those 3 years. Complaints include: verbal interference or intimidation—instructing civilians to stop recording, or threatening arrest; searching civilians’ phones for evidence of recordings and deleting footage, or, at times, deleting all data on the device; damaging recording devices; and obstructing the view of a civilian’s camera lens by standing directly in front of the camera or shining a flashlight into the lens.³¹ For example, in a 2012 incident, an officer took a civilian’s device and deleted all the data on the phone, including the video recording of the officer. Fortunately, the incident was captured by a surveillance camera showing the officer examining the cell phone and subsequently deleting the data.³² In the context of camera obstruction, in a 2015 complaint, a civilian recorder alleged that an

²⁵ *Discovery Reform in New York: Summary of Major Legislative Provisions*, CTR. FOR CT. INNOVATION, https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery_NYS-Summary.pdf.

²⁶ Donna Lieberman and Isabelle Kirshner, *Take off the blindfold: Reform NY discovery law*, NYCLU (Mar. 11, 2019), <https://www.nyclu.org/en/publications/take-blindfold-reform-ny-discovery-law-commentary>.

²⁷ Penal Law § 195.05.

²⁸ Penal Law § 240.20.

²⁹ Penal Law § 205.30.

³⁰ Civilian Complaint Review Board, *Worth a Thousand Words: Examining Officer Interference with Civilian Recordings of Police*, 2017, at 1, available at: https://www1.nyc.gov/assets/ccrb/downloads/pdf/20172806_report_recordinginterference.pdf.

³¹ *Id.* at 24–28.

³² *Id.* at 26.

officer used his hat to physically block the view of the camera lens, while saying “get that phone away from me.”³³

In other cases, officers have attempted to destroy civilian recordings, only to have civilians recover their data from remote backups. For example, in Baltimore, Kianga Mwamba recorded police beating a man in handcuffs. Officers forced Mwamba out of her car and subsequently tased and arrested her. When Mwamba retrieved her phone upon her release from jail, the video had been deleted. Her phone, however, was set to automatic backup and the recording was recovered, leading to her charges being dropped.³⁴

Civilians can also face retaliatory arrests, illegal confiscation of phones, doxing (public records disclosures), and physical violence.³⁵ In a particularly violent case, an officer used her asp to strike a civilian’s arm while he recorded his son being arrested. After seizing the individual’s phone, the officer continued to strike his chest and body.³⁶

In the context of retaliatory arrests, in a 2016 incident, Jose LaSalle—founder of the South Bronx Copwatch Patrol Unit—was arrested after videotaping police stop and frisk two men in the Bronx. Unbeknownst to the officers, LaSalle initiated an audio recording when he arrived at the police stationhouse. In the recording, officers can be heard cheering at the arrest of a well-known cop watcher and accusing LaSalle of having committed a felony for possessing a radio that transmitted over police frequencies; LaSalle maintains that it was a legal two-way walkie-talkie used for communicating with Copwatch Patrol Unit members. LaSalle subsequently settled civil claims against the NYPD for more than \$900,000.³⁷

In 2014, Jairo Tejada Espinosa was charged with obstructing government administration, resisting arrest, disorderly conduct, and assault on a police officer after filming officers arresting a man in Manhattan. A *New York Times* reporter described Espinosa being “pinned to the ground by four officers, one of them crushing the man’s neck and head into the concrete while another gave him quick blows to the side, as yet another cuffed him and a fourth twisted his leg.”³⁸ That same year, Ruben An—an activist and associate with the Committee Against Anti-Asian Violence—received similar charges after filming officers interacting with another man in Manhattan. He

³³ *Id.* at 25.

³⁴ Yvonne Wenger, *Baltimore City To Pay \$60,000 Settlement To Woman Who Recorded Arrest*, THE BALTIMORE SUN (Jan. 19, 2016), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-settlements-20160119-story.html>.

³⁵ *Id.* at 24.

³⁶ *Id.*

³⁷ Ashoka Jegroo, *Bronx Cops Celebrated a Copwatcher’s Arrest. They Had No Idea They Were Caught on Tape*, THE APPEAL (May 9, 2019), <https://theappeal.org/bronx-cops-celebrated-a-copwatchers-arrest-they-had-no-idea-they-were-caught-on-tape>.

³⁸ Talmon Joseph Smith, *The Impolite Realities of Observing Police Abuse*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/opinion/police-abuse-excessive-force.html>.

subsequently filed charges in federal district court alleging that the NYPD violated the First Amendment by interfering with his recording of officer activity.³⁹

Likewise, after recording an officer stop and frisk a friend in Manhattan, Jason Disisto was arrested on charges of disorderly conduct, resisting arrest, and interfering with a police investigation. Although the officer claimed that Disisto had “crouched in a fighting stance, lunged at him and swung a fist before he was arrested,” video surveillance from a nearby restaurant indicated otherwise. The officer was subsequently charged with official misconduct and lying in a criminal complaint.⁴⁰

Individuals who have captured high-profile cases on film, such as the death of Eric Garner, have also faced retaliation from officers. For instance, Ramsey Orta has repeatedly been targeted and harassed by police officers after his video of Garner’s death went viral.⁴¹ Orta—who had been arrested dozens of times since the video was released—is currently serving a four-year sentence on weapons and drug charges; he claims these are retaliatory charges.⁴² Similarly, Taisha Allen alleges that police officers falsely arrested and assaulted her in retaliation for filming Garner’s death.⁴³

Even as federal courts continue to uphold the right to record, their track record in retaliation cases is far more mixed. As recently as March 2018, a federal court in New York ruled that plaintiff had a right to record, but that police could effectively circumvent it by ordering the civilian to stop recording and then retaliating, potentially giving police a roadmap to block unwanted recording. The alarming decision held that even if “the right to videotape police is ‘clearly established’” and “defendant officers’ conduct violated this right” by ordering defendant to stop, the officers could still claim qualified immunity for arresting a plaintiff who defied that order.⁴⁴ Under this bizarre logic, even where the underlying order itself was illegal, officers were not liable for enforcing it with arrest. This sort of retaliation and other limits to the First Amendment right to record show the need for additional protections at the state and local level.

IV. Measures Adopted by Other Jurisdictions

Some states have responded to recent police misconduct with legislation that expands the public’s First Amendment right to record police. These statutes clarify that

³⁹ Eli Rosenberg, *Suit Accuses New York Police of Violating Citizens’ Right to Film*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/07/08/nyregion/suit-accuses-new-york-police-of-violating-citizens-right-to-film.html>.

⁴⁰ James C. McKinley Jr., *New York Officer Is Charged in Arrest of Man Who Tried to Film Him*, N.Y. TIMES (Dec. 22, 2015), <https://www.nytimes.com/2015/12/23/nyregion/officer-is-charged-in-arrest-of-man-who-tried-to-film-him.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

⁴¹ In the video, an NYPD officer pins Garner to the ground in a chokehold and asphyxiates him.

⁴² Dragana Kaurin, *The Price of Filming Police Violence*, VICE (Apr. 27, 2018), https://www.vice.com/en_us/article/evqw9z/filming-police-brutality-retaliation.

⁴³ Christina Carrega, *Police assaulted, arrested Staten Island woman as revenge for filming Eric Garner video: lawsuit*, DAILY NEWS (July 14, 2015), <https://www.nydailynews.com/new-york/cops-assaulted-woman-filming-eric-garner-video-lawsuit-article-1.2291194>.

⁴⁴ See *Leibovitz v. City of N.Y.*, 2018 U.S. Dist. LEXIS 34972, at *22, 31–32 (E.D.N.Y. Mar. 2, 2018).

recording a police officer is permissible, and, in one instance, have a private right of action for damages. While substantively similar to First and Fourth Amendment protections, these statutes better defend the right to record, because plaintiffs can invoke such provisions without overcoming qualified immunity.⁴⁵

For instance, Colorado passed legislation making it illegal for police to interfere with civilians lawfully recording police.⁴⁶ The Colorado law gives the public a right to recover against officers who seize, destroy, or damage a person’s recording device or video while lawfully recording an officer’s conduct. More specifically, civilians are entitled to the replacement of damaged devices, \$500 for damaged or destroyed recordings, legal fees, and punitive damages of up to \$15,000.⁴⁷ Although it is already illegal under the Fourth Amendment for police to seize most recordings without a warrant, as articulated by State Representative Joe Salazar, “it is rare that law enforcement agencies or local District Attorneys will hold police accountable.”⁴⁸

Requiring departments to pay civil penalties for violations is a positive step towards strengthening the public’s ability to hold police accountable. Colorado has also implemented administrative punishments that have resulted in fines for offending officers. For instance, in 2019, the Denver Police Department concluded an internal investigation, determining that two officers broke department policy by handcuffing and detaining a local newspaper editor for recording the police.⁴⁹ The internal investigation resulted in fines totaling to two days of pay for each officer. There are ongoing negotiations between the editor and her newspaper and the city regarding a civil suit.

California passed similar legislation clarifying a First Amendment right to record police in public spaces or when the recorder is in a place he/she has the right to be.⁵⁰ Unlike the Colorado law, the California statute does not create a private right of action for damages. In spite of this, State Senator Ricardo Lara—author of the legislation—stated that the “law reinforces [the] First Amendment right and ensures transparency, accountability, and justice for all Californians.”⁵¹

Additionally, in Oregon, individuals have the right to record police if the officer is acting in an official capacity; “the recording is made openly and in plain view of the participants in the conversation”; “the conversation being recorded is audible to the

⁴⁵ See *supra* section II.a.2(a),(b).

⁴⁶ See Colo. Rev. Stat. § 13-21-128 (2016) (giving the public a right to recover against police officers who seize, destroy, or damage an individual’s recording device or video while lawfully recording an incident with police officers).

⁴⁷ *Id.*

⁴⁸ Chris Halsne, *Colorado Legislators Target Police Harassment of Citizen Video*, FOX31 DENVER (Feb. 11, 2015), <https://perma.cc/F82A-N52A>.

⁴⁹ Alex Burness, *Denver Police Violated Policy When They Detained Indy Editor, Internal Investigation Finds*, COLORADO INDEPENDENT (Feb. 6, 2019), <https://www.coloradoindependent.com/2019/02/06/denver-police-violated-policy-when-they-detained-indy-editor-internal-investigation-finds/>.

⁵⁰ See Cal. Penal Code § 69(b).

⁵¹ *California Law Affirms Person’s Legal Right to Film and Record Police*, COMPLAINT SANTA CLARA, <http://www.complaintsantaclara.com/?p=466>.

person by normal unaided hearing”⁵²; and the person recording is in a place that he or she has the right to be.⁵² Like the California law, the Oregon law does not create a private right of action for damages. Despite these shortcomings, the California and Oregon laws clarify the First Amendment right to record, helping civilians overcome qualified immunity. And by creating a private right of action that includes damages, Colorado provides an alternative method of recourse that will not be subjected to the procedural limitations of litigating in federal court.

V. Technological Solutions

Various technological solutions strengthen public oversight of police conduct.

a. *Phone Apps and Social Media Platforms*

Civil society organizations have developed mobile device apps to document evidence of police misconduct. The American Civil Liberties Union (“ACLU”), New York Civil Liberties Union (“NYCLU”), Guardian Project, and WITNESS have all created video recording tools that run on users’ smartphones. For instance, the ACLU “Mobile Justice” app allows users to record interactions with police officers and, in real time, send the recordings to their local ACLU affiliate for remote backup.⁵³ Mobile Justice is currently available in 17 states and the District of Columbia.

WITNESS and the Guardian Project’s ProofMode⁵⁴ app are designed to protect activists, journalists, advocates, and others documenting rights violations, including police misconduct. ProofMode allows users to take photos and videos that can be verified as authentic. This means that when a photo or video is taken, the app captures verification metadata, including a cryptographic signature and set of device sensor readings. For example, the app captures location, timestamp, surrounding networks—e.g., wifi networks, GPS location, and Bluetooth signals—and device information. ProofMode provides a cryptographic chain of custody. ProofMode also supplies the option to externally back up recordings to places like Google Drive.⁵⁵

Apart from apps developed by civil society organizations, social media platforms have expanded opportunities for surveillance and have become a common tool for recording and streaming police activity. These platforms include, but are not limited to, Facebook Live, YouTube Live, and Instagram Live. Social media can afford civilians the power to document abuse, expose corruption, and provide a check on police power, but platforms retain discretion over which content to protect and which content to remove. And because information on social media can be circulated quickly to a broader audience,

⁵² See Or. Rev. Stat. § 165.540(5).

⁵³ *ACLU Apps to Record Police Conduct*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/aclu-apps-record-police-conduct>.

⁵⁴ ProofMode is described as a light “reboot” of CameraV. In comparison, ProofMode is a smaller app—under 3MB—and can be run all of the time in the background without noticeable battery, storage, or network impact. ProofMode is available on Android.

⁵⁵ Dia Kayyali, *Set Your Phone to ProofMode*, WITNESS (April 27, 2017), <https://blog.witness.org/2017/04/proofmode-helping-prove-human-rights-abuses-world>.

issues can gain national attention and become the catalyst for encouraging awareness and activism. Social media platforms have been instrumental in disseminating stories of police abuse. For example, when Diamond Reynolds live-streamed the killing of Philando Castile on Facebook, within five days, Reynolds’s video had been watched nearly four million times.⁵⁶ Social media’s viral component also can make it difficult for officers to destroy footage. Therefore, backing up videos in a private location, e.g., external hard drive, server, or a personal iCloud or Google Drive account ensures that the original file is not lost.

b. Automatic Phone Backup

Allegations that police officers delete recordings from individuals’ devices are common. Therefore, automatic phone backup is a useful tool to safeguard recordings that have been deleted from a device. Automatic backup is a system that automates the recovery of information stored on a device.

Unfortunately, automatic backup sites also create potential vulnerabilities for civilians. This is because many commercially available storage platforms fail to deploy end-to-end encryption, meaning that the service provider is able to access the individual’s data. These services preserve exculpatory recordings that can help civilians, but they can also preserve incriminating evidence as well. This means that in some cases, where law enforcement agencies are unable to access a physical device—e.g., a computer, tablet, or phone—they might be able to retrieve the incriminating information by serving a court order on the storage provider. Some services, such as the Swiss cloud storage firm Tresorit, use encryption methods that would make such disclosures impossible.

c. Shortcut Feature

Similarly, iPhone and Android shortcuts may help safeguard civilian recordings. Shortcuts are a feature that allows users to automate specific tasks, or sequences of tasks, on their iPhone or Android; these tasks can be triggered with a single tap or voice command. iPhone users in particular can use the shortcut feature to start a video recording; text a predetermined contact that you have been pulled over; and send a video of the encounter to the predetermined contact or to a remote location, e.g., Dropbox.⁵⁷ Once set up, the shortcut can be activated by saying, “Siri, I am being pulled over.”

VI. Recommendations

Statutory protections expressly identifying citizens’ right to record police activity have several advantages in light of the practical limitations on enforcing state and federal

⁵⁶ Daniel Victor and Mike McPhate, *Critics of Police Welcome Facebook Live and Other Tools to Stream Video*, NEW YORK TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/critics-of-police-welcome-facebook-live-and-other-tools-to-stream-video.html>.

⁵⁷ Kif Leswing, *'Siri, I'm getting pulled over': A shortcut for iPhones can automatically record the police*, BUSINESS INSIDER (Oct. 2, 2018), <https://www.businessinsider.com/ios-12-shortcut-uses-iphone-to-record-police-during-traffic-stop-2018-10>.

constitutional rights.⁵⁸ Accordingly, New York should follow the lead of California, Oregon, and Colorado by adopting statutory language definitively identifies an individual’s right to record officers when the recorder is in a place he/she has a right to be. By enshrining the right in state law, individuals whose rights are violated will be able to vindicate those rights in state court without having to depend on judicial interpretations of the state constitution.⁵⁹ It will also ensure that the right to record is “clearly established” such that officers will no longer be able to rely on qualified immunity to evade liability under the federal First Amendment.

Of course, as Representative Salazar recognized, even if the right to record is clear, it may not be adequately enforced by law enforcement agencies and corresponding district attorneys, given their institutional incentives. Therefore, New York should empower private citizens and independent oversight entities who can enforce that right by following Colorado’s lead and adopting a provision which provides a private right of action to lawful recorders whose phones—or the data on them—are damaged or destroyed by officers. Such a provision would allow the recorder to serve as a private attorney general, enforcing the public’s right to record and, hopefully, disincentivizing police from committing similar infractions in the future. And, of course, a private right of action allows the recorder to recover for the actual damage he/she has suffered at the hands of the officer.

New York should also bolster funding for entities like CCRB which engage in independent oversight of police practices. CCRB, which is “empowered to receive, investigate, mediate, hear, making filings, and recommend action on complaints against New York City police officers,”⁶⁰ can serve as a vital champion of the right to record so long as it is adequately funded.

VII. Conclusion

The public’s right to record the police is a vital check against police misconduct. But while this essential safeguard is increasingly recognized on paper, it is all-too-often ignored in practice. New York state must build on the protections granted by the First and Fourth Amendments to create protections that will overcome the limitations of federal litigation. Through legislation, New York can clarify and concretize the public’s rights. Following the lead of California, Oregon, and, most crucially, Colorado, the state should enact legislation that ensures officers face serious sanctions for interfering with the right to record.

⁵⁸ See *supra* Part III.

⁵⁹ See *supra* note 24 and accompanying text.

⁶⁰ *About CCRB*, CIVILIAN COMPLAINT REV. BOARD, <https://www1.nyc.gov/site/ccrb/about/about.page>.



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