

NOTES

QUALIFIED KNOWLEDGE: THE CASE FOR CONSIDERING ACTUAL KNOWLEDGE IN QUALIFIED IMMUNITY JURISPRUDENCE AS IT RELATES TO THE FIRST AMENDMENT RIGHT TO RECORD

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INTRODUCTION

In the summer of 2020, the entire world watched Minneapolis police officer Derek Chauvin kneel on an unarmed Black man's neck for nine minutes and twenty-nine seconds.¹ Chauvin's victim, George Floyd, died as a result.² The final moments of his life were captured by a seventeen-year-old bystander with a cell phone, and that video has since been viewed millions of times by people across the country and around the globe.³

George Floyd's story should be exceptional, but unfortunately, police brutality is all too common in America. Since 2015, *The Washington Post* has reported around 1,000 fatal shootings by on-duty police officers every year.⁴ As cell phone and social media use has grown more prevalent, more and more of these deadly encounters have become known to the general public.⁵ In turn, the American judiciary has entered into uncharted territory: cell phone footage can be valuable trial evidence.⁶ At Chauvin's 2021 murder trial, for example, the prosecution played the recorded video of George Floyd's death for the jury as the focal point of their case against the former police officer.⁷ It seems unlikely that such footage will lose its value in the future, and as a result, courts will

1. See Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Kneel 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-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [<https://perma.cc/AMK5-RM3M>].

2. *Id.*

3. Nicholas Bogel-Burroughs & Marie Fazio, *Darnella Frazier Captured George Floyd's Death on Her Cellphone. The Teenager's Video Shaped the Chauvin Trial*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/darnella-frazier-video.html> [<https://perma.cc/3VZC-V8FG>].

4. *Fatal Force*, WASH. POST (Aug. 16, 2021), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/#> [<https://perma.cc/FE2N-HEEK>].

5. See, e.g., Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 337 (2011).

6. See Andrés R. Martínez & Tim Arango, *Given Power of Video, Legal Experts Say Chauvin Should Consider Testifying*, N.Y. TIMES (Mar. 29, 2021, 7:22 PM), <https://www.nytimes.com/live/2021/03/29/us/derek-chauvin-trial-live#given-power-of-video-legal-experts-say-chauvin-should-consider-testifying> [<https://perma.cc/A7Z2-8AZV>] (illustrating that video footage is such powerful trial evidence that it almost requires testimony by defendant to directly address it).

7. *Id.*

have to continue to settle issues related to recorded police interactions.⁸

A majority of circuit courts have found that the First Amendment right to freedom of the press does not only protect the press. Instead, the right likely extends to freelance citizens as well, subject to reasonable time, place, and manner restrictions.⁹ This means that private citizens, acting as news couriers in their own right, have a constitutionally protected freedom to record and publish police interactions so that the general public can access and assess the information.¹⁰ However, in the real world, many police officers have not responded favorably when filmed. In fact, in many situations, the officers involved have resorted to violence or arrested the filming individuals on criminal charges.¹¹

At trial, officers prosecuted for this kind of retaliatory conduct tend to invoke the doctrine of qualified immunity as an affirmative defense.¹² Because “[t]he specific contours of the right” to record police interactions “have not been clearly established enough to provide blanket protection to all individuals” in most cases involving the arrest of filming individuals, the defense has been successful.¹³ This is because to be immune to a lawsuit under the doctrine of qualified immunity, all a prosecuted officer needs to prove is that the right to record police at the time of the incident in question did “not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁴

Unfortunately for private citizens, whether the First Amendment right to film police is clearly established enough to defeat an officer’s defense of qualified immunity is a hotly contested topic. Certain judges have argued that, when comparing similar cases, the level of generality should be narrowly construed—in other words, the cases

8. See *infra* Part II.

9. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 687-90 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600-01 (7th Cir. 2012).

10. See *supra* note 9 and accompanying text.

11. See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 427-32 (2016).

12. See *infra* Part II.

13. Doori Song, Note, *Qualified Immunity and the Clear, but Unclear First Amendment Right to Film Police*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 337, 337-38, 342-44 (2019).

14. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citing *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

should be compared at a high level of specificity.¹⁵ From this perspective, qualified immunity generally ought to be upheld because there are few to no prior on-point cases that would notify a reasonable officer about the right.¹⁶ Meanwhile, other judges have advocated for using a broader level of generality when comparing similar cases—analyzing common themes rather than specific events.¹⁷ Proponents argue that through this lens, typically there is enough on-point precedent for a reasonable officer to know that the right to film police activity is clearly established even if the specific factual circumstances involved vary from case to case.¹⁸

The Tenth Circuit's recent decision in *Frasier v. Evans* exemplifies one particular way that this already-complex debate has grown even more complicated. *Frasier* and similar decisions in other circuits have allowed officers—who have been taught as part of their official police training that citizens have a First Amendment right to record police—to still enjoy qualified immunity protection.¹⁹ The appellate court in *Frasier* found that the right to record public police interactions was not clearly established within the Tenth Circuit in August 2014 when the incident at issue occurred.²⁰ Therefore, the court stated that any training that the officer personally received to the contrary was largely irrelevant for the purposes of a successful

15. In *Turner*, the court stated:

[T]he Supreme Court has “repeatedly” instructed courts “not to define clearly established law at a high level of generality”: “The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.” Thus, [] reliance on decisions that “clarified that [First Amendment] protections ... extend[] to gathering information” does not demonstrate whether the specific act at issue here—video recording the police or a police station—was clearly established.

See 848 F.3d 678, 686-87 (5th Cir. 2017).

16. *See id.*

17. *See Fields v. City of Philadelphia*, 862 F.3d 353, 362-64 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part) (finding that the unique factors of a case may lead to situations where “any reasonable official ... would know the boundaries of a constitutional right well before [the Supreme Court has] ruled on it,” justifying a more generalized comparison where no fact-specific, on-point precedent exists).

18. *See id.*

19. 992 F.3d 1003, 1015 (10th Cir. 2021). Given the breadth of qualified immunity jurisprudence, the scope of this Note is limited to an in-depth analysis of *Frasier* (though the core tenets of the discussion are easily extendable to similar past and future cases across circuits).

20. *Id.*

qualified immunity defense even if that training was conducted by the municipality where the incident at issue occurred.²¹

This Note argues that this particular finding of the *Frasier* court is both pragmatically and philosophically problematic. By design, the qualified immunity doctrine seeks to shield police officers from civil rights lawsuits. However, prioritizing assumed knowledge over actual knowledge in determining what qualifies as a clearly established constitutional right harms the citizens that law enforcement officers have sworn to protect and serve. While traditional delineations of clearly established rights have involved appeals to precedent, public policy concerns are also important considerations in the qualified immunity analysis.²² In this way, *Frasier* is especially concerning in that it prioritizes the total defense of police officers over the deterrence of civil rights violations. Only Supreme Court intervention can rectify this particular problem. Namely, the Court should reverse the Tenth Circuit's *Frasier* judgment and similar judgments in other circuits and find that officers who knowingly violate the constitutional right of private citizens to record public police interactions are not entitled to qualified immunity.

This Note proceeds in Part I with a historical outline of the qualified immunity doctrine for law enforcement officers. Part II then evaluates how courts have applied the qualified immunity doctrine in cases concerning arrests of private citizens for filming police activities. Part III outlines *Frasier v. Evans* and offers a new standard for incorporating actual knowledge into the existing qualified immunity analysis. Finally, Part IV addresses related policy implications and responds to potential counterarguments.

I. A QUALIFIED HISTORY OF THE QUALIFIED IMMUNITY DOCTRINE

Before exploring how the qualified immunity doctrine has been applied in First Amendment retaliation cases regarding the right to record public police activity, this Note briefly addresses the historical roots and general development of the doctrine. In 1974, the Supreme Court first found that qualified immunity to civil suits existed for officers of the executive branch, including law enforcement

21. *Id.* at 1019.

22. *See infra* Part II.A.

agents.²³ The Court in *Scheuer v. Rhodes* justified this immunity—all the while emphasizing that it was *not* meant to be absolute—in two main ways. To begin with, the Court stressed that when officers exercise discretion in good faith in accordance with the legal obligations of their position, holding them liable for mistakes is unjust.²⁴ The Court further emphasized that, for public policy reasons, the threat of a civil lawsuit against police should not be so broad as to overdeter officers from effectively performing the duties of their position “with the decisiveness and the judgment required by the public good.”²⁵

As time went on, the search for good faith on the part of police officers involved in civil rights litigation became too burdensome for the judicial system to execute well.²⁶ Such inquiries required extensive (and expensive) discovery as well as investigations into the officer’s subjective mindset that many courts regarded as inherently requiring jury resolution.²⁷ Given these procedural challenges, eight years after the *Scheuer* decision, the Supreme Court eliminated the good faith requirement in the groundbreaking case of *Harlow v. Fitzgerald*.²⁸ This decision was largely justified by the fact that the good faith standard undermined the goals of qualified immunity by exposing all officers exercising their discretion and good judgment “to the costs of trial [and] to the burdens of broad-reaching discovery.”²⁹ In its place, the *Harlow* Court implemented a new normal: law enforcement officers would be “shielded from liability” as long “as their conduct d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁰ This objective test was designed to allow presiding judges to determine at the outset whether a civil rights case involving an officer should proceed to trial or end quickly on summary judgment.³¹

23. See *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

24. *Id.*

25. *Id.* at 240.

26. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982).

27. *Id.* at 816.

28. *Id.* at 816-18.

29. *Id.*

30. *Id.* at 818.

31. See *id.*

The quest to dismiss insubstantial claims at the beginning of a civil rights lawsuit motivated the Court to develop a mandatory two-step framework for applying *Harlow*.³² Nearly two decades after the reasonableness standard was adopted in *Saucier v. Katz*, the Supreme Court first required courts to establish whether the facts alleged, construed in the light most favorable to the party asserting the injury, showed that the officer's conduct violated a constitutional right.³³ If the presiding judge answered yes to that threshold question, the court's next matter of business was to determine whether, at the time of the incident in question, the constitutional right was clearly established enough to place a reasonable officer on notice.³⁴ This second inquiry was intended to consider "the specific context of the case, not [reasonableness] as a broad general proposition."³⁵ The *Saucier* Court allowed judges to dispense with cases on summary judgement during step one of the inquiry even if issues of material fact remained on the plaintiff's underlying claim in step two.³⁶ A plaintiff could only defeat an officer's qualified immunity defense if both steps of the test were satisfied.³⁷

Once again, the Supreme Court's criteria proved unwieldy for the lower courts to apply in practice, and *Saucier* was overruled in the 2009 case *Pearson v. Callahan*.³⁸ The *Pearson* Court held that courts could now rule on either step of the original two-step test first—in other words, starting with (or dispensing with the case at) either the constitutional rights question or the clearly established question.³⁹ The Court explained its decision to end the two-step requirement in several ways. To start, the Court addressed that it is inefficient for presiding judges to rule on the constitutional rights question at all when it is clear that the outcome of the clearly established inquiry would culminate in the dissolution of the case.⁴⁰ Next, the Court acknowledged that the two-step test forced courts to rule on the

32. See *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

33. *Id.* at 201.

34. *Id.*

35. *Id.*

36. See *id.*

37. See *id.*

38. 555 U.S. 223, 236 (2009).

39. *Id.*

40. See *id.* at 236-37.

constitutional rights merits question at the pleading stage without even knowing the precise factual basis for the plaintiff's claim or claims.⁴¹ Third, the Court reasoned that the two-step framework needlessly complicated appellate review of cases where the defendant had lost below on the constitutional rights merits question but had prevailed on the clearly established notice question.⁴² Fourth, the Court argued that the *Harlow* framework would lead to unnecessary reversals of lower court judgments on the constitutional rights merits question in cases in which the briefing of constitutional questions was "woefully inadequate."⁴³ Lastly, the Court found that mandating lower courts to decide unnecessary questions involving constitutional rights departed from the generally recommended maxim of constitutional avoidance and ran counter to judicial counsel encouraging such restraint if possible to dispose of the case on other grounds.⁴⁴

Following the *Pearson* decision, many lower courts have elected to start with the clearly established inquiry when reviewing civil suits against law enforcement officials; the challenges and inefficiencies of approaching the constitutional rights merits question first are often simply too daunting.⁴⁵ If a court adopts this approach and finds that a plaintiff's constitutional right at the time of the incident in question was not clearly established enough to put a reasonable officer on notice, the officer will be immune from liability. Given the critical nature of the clearly established question, then, that the topic has now garnered much attention among civil rights scholars, government officials, and even judges is unsurprising.

The Supreme Court first began to define the clearly established standard in its 1999 case *Wilson v. Layne*.⁴⁶ In *Wilson*, the Court held that a group of law enforcement officers were entitled to qualified immunity from violating the Fourth Amendment by

41. *See id.* at 238-39.

42. *See id.* at 240.

43. *Id.* at 239.

44. *See id.* at 241.

45. *See, e.g.*, *Kelly v. Borough of Carlisle*, 622 F.3d 248, 261-63 (3d Cir. 2010); *Meléndez-García v. Sánchez*, 629 F.3d 25, 35-36 (1st Cir. 2010); *Ewing v. City of Stockton*, 588 F.3d 1218, 1231 (9th Cir. 2009).

46. 526 U.S. 603, 614-15 (1999).

bringing along media representatives to capture the plaintiff's arrest on film.⁴⁷ The Court reasoned that the unlawful nature of the media ride-along had not been clearly established at the time the incident occurred.⁴⁸ There was "no controlling authority [within] the jurisdiction," nor a "consensus ... of persuasive authority" on point outside the jurisdiction; therefore, the right was not clearly established enough that a reasonable officer would know that it was unconstitutional to bring along media representatives to film an arrest.⁴⁹ Per *Wilson*, the Court has seemingly indicated that a right is clearly established if (1) it is recognized by controlling authority within the jurisdiction or (2) there is a consensus of persuasive authority outside of the relevant jurisdiction.⁵⁰

To determine whether a prior case counts as a controlling authority within the jurisdiction, the Supreme Court has suggested that the older case must have similar facts to the present case when narrowly construed.⁵¹ That is, courts must find that the facts of the cases are similar "in a more particularized, and hence more relevant, sense."⁵² In *Brosseau v. Haugen*, for example, the Court found that a police officer who shot an unarmed man who was trying to flee a crime scene was entitled to qualified immunity.⁵³ Even though there were a high number of excessive force cases in the jurisdiction where the incident took place, the *Brosseau* Court held that the facts of the present case could be distinguished enough to lie in the "hazy border between excessive and acceptable force."⁵⁴ However, while most acts will require controlling authority in the relevant jurisdiction for their unlawfulness to be considered clearly established, the Court has also noted that the illegal nature of some acts is "so obvious" that any law enforcement official should have

47. *Id.* at 617.

48. *Id.*

49. *Id.*

50. *See id.*

51. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts ... not to define clearly established law at a high level of generality."); *see Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam).

52. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

53. *See* 543 U.S. at 194-95.

54. *Id.* at 201 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

“fair warning.”⁵⁵ In other words, it is possible “that officials can still be on notice that their conduct violates established law even in novel factual circumstances.”⁵⁶

Naturally, courts must look to the holdings of other circuits to determine if there is a robust consensus of cases of persuasive authority indicating that a constitutional right is clearly established in outside jurisdictions.⁵⁷ At present, the majority of circuits end up looking outside of their jurisdictions for controlling authority as well, but this was not always the case.⁵⁸

To determine whether outside cases of persuasive authority rise to the level of a robust consensus, courts look at (1) the total number of circuits where such cases are found, (2) how recently the cases were decided, (3) whether the authoritative value of the cases is based on more than dicta alone, and (4) the degree of divergence or convergence between the circuits with respect to the specific issue.⁵⁹ If legal rules in different jurisdictions are inconsistent, courts have typically deemed that the outcome of the particular issue is not clearly established and have deferred to the defendant police officers in granting qualified immunity.⁶⁰

As a whole, the current body of case law regarding civil suits against law enforcement officials provides that courts will rule in favor of the plaintiff if the officer violated a constitutional right and the right was clearly established enough to put a reasonable officer on notice. A right is clearly established if there is an on-point case

55. *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) (finding that prison guards who tied an inmate to a hitching post were not entitled to qualified immunity because the Eighth Amendment gave notice of the act’s unconstitutionality even in the absence of materially similar case law).

56. *Id.* at 741.

57. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

58. *See, e.g., Terebesi v. Torreso*, 764 F.3d 217, 231 n.12 (2d Cir. 2014) (“[T]he decisions of other circuits may reflect that the contours of the right in question are clearly established.”); *Peterson v. Jensen*, 371 F.3d 1199, 1202 (10th Cir. 2004) (“A right is ‘clearly established’ ... if the ‘weight of authority from other circuits’ found a constitutional violation from similar actions.” (quoting *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir. 1999))).

59. *al-Kidd*, 563 U.S. at 741-43.

60. *See id.* at 746 (Kennedy, J., concurring) (“When faced with inconsistent legal rules in different jurisdictions, [law enforcement officers] should be given some deference for qualified immunity purposes.”).

that recognizes the right within the same jurisdiction where the incident occurred or there is a robust consensus of persuasive authority outside of the jurisdiction delineating the right.⁶¹ However, the Supreme Court has also underscored the fact that as a matter of public policy, deterring civil rights violations and compensating plaintiffs for constitutional harms arising from police officers abusing their positions are important objectives to be factored into the qualified immunity analysis.⁶² Thus, “[i]t can hardly be argued ... that under no circumstances can the officers of state government be subject to liability” despite the existence of the qualified immunity defense.⁶³

II. QUALIFIED IMMUNITY IN CONTEXT: THE RIGHT OF PRIVATE CITIZENS TO FILM POLICE ACTIVITY

In the wake of *Pearson v. Callahan*, judges presiding over civil lawsuits against law enforcement officers will rule in the plaintiff’s favor if the defendant officer violated a constitutional right of which a reasonable police officer would have been aware.⁶⁴ Courts are free to address either the constitutional right merits question or the clearly established notice question first, but if either inquiry is resolved in the defendant officer’s favor, the officer will not be found liable.⁶⁵ Every circuit has addressed these two questions with respect to police arrests of filming individuals; this Note, however, addresses only one half of this inquiry, as the clearly established notice question alone is implicated in the discussed portion of the Tenth Circuit’s opinion in *Frasier v. Evans*. This Part reviews the various circuit perspectives on the clearly established inquiry as well as the relevant components of the analysis.

61. *See id.* at 741-42.

62. *See Scheuer v. Rhodes*, 416 U.S. 232, 242-43 (1974).

63. *Id.* at 243.

64. *See* 555 U.S. 223, 231 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982).

65. *Pearson*, 555 U.S. at 236.

A. Circuit Perspectives on the Clearly Established Notice Question

With the exception of the Tenth Circuit, courts in every circuit have held that there is a general First Amendment right to film public police activities, subject to reasonable time, place, and manner restrictions.⁶⁶ Thus, the majority of cases concerning the right to record police activities have turned on the second step of the *Saucier* framework. In other words, such cases typically turn on whether the right was clearly established enough at the time the incident occurred to put the defendant officer on notice.

Although most circuits have found that individuals have a First Amendment right to film police activities in public, many courts have failed to find that the right was clearly established enough to put a reasonable officer on notice.⁶⁷ Pursuant to the *Wilson v. Layne* standard, these courts reason that (1) there is no controlling authority on point within their jurisdictions, (2) there is no consensus of persuasive authority on point outside their jurisdictions, and/or (3) public policy concerns weigh against broad extensions of the right to film police activities.⁶⁸

1. Lack of Controlling Authority Within the Jurisdiction

Several courts have found that the right to film police activities is not clearly established because when analyzing the facts of the relevant cases, no controlling authority on point exists within their jurisdictions.⁶⁹ For a prior case to be on point, its facts must be comparable to the circumstances of the present case when viewed at a “high level of particularity.”⁷⁰ For example, in *Szymbek v. Houck*, the Fourth Circuit held that it was not reasonable for the defendant officers to know that the plaintiff had a First Amendment

66. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Crawford v. Geiger*, 656 F. App'x 190, 196-97 (6th Cir. 2016).

67. See, e.g., *Fields*, 862 F.3d at 362; *Turner*, 848 F.3d at 687; *Mocek v. City of Albuquerque*, 813 F.3d 912, 932 (10th Cir. 2015).

68. See 526 U.S. 603, 617 (1999).

69. See, e.g., *Turner*, 848 F.3d at 687; *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-63 (3d Cir. 2010).

70. *Szymbek v. Houck*, 353 F. App'x 852, 852 (4th Cir. 2009) (per curiam) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999)).

right to film the officers removing her husband from an outdoor festival for carrying a handgun.⁷¹ Because there was no prior case within the Fourth Circuit that recognized a right to film one's spouse being removed by police from a festival for carrying a handgun, the court ruled that such a right was not clearly established enough to put the officers on notice.⁷² Thus, it would appear that in order for a prior case within the Fourth Circuit to serve as controlling authority, the factual circumstances of the case must be nearly identical to the facts presented in the current case.

Similar holdings in the Third and Fifth Circuits have established that equally high fact-specific standards apply in those jurisdictions.⁷³ While some circuits at the appellate level have not yet addressed the clearly established question, several district courts within those circuits have done so. Like the Third, Fourth, and Fifth Circuits, these lower courts have applied a highly fact-specific approach toward finding controlling authority. For example, in the Seventh Circuit, the District Court for the Southern District of Indiana held in *King v. City of Indianapolis* that the plaintiff, who was unruly and intoxicated, did not have a clearly established right to film the defendant officer during a traffic stop.⁷⁴

Thus, the current body of case law demonstrates that the right to film police activities in public is clearly established if there is controlling authority on point within the jurisdiction. For a prior case to be on point, it must be comparable with the circumstances of the present case when viewed at a high level of particularity.⁷⁵ The Third, Fourth, and Fifth Circuit Courts of Appeal and several district courts within various circuits have applied a highly fact-specific approach to finding controlling authority. None of those courts have found a prior case on point that clearly establishes the right to film public police activities.

71. See 353 F. App'x at 853; *Szymbek v. City of Norfolk*, No. 08cv142, 2008 WL 11259782, at *1 (E.D. Va. Dec. 17, 2008), *aff'd sub nom. Szymbek v. Houck*, 353 F. App'x at 853.

72. See *supra* note 71 and accompanying text.

73. See *Turner*, 848 F.3d at 687; *Kelly*, 622 F.3d at 263.

74. 969 F. Supp. 2d 1085, 1088, 1092 (S.D. Ind. 2013) (“[T]he additional facts present here, a person resisting arrest and a tense crowd, distinguish the facts from *Smith* and *Glik*.”).

75. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam).

2. *Lack of Persuasive Authority*

Even if there is no controlling on-point authority within the jurisdiction, the right to film public police activities may still be deemed clearly established if there is a consensus of on-point persuasive authority outside the jurisdiction. Many courts have held that the right to film public police activities is not clearly established because there is no robust consensus of persuasive authority recognizing that right.⁷⁶ Traditionally, some circuits have refused to look outside of their jurisdictions for the purposes of determining whether a right is clearly established,⁷⁷ but now the majority of circuits will do so.⁷⁸ Consequently, if there is a robust consensus of on-point persuasive authority outside of the relevant jurisdiction, then most courts will find that the right is clearly established.

Granted, what exactly constitutes a robust consensus is unclear. Despite this uncertainty, the Third, Fourth, and Fifth Circuits have each held that there is not enough persuasive authority outside of their jurisdictions to find that the right to film police activities is clearly established.⁷⁹ For instance, in *Kelly v. Borough of Carlisle*, the Third Circuit acknowledged the Ninth and Eleventh Circuit holdings that the First Amendment provides private citizens with the right to record police activity.⁸⁰ Nevertheless, the court ultimately determined that the Ninth and Eleventh Circuit cases were “insufficiently analogous to the facts of this case to have put [the defendant officer] on notice of a clearly established right to videotape police officers during a traffic stop.”⁸¹

Meanwhile, in *Turner v. Driver*, the Fifth Circuit provided a much more comprehensive analysis of the various circuit court holdings on the issue of filming police. The court cited cases from the First, Seventh, and Eleventh Circuits to stand for the proposition “that the

76. See *Szymbekski*, 353 F. App'x at 852-53; *Turner*, 848 F.3d at 687; *Kelly*, 622 F.3d at 262.

77. See *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) (“[O]nly Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can ‘clearly establish’ law in this circuit.”).

78. See *supra* note 58 and accompanying text.

79. See *Kelly*, 622 F.3d at 262; *Turner*, 848 F.3d at 687; *Szymbekski*, 353 F. App'x at 852-53.

80. 622 F.3d at 263 (citing *Fordeyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)); *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994)).

81. *Id.* at 262.

First Amendment protects the rights of individuals to videotape police officers performing their duties.”⁸² The Fifth Circuit then cited cases from the Third, Fourth, and Tenth Circuits to acknowledge that the right to film police activities was not clearly established in those jurisdictions.⁸³ In the end, the court found that “there was no clearly established First Amendment right to record the police at the time of Turner’s activities.”⁸⁴ Evidently, the contrary holdings of the Third, Fourth, and Tenth Circuits constituted no more than a “dearth of ... persuasive authority.”⁸⁵

On the other hand, the First and Seventh Circuits have found enough authority outside of their jurisdictions to hold officers liable for depriving individuals of the right to film public police activities. In *Glik v. Cunniffe*, for example, the First Circuit found a police officer liable for arresting a bystander for filming the officer arresting someone else.⁸⁶ Although there was no prior on-point case within the First Circuit, the court ruled that the officer violated the bystander’s First Amendment right based not only on holdings from the Ninth and Eleventh Circuits but also on “the fundamental and virtually self-evident nature of the First Amendment’s protections in this area.”⁸⁷ The Seventh Circuit offered similar reasoning in *ACLU of Illinois v. Alvarez*, noting *Glik* and general principles of the First Amendment regarding “the use of ... instrument[s] of communication ... [is] integral ... in the speech process.”⁸⁸

The Second, Third, and Fifth Circuit Courts of Appeal have yet to rule that the right to film public police activities is clearly established. However, a growing number of district courts within those circuits have acknowledged that there might now be enough persuasive authority to conclude that the right to film public police

82. *Turner*, 848 F.3d at 686-87 (citing *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)).

83. *Turner*, 848 F.3d at 687 (citing *Kelly*, 622 F.3d at 248; *Szynecki*, 353 F. App’x at 853; *McCormick v. City of Lawrence*, 130 F. App’x 987, 988-89 (10th Cir. 2005)).

84. *Id.*

85. *Id.*

86. *See* 655 F.3d 78, 85 (1st Cir. 2011).

87. *Id.*

88. 679 F.3d 583, 600 (7th Cir. 2012).

activities is clearly established.⁸⁹ This may very well prompt change at the appellate level in the near future.

3. *Public Policy Concerns*

Public policy concerns have also discouraged courts from holding that the right to film police activities in public is clearly established. To begin with, many courts have expressed concern that an overly broad right to film police activities might threaten officer safety.⁹⁰ Courts have also worried that an overly broad First Amendment right to film police activities would deter police officers from performing their duties effectively.⁹¹ According to these courts, an overly broad First Amendment right would increase the threat of liability to officers making an arrest; thus, the officers might prefer inaction to action even though an arrest is clearly warranted in the situation at hand. Left unchecked, such inaction could undermine effective law enforcement and threaten overall public safety.⁹²

Lastly, courts have noted that a broad reading of the First Amendment could lead to an onslaught of litigation and frivolous claims.⁹³ Granted, courts have also acknowledged that a basic purpose of civil rights lawsuits is to compensate the victims of official misconduct.⁹⁴ Despite this fact, though, courts have underscored that the goal of compensation is not furthered when officers are forced to pay damages to individuals whose acts of filming police have disrupted police work and jeopardized officer safety.⁹⁵ Furthermore, because municipalities in most jurisdictions tend to

89. See *Fleck v. Trs. of the Univ. of Pa.*, 995 F. Supp. 2d 390, 407 n.13 (E.D. Pa. 2014); *Buehler v. City of Austin*, No. A-13-cv-1100, 2015 WL 737031, at *9 (W.D. Tex. Feb. 20, 2015); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015).

90. See *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-63 (3d Cir. 2010) (noting that public policing often involves “inherently dangerous situations”).

91. *Alvarez*, 679 F.3d at 612-13 (Posner, J., dissenting) (noting that a broad reading of the First Amendment could cause a police officer to “be concerned when any stranger moves into earshot, or when he sees a recording device ... in a stranger’s hand”).

92. *Id.* at 612.

93. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

94. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 254 (1978).

95. See *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Alvarez*, 679 F.3d at 611-12 (Posner, J., dissenting).

indemnify police officers, it is the taxpayers who ultimately bear the costs of civil suits against police.⁹⁶

III. IS ACTUAL KNOWLEDGE IRRELEVANT?

The current body of qualified immunity case law illustrates that the right of private citizens to film public police interactions is anything but clear for individuals who seek to vindicate that right through the legal system. While some circuit and district courts have extended First Amendment protections to the right to film public police activities, the majority of courts have refrained from finding that the right is clearly established enough to place a reasonable officer on notice.⁹⁷ Some courts have held that the right is not clearly established because there is no on-point controlling authority within their jurisdictions. Other courts have cited a lack of persuasive authority as well as concerns that an overly broad right to film police would undermine goals of public policy. Although an increasing number of district courts recognize the right as clearly established, at the appellate level, the majority of circuits have maintained their position that it is not.⁹⁸

Such is the backdrop for the Tenth Circuit's ruling in *Frasier v. Evans* and similar cases decided in other circuits. The facts of *Frasier* are relatively straightforward: after a bystander filmed Denver police officers using force to arrest a suspect in public, one of the officers involved followed the bystander to his car and asked him to surrender his video of the arrest.⁹⁹ During this interaction, additional officers surrounded the individual and pressured him to turn over the video.¹⁰⁰ According to the bystander, when he showed one of the officers his tablet computer, the officer snatched the device from his hands and searched it for the video.¹⁰¹

96. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50, 77 (1998).

97. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 362 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 687 (5th Cir. 2017); *Mocek v. City of Albuquerque*, 813 F.3d 912, 932 (10th Cir. 2015); *Szymbek v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (per curiam).

98. See *supra* Part II.

99. *Frasier v. Evans*, 992 F.3d 1003, 1008 (10th Cir. 2021).

100. *Id.*

101. *Id.*

At trial, the district court concluded that the bystander-plaintiff “did not have a clearly established right to film a public arrest.”¹⁰² Despite this finding, however, the court denied the officers qualified immunity for the bystander’s First Amendment retaliation claim.¹⁰³ The court reasoned that the record indicated that the officers actually knew from their training that people have a First Amendment right to record police in public and that officers are not entitled to qualified immunity when they knowingly violate a plaintiff’s rights.¹⁰⁴

On review, the Tenth Circuit reversed the district court.¹⁰⁵ The appellate court stated that even if the record supported a finding that the officers knew from their training that a First Amendment right to record public police activities existed, judicial precedent had not clearly established this right in August of 2014 when the incident occurred.¹⁰⁶ The court explained that there were two independent grounds for concluding that the district court’s holding was incorrect. First, “a defendant’s eligibility for qualified immunity is judged by an objective standard”; therefore, what the defendant officers “subjectively understood or believed the law to be was irrelevant with respect to the clearly-established-law” inquiry.¹⁰⁷ Second, the court stated that “judicial decisions are the only valid interpretive source of the content of clearly established law.”¹⁰⁸ Because of this, the court found that, once again, whatever training the officers received concerning the First Amendment right to record public police activities was “irrelevant” to answering the clearly established notice question.¹⁰⁹

But is actual knowledge ever truly irrelevant—and should it be deemed so for the purposes of qualified immunity analysis? This Note argues that the answer to both questions is a resounding no. As such, the Supreme Court should reverse the Tenth Circuit (as well as similar holdings in other circuits) and, more broadly, adopt

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1035.

106. *Id.* at 1014-15.

107. *Id.* at 1015.

108. *Id.*

109. *Id.*

an approach like that taken by the *Frasier* district court, which accounts for the role of actual knowledge in the qualified immunity analysis. This Part considers both of the Tenth Circuit's explanations for granting qualified immunity to the officers for the First Amendment retaliation claim at issue in *Frasier*. Sections A and B will each examine a respective justification. Both Sections will also highlight problems presented by each argument that can only be resolved by considering the role of actual knowledge in formal qualified immunity analysis. Section C will outline the solution that this Note proposes.

A. *Qualified Immunity: An Objective Standard*

In granting the police officers qualified immunity for the plaintiff's First Amendment retaliation claim, the Tenth Circuit in *Frasier* stated that "the standard for qualified immunity is wholly objective."¹¹⁰ The court also declared that considering a defendant officer's particular knowledge is a subjective inquiry, one that is not a valid exception to the objectivity rule.¹¹¹ At first glance, these findings make sense, but on closer scrutiny, they fall apart. The court's standard for objectivity is unreasonable and incomplete, especially where record evidence indicates that knowledge of the First Amendment right to record police was a required condition for hire and/or continued employment at the time that the relevant conduct occurred.

The *Frasier* opinion began its qualified immunity analysis by highlighting the benefits of an objective test versus a subjective one:

An assertion of qualified immunity is properly evaluated under the standard enunciated by the Supreme Court in *Harlow v. Fitzgerald* Before *Harlow*, qualified immunity contained both an objective and a subjective component. Because of its subjective component, qualified immunity was often ineffective in resolving insubstantial suits against government officials before trial. In an attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the performance of

110. *Id.*

111. *Id.*

their duties as a result of baseless claims, the Court adopted an objective test to determine whether the doctrine of qualified immunity applies. When government officials are performing discretionary functions, they will not be held liable for their conduct unless their actions violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹¹²

The court then addressed *Harlow* directly, emphasizing that the objective standard exists to avoid excessive disruption of government and allow many insubstantial claims to be resolved on summary judgment.¹¹³ According to the court, the basis for this objective legal reasonableness standard is formed by an assessment of the legal rules that were clearly established at the time the action in question was taken.¹¹⁴

The Tenth Circuit further contended that the Supreme Court’s later ruling in *Anderson v. Creighton* clarified the *Harlow* doctrine by removing an officer’s subjective belief from the qualified immunity equation.¹¹⁵ Indeed, the standard articulated in *Anderson* is that an officer is entitled to qualified immunity if “he could, as a matter of law, reasonably have believed that [his conduct] was lawful ... in light of the clearly established principles governing [it].”¹¹⁶

The *Frasier* opinion correctly implies that the Supreme Court intended for qualified immunity to provide expansive protection to officers.¹¹⁷ If the goal of the *Harlow* approach was to limit government disruption and settle insubstantial claims on summary judgment, construing actual knowledge as subjective belief (and thereby rendering such knowledge irrelevant to the analysis) likely accomplishes that goal. However, it does so by making the search for clearly established law increasingly unlikely to succeed, rendering

112. *Id.* (quoting *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988)).

113. *Id.* at 1016.

114. *Id.*

115. *Id.*; see *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

116. *Frasier*, 992 F.3d at 1016 (alteration in original) (quoting *Anderson*, 483 U.S. at 641).

117. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017).

qualified immunity nearly absolute.¹¹⁸ The results are perverse: police officers have impunity to retaliate against citizen recorders for conduct that is evidently constitutional in the vast majority of circuits. Police officers may “wear the mantle of a reasonable, [uninformed] counterpart in seeking dismissal on qualified immunity grounds,” then still avoid liability when they “later admit[] in discovery [that they] did in fact know the constitutional contours of the right were as the plaintiff initially alleged.”¹¹⁹ While this might uphold an objective legal reasonableness standard, as the *Frasier* district court pointed out, it also reeks of gamesmanship.¹²⁰

Worse still, a right is clearly established when “a reasonable person in a defendant’s position should know about the constitutionality of the conduct.”¹²¹ The purpose of the notice inquiry is to ask whether the government official should have known about the right.¹²² Here, given the weight of judicial authority on the existence of the right and the fact that many defendant officers participate in required department training on citizens’ First Amendment rights, it is arguably unreasonable to believe that a person in the defendant officer’s position would not know about the constitutionality of a citizen recorder’s conduct.¹²³ Yet if the Tenth Circuit and its counterparts are to be believed, this actual knowledge is somehow less valuable and more subjective than the knowledge that reasonable individuals are presumed to have regarding the on-point precedent in their jurisdiction.¹²⁴ According to the Tenth Circuit, this is true even though the presumption that public officials are aware of developments in constitutional law is well recognized as a legal

118. See John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859 (2010).

119. *Frasier v. Evans*, No. 15-cv-01759, 2018 WL 6102828, at *2 (D. Colo. Nov. 21, 2018), *rev’d*, 992 F.3d 1003 (10th Cir. 2021).

120. See *id.*

121. *Young v. Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998).

122. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”).

123. See *Frasier*, 992 F.3d at 1008.

124. This Note presumes that the actual knowledge law enforcement officers acquire regarding the First Amendment right to record is measurable, given that objective department standards and requirements for hire exist and are quantifiable metrics.

fiction.¹²⁵ In other words, it is patently untrue that both everyday citizens and public officials have knowledge about new and modified constitutional laws. Yet, in the Tenth Circuit, it is somehow more reasonable to assume that police officers are aware of developments in First Amendment case law in their jurisdiction than it is to assume that officers who participated in required training about the right to record actually know (or reasonably should know) that the right exists.

In this way, the current approach and its paradoxical results do not uphold the core goals of the qualified immunity doctrine. Qualified immunity exists to protect reasonable mistakes, not knowingly illegal conduct.¹²⁶ Moreover, on a practical level, the objective legal reasonableness of an officer's conduct cannot be cleanly separated from the actual contents of his mind—knowledge is knowledge, even if a fictional reasonable person would not objectively know the same information. To pretend otherwise is to allow offenders to knowingly violate both the law and individuals' First Amendment rights just because they happen to have knowledge that others might not have. The *Frasier* district court's opinion addresses this particular concern by explaining that “[t]he fiction of the hypothetical reasonable officer is a useful device in attempting to discern what an individual officer should know, but it must give way when the reality shows the actual officer was better informed than his fictional colleague.”¹²⁷

Applied case-by-case, the process of identifying an officer's subjective knowledge could require a significant expense of time and energy by the trial court; it is largely for this very reason that the Supreme Court has deemed that an officer's “subjective beliefs about [whether his conduct was lawful] are irrelevant.”¹²⁸ However, it is entirely possible to evaluate the knowledge individual officers

125. See *Frasier*, 992 F.3d at 1016; *Amore v. Navarro*, 624 F.3d 522, 535 (2d Cir. 2010) (“[T]he statement in *Harlow* that reasonably competent public officials know clearly established law[] is a legal fiction.” (second alteration in original) (quoting *Lawrence v. Reed*, 406 F.3d 1224, 1237 (10th Cir. 2005) (Hartz, J., dissenting))).

126. *Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1119 (9th Cir. 2017); see *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring).

127. *Frasier v. Evans*, No. 15-cv-01759, 2018 WL 6102828, at *2 (D. Colo. Nov. 21, 2018), *rev'd*, 992 F.3d at 1003.

128. See *Frasier*, 992 F.3d at 1016 (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

actually possess in an objective way, at least in cases like *Frasier* in which ample record evidence exists not only that the municipality had a policy in place to educate officers on the First Amendment right to record but also that the actual officers involved in the suit had received both formal and informal training on the subject.¹²⁹ If it is safe to assume that a “reasonably competent public official should know the law governing his conduct,”¹³⁰ it seems as though that same logic would extend (and actually apply) to departmental training subject matter as well. Such an inquiry, specifically conducted in cases where the evidence clearly indicates that there were relevant training procedures or policies in place, need not delve into actual subjective matter, such as whether the officer acted in good faith or with malice. It would simply consider the actual knowledge of the officer—as reflected in the record—as a component of the reasonableness standard, much as controlling precedent within the jurisdiction is currently treated in judicial analysis.

B. Clearly Established Limits: Prior Judicial Decisions

After critiquing the district court’s approach for lack of objectivity, the Tenth Circuit’s *Frasier* opinion raised yet another hurdle for plaintiffs to jump. Specifically, the opinion stated that “[j]udicial decisions are the only valid interpretive source of the content of clearly established law.”¹³¹ This is an incredibly restrictive rule that not only hinders the development of qualified immunity jurisprudence but renders the doctrine of qualified immunity a nearly insurmountable obstacle for plaintiffs to overcome.

The court stated that judicial decisions “concretely and authoritatively” define the boundaries of constitutional conduct in a way that government-employee training never can.¹³² On one hand, this perspective aligns with the Supreme Court’s expansive view of qualified immunity protection; the Court has indisputably imposed a high bar for showing that an officer’s conduct violates clearly established

129. *Frasier*, 2018 WL 6102828, at *1.

130. *Id.* at *2 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

131. *Frasier*, 992 F.3d at 1019.

132. *Id.*

law.¹³³ On the other hand, the Court's qualified immunity jurisprudence provided lower courts with sparse guidance on a major component of the analysis: the proper sources of clearly established law.¹³⁴ As a result, courts like the Tenth Circuit have tended to adopt a restrictive definition of clearly established law that requires a controlling precedent, either from the Supreme Court, the court of appeals in that circuit, or the highest court of the state where the violation took place.¹³⁵ In taking on such a restrictive approach, the inquiry focuses exclusively on binding case law without consulting other sources that would likely educate a reasonable person about constitutional rights.¹³⁶ In fact, courts seldom engage with the question of whether a reasonable person would have known of the right at issue at all; instead, they mechanically analyze controlling precedent as a proxy for legally reasonable behavior.¹³⁷

As one commentator notes, “[t]his approach evokes formalism by promoting a predictable bright-line rule while giving little weight to the underlying objectives of qualified immunity.”¹³⁸ Indeed this is true in the same way that a restrictive view of objectivity (as discussed above) devalues actual knowledge and, as a result, empowers law enforcement officials to knowingly engage in illegal conduct. While efficient and, in many black-and-white cases, effective, bright-line rules are often incapable of accounting for the grey areas of the legal field. Here, the formalist fixation on narrowly construed controlling precedent places a “heavy thumb on the scale in favor of government interests.”¹³⁹ Plaintiffs are unable to vindicate their constitutional rights when the judicial system has become stuck in a loop of granting qualified immunity to officers due to lack of controlling precedent—which does not and is unlikely to ever exist given the very nature of the cycle. As is evident in *Frasier*,

133. See *supra* Parts I-II.

134. See *supra* Parts I-II.

135. See *supra* Part II.A.1.

136. See *supra* Part II.A.1.

137. Cf. *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc) (“Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement; over time misapplication of the law can creep in.”).

138. Tyler Finn, Note, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445, 447 (2019).

139. *Id.* at 460 (citing Jeffries, *supra* note 118, at 859).

presumed knowledge continually defeats actual knowledge because that actual knowledge is never given a chance to be recognized by the courts.

Once again, this particular dilemma could be adequately addressed by honoring the value of actual knowledge without needing to analyze the contents of individual officers' minds—and without upsetting the core premise that the courts are the only valid interpretive source on clearly established law. In cases such as *Frasier*, where clear record evidence indicates that the defendant officers were trained and expected to internalize information regarding various constitutional protections,¹⁴⁰ the relevant training materials could be considered by the courts as a secondary source in light of the goals of qualified immunity and the limits of its reach (namely, it does not protect knowing violations of the Constitution).¹⁴¹ Individuals obtain knowledge from a variety of sources, including training materials, and the courts are certainly capable of analyzing such information in an objective manner.

C. Answering the Actual Knowledge Question: A Proposed Solution

All told, this Note proposes that the Supreme Court overrule *Frasier v. Evans* (and any cases like it) and enact a standard resembling that taken by the district court. That is, where overwhelming record evidence that the defendant officers were trained on the First Amendment right to record exists, courts should consider those training materials objectively as a secondary source when deciding whether a reasonable officer would have known about the right based on the current status of the law in his jurisdiction at the time of the incident. This approach would honor both the goals of qualified immunity and the value of actual knowledge, especially in cases where the objective likelihood of the defendant having such knowledge is substantially higher than the presumed likelihood of him being aware of controlling on-point legal precedent in his jurisdiction.

140. *Frasier v. Evans*, No. 15-cv-01759, 2018 WL 6102828, at *3 (D. Colo. Nov. 21, 2018), *rev'd*, 992 F.3d 1003 (10th Cir. 2021).

141. *See Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring).

To illustrate this proposed solution in action, consider the approach as applied to *Frasier* specifically. Here, there was record evidence that the defendant officers knew about the First Amendment right to record: a training bulletin, which represented official city policy, and the content of a training course that each of the officers had completed.¹⁴² At the summary judgment stage, such evidence would act as a secondary source, informing the court's opinion as to whether a reasonable person, in the officer's shoes, would objectively know about the First Amendment right to record public police interactions. Armed with the baseline assumption that an officer hired by a department that requires education on this right as a condition for hire and/or continued employment actually received such an education, it would be reasonable to say that the defendant officers in *Frasier* would have known about the right to record in August of 2014. Under this revised approach, the court could comfortably deny the officers qualified immunity.

IV. QUESTIONING ACTUAL KNOWLEDGE

If the Supreme Court overruled *Frasier* and cases that apply a similar framework, the development of First Amendment jurisprudence and the doctrine of qualified immunity would be best served by implementing a rule like that applied by the *Frasier* district court. The Court has never specifically addressed whether or not qualified immunity applies to officers who knowingly violate the law, and in fact, at least three former Supreme Court Justices have interpreted *Harlow* as prohibiting immunity in such cases.¹⁴³ Lower courts would benefit from clarification on this point.

This Note seeks to provide that clarity by proposing that, in cases where there is overwhelming record evidence that the defendant officers actually knew about the First Amendment right to record public police interactions, the relevant training materials should be considered objectively as a secondary source. Assuming that qualified immunity does not protect officers who knowingly violate individuals' constitutional rights, lower courts could evaluate training materials objectively by treating such information in the

142. *Frasier*, 2018 WL 6102828, at *3.

143. *See, e.g., Harlow*, 457 U.S. at 821 (Brennan, J., concurring).

same way that controlling jurisdictional precedent is treated now—as presumed knowledge (though in reality, the officers more than likely actually know the information). As more cases are decided in accordance with this rule, the existing body of controlling on-point precedent will also increase, which will provide lower courts with more detailed guidance when deciding future cases.

This novel approach would not only promote the core goals of the qualified immunity doctrine but further several relevant public policy objectives as well. Section A expands on the policy considerations below. Of course, no proposal is foolproof, especially one concerning a topic as complicated and controversial as qualified immunity. Accordingly, Section B then addresses potential counterarguments and responds to such concerns.

A. Policy Considerations

By downplaying the role of actual knowledge, the current qualified immunity standard, as articulated in *Frasier*, chills both socially valuable activity and public confidence in law enforcement. In the First Amendment context, “qualified immunity decisions have the potential to directly influence citizen behavior.”¹⁴⁴ Unlike the Fourth Amendment protection against unreasonable search and seizure or the Eighth Amendment prohibition of cruel and unusual punishment—the rights implicated in the vast majority of qualified immunity decisions—First Amendment jurisprudence governs the conduct of private citizens.¹⁴⁵

Because of the qualified immunity doctrine, the current legal framework sends a mixed—and troublesome—message to would-be civilian recorders: although the right is protected under the First Amendment, there is no remedy for a violation, even if a law enforcement official knows about the right and chooses to violate it anyway. Not only is this likely to undermine public confidence in both law enforcement officials and the protection offered by police in general but also, absent legal guarantees, those seeking to

144. Finn, *supra* note 138, at 474.

145. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88-90 (2018) (finding that, of twenty-nine Supreme Court cases on qualified immunity from 1982 to 2017, all but eight turned on Fourth and Eighth Amendment claims).

document police activity run the risk of being arrested, even when the act of recording does not conflict with law enforcement duties.¹⁴⁶ For most people, the threat of arrest understandably presents a powerful deterrent—and this is especially true for spur-of-the-moment “recorders who may ‘have no deep commitment to capturing any particular image.’”¹⁴⁷

Deterring citizen recorders is problematic because the documentation of police conduct serves numerous social goals. For one, recording advances the societal and governmental interests in promoting constitutional (and ethical) policing, as documented interactions with police carry greater accuracy and legitimacy than testimonial evidence alone.¹⁴⁸ Videos captured by cell phone cameras have both exposed police misconduct and exonerated officers from wrongful charges.¹⁴⁹ Additionally, citizen recording meaningfully contrasts with the use of police body cameras because body cameras can be manipulated, turned off by their wearers, or forgotten to be turned on in the first place.¹⁵⁰

In other words, citizen recording gives the general public a vehicle with which to hold law enforcement officials accountable for their official actions. But holding police officers accountable for knowingly violating constitutional rights that they were trained to protect is an important component of both officer accountability and the public’s faith in individual officers and the institution of policing as a whole. Given the ubiquity of recording devices (like cell phones) in the United States at present and the rising prevalence of civilian cop-watch groups, it is hardly surprising that cases of police retaliation against citizen recorders arise regularly.¹⁵¹ Considering these

146. Brief of Amici Curiae Media & Free Speech Organizations in Support of Plaintiff-Appellant at 1-2, *Higginbotham v. Sylvester*, 741 F. App’x 28 (2d Cir. 2018) (No. 16-3994), 2017 WL 1046937.

147. Finn, *supra* note 138, at 474 (citing Kreimer, *supra* note 5, at 367).

148. See Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1009-10 (2016); see also Joseph Goldstein, ‘Testilying’ by Police: A Stubborn Problem, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html> [<https://perma.cc/LN47-4QFR>] (describing how video evidence is frequently, and increasingly, used to discredit police testimony in criminal proceedings).

149. *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017).

150. See Marceau & Chen, *supra* note 148, at 1005-06.

151. Examples abound. In 2016, Jose LaSalle, an activist, was arrested after recording a stop-and-frisk in the South Bronx. George Joseph, *Police Arrested This Cop Watch Activist—*

factors, there is little to no reason to believe that citizen recorders will stop bringing legal claims. Thus, courts will continue to grapple with qualified immunity and its relation to police recordings, and as long as they continue to devalue the role of actual knowledge, public confidence in law enforcement and the legal system is likely to fall as a result.

Qualified immunity is meant to discourage the filing of insubstantial cases, but it was never intended to discourage the filing of meritorious cases.¹⁵² It was certainly not meant to discourage private citizens from engaging in constitutionally protected behavior, or to undermine the public's confidence in law enforcement and the legal system. By doing so today, the defense is not performing its proper function as envisioned by the Supreme Court.

This problem is rectifiable, however, and an approach such as that proposed in this Note would further that end. By ensuring that officers who clearly have knowingly violated the First Amendment right to record are held accountable for their actions, public confidence in law enforcement and the legal system will be bolstered. Private citizens will know that they can record public police interactions without fear of retaliation—and that if such retaliation does occur, it is not without remedy (or is sanctioned by the courts). Consequently, it is likely that more people will feel empowered to record public police interactions, as is their constitutional right.

but then Recorded Themselves by Accident, THE NATION (Apr. 3, 2017), <https://www.thenation.com/article/police-arrested-this-cop-watch-activist-but-then-recorded-themselves-by-accident> [<https://perma.cc/LQU8-79Q7>]. Just one year later, a Detroit man who attempted to film an arrest was detained for nearly an hour and lectured on why he should not record on-duty police officers. Jermont Terry & Amber Ainsworth, *Internal Investigation Launched After Man Detained While Recording Highland Park Arrest*, CLICKONDETROIT (Aug. 25, 2017, 11:41 PM), <https://www.clickondetroit.com/news/2017/08/26/internal-investigation-launched-after-man-detained-while-recording-highland-park-arrest/> [<https://perma.cc/WC64-FUC7>].

152. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (declaring that “the driving force” behind enduring qualified immunity principles is the early resolution of insubstantial claims against government officials); *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982) (discussing the role of qualified immunity in allowing federal courts to terminate insubstantial lawsuits against public officials more efficiently).

B. Countenancing Counterarguments

Critics might respond to this Note's proposed approach to qualified immunity jurisprudence by arguing that the doctrine aims to decrease the overall number of lawsuits involving officers and that this strategy will have the opposite effect. However, qualified immunity is supposed to create a balance between the vindication of constitutional rights and the insulation of public officials from insubstantial lawsuits, and qualified immunity jurisprudence as it relates to the First Amendment right to record has brought the existing imbalance into stark relief.¹⁵³ The traditional approach has failed to work in an increasingly modernized and technological world—it has failed to deter law enforcement officers from stopping citizen recorders,¹⁵⁴ and it has therefore not prevented public servants from committing constitutional harms. Moreover, the likelihood of a First Amendment retaliation claim being dismissed because the right to record was not clearly established at the time of the incident is substantial, despite the fact that at this point, nearly every circuit has acknowledged that such a right exists.¹⁵⁵ In this way, the existing jurisprudence actually *encourages* the commission of constitutional harms by insulating officers from liability in situations where they knowingly and deliberately infringe individuals' constitutional rights because they are aware that they are unlikely to suffer the consequences of such behavior.

Adopting a proposal such as the one suggested herein is unlikely to increase the amount of litigation involving law enforcement officials or impact officers' ability to perform the roles of the job effectively. To begin with, such a rule would apply only in situations where substantial record evidence indicates that the defendant officer had actual knowledge of the First Amendment right to record public police activities—for example, where the relevant precinct has a policy of uniformly training all newly hired officers about the existence of the right. Where application of the rule is triggered, courts would then be free to exercise their discretion, much as they

153. Finn, *supra* note 138, at 460.

154. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1563 (2016).

155. See Finn, *supra* note 138, at 464-65.

do in many other factual circumstances, to determine whether the relevant policy or procedure persuasively indicates that a reasonable officer in that particular jurisdiction or precinct would have been aware of the right to record at the time of the activity. If, when viewed through an objective lens, the record evidence does not substantially show that the defendant officer had actual knowledge of the right to record in the first place, the claim could be dispensed on summary judgment at the outset of the proceeding. Thus, applying this Note's approach would still uphold the procedural aims of the qualified immunity doctrine: to quickly terminate insubstantial lawsuits against public officials and protect lower courts from the burden of litigating unclear doctrine.¹⁵⁶ It gives officers "breathing room to make reasonable but mistaken judgments about open legal questions"¹⁵⁷ without also granting them the freedom to completely disregard constitutional rights that they are actually informed about due to extensive training on the subject.

Some critics might also claim that the current qualified immunity standard creates incentives for public officials to keep up with legal developments in order to stay on the right side of the law.¹⁵⁸ In practice, though, the legal education of law enforcement officers probably derives from formal training and policy directives or advice from legal counsel.¹⁵⁹ In this way, the current standard ignores reality, while creating very real consequences for individuals who value their First Amendment rights.

156. See *Harlow*, 457 U.S. at 814. The Court has stressed that qualified immunity is not just immunity from liability but also immunity from suit—that is, from the burdens of having to defend the litigation. See MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 143 (3d ed. 2014).

157. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

158. Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV 525, 542-43 (2016).

159. See, e.g., *Frasier v. Evans*, No. 15-cv-01759, 2018 WL 6102828, at *1 (D. Colo. Nov. 21, 2018), *rev'd*, 992 F.3d 1003 (10th Cir. 2021) (noting that defendant officers had received both formal and informal training on the Denver police policy regarding the First Amendment right to record public police activities); *Fields v. City of Philadelphia*, 862 F.3d 353, 363 (3d Cir. 2017) (Nygaard, J., concurring in part, dissenting in part) (describing the Philadelphia Police Department's policy on citizen recorders to clarify the duties of street-level officers); *Lawrence v. Reed*, 406 F.3d 1224, 1237 (10th Cir. 2005) (Hartz, J., dissenting) (addressing the role the advice of counsel plays in the clearly established inquiry).

CONCLUSION

In a world still reeling from George Floyd's murder and its aftershocks, law enforcement accountability is more important than ever before. At the forefront of this effort lies the First Amendment right to record, but the current approach to qualified immunity has left citizen recorders in several jurisdictions exposed to police retaliation, without remedy. Bystanders have captured videos of police interactions that have served as invaluable trial evidence. Citizen recorders have publicized incidents of police brutality that would have otherwise gone unnoticed. Time and time again the right has proven that it is one worth protecting, but without adequate judicial safeguards, it is only an empty promise.

This Note proposes that courts recognize the role of actual knowledge of constitutional violations in order to preserve the core goals of qualified immunity. By abandoning the approach taken by the Tenth Circuit in *Frasier v. Evans* and similar standards adopted in other jurisdictions with respect to officer training, courts could make commonsense determinations regarding whether the state of the law provided fair warning to an official about the constitutionality of her conduct or whether an official knowingly violated a citizen recorder's rights. Consideration of actual knowledge would create a slightly broader conception of clearly established law and would improve public confidence in law enforcement and the legal system. Furthermore, it would encourage socially valuable activity and better serve the goals of both the qualified immunity doctrine and the First Amendment.

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