**Constitutional Law**—First Circuit Protects Right to Record Public Officials Discharging Duties in Public Space—*Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)

The First Amendment protects the freedom of speech and press—liberties that include the right to disseminate certain information concerning governmental activities, including police work.[1] A police officer may defend against a claim of violating a citizen's constitutionally protected right to gather and disseminate information by invoking the doctrine of qualified immunity.[2] Qualified immunity requires the government official to prove the constitutional right allegedly infringed upon was not clearly established at the time of the challenged conduct.[3] In *Glik v. Cunniffe*,[4] the Court of Appeals for the First Circuit addressed the existence of a constitutional right to film officers discharging their duty in public and assessed whether that right was clearly established at the time Glik did so.[5] The court held that the First Circuit case law clearly establishes a First Amendment right to record public police activity, and therefore the police officers could not invoke the qualified-immunity doctrine.[6]

As he passed the Boston Common—the oldest public park in the country—on October 1, 2007, Simon Glik witnessed three police officers arresting an individual.[7] After hearing one bystander say to the officers, "You are hurting him, stop," Glik began recording the arrest with his cell phone camera.[8] After the officers handcuffed the suspect, one of the officers turned to Glik and said, "I think you have taken enough pictures."[9] Glik responded: "I am recording

1. *See* U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The Supreme Court of the United States has interpreted the First Amendment as granting a general right to gather and disseminate information and ideas concerning the public interest. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (discussing undoubted right to gather news from any lawful means); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (reasoning First Amendment prevents government from limiting stock of information from which public may draw); Branzburg v. Hayes, 408 U.S. 665, 681-82 (1972) (discussing right to lawfully gather news from anonymous source).

2. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.").

3. *See id.* (discussing qualified-immunity doctrine).

4. 655 F.3d 78 (1st Cir. 2011).

5. *Id.* at 78-79 (reasoning Glik exercised clearly established First Amendment rights).

6. *Id.* (holding Glik arrested without probable cause).

7. *Id.* at 79.

8. 655 F.3d at 79-80. Glik became concerned that the officers employed excessive force during the arrest. *Id.* at 79.

9. *Id.* at 80.

this. I saw you punch him."[10] After the officers confirmed with Glik that his recording captured sound, the officers arrested Glik for unlawful audio recording in violation of Massachusetts's wiretap statute.[11] While detained at the South Boston police station, officers confiscated Glik's cell phone and a computer flash drive as evidence.[12]

The District Attorney charged Glik with violating the wiretap statute, disturbing the peace, and aiding the escape of a prisoner.[13] After the Commonwealth voluntarily dismissed the charge of aiding in the escape of a prisoner, the Boston Municipal Court, in February 2008, granted Glik's motion to dismiss the final two charges: disturbing the peace, and violating the wiretap statute.[14] The judge found that Glik's exercise of his First Amendment right to film police did not disturb the peace, noting the officers' dislike of Glik's recording did not make this constitutionally protected activity unlawful.[15] The judge also dismissed the wiretap charge for lack of probable cause because the statute requires a secret recording and the officers admitted Glik had recorded openly and in plain view.[16]

Glik filed a civil-rights claim against the arresting officers and the City of Boston, alleging the officers infringed upon his First and Fourth Amendment rights under the United States Constitution.[17] The defendants moved to dismiss, claiming qualified immunity shielded them from liability because the

10. *Id.*

11. *Id.*; *see also* MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (2012).

12. 655 F.3d at 80.

13. *Id.* Officers charged Glik with violating the wiretap statute, MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (2012) ("Except as otherwise specifically provided in this section any person who—willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment."); disturbing the peace, ch. 272, § 53(b) ("Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than $150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment."); and aiding the escape of a prisoner, ch. 268, § 17 ("Whoever aids or assists a prisoner in escaping or attempting to escape from an officer or person who has the lawful custody of such prisoner shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than two years."). 655 F.3d at 80. The Commonwealth of Massachusetts voluntarily dismissed the count of aiding in the escape of a prisoner for lack of probable cause. *Id.*

14. 655 F.3d at 80.

15. *Id.*

16. *Id.*; *see also* ch. 272, § 99(b)(4) ("The term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.").

17. 655 F.3d at 80. Glik filed a civil-rights action in February 2010 after the Boston Police Department failed to investigate his internal-affairs complaint or discipline its officers. *Id.* Glik alleged the following in his complaint: claims under 42 U.S.C. § 1983 for violations of Glik's constitutional rights; state law claims under the Massachusetts Civil Rights Act; and claims of malicious prosecution. 655 F.3d at 80.

constitutional right to record was not clearly established at the time of the challenged conduct.[18] The district court rejected the defendants' motion, holding the First Circuit case law had clearly established the First Amendment right to publicly record the activities of police officers.[19] On appeal, the First Circuit held Glik exercised a clearly established First Amendment right by recording the activity of police officers in a public space—therefore denying the defendants qualified immunity—and accordingly, Glik's arrest without probable cause violated his Fourth Amendment rights.[20]

When public officials exercise their discretion reasonably, qualified immunity protects them from liability for incidental infringement upon citizens' constitutionally protected rights in suits brought under 42 U.S.C. § 1983.[21] When public officials exercise their discretion irresponsibly, they cannot invoke qualified immunity to shield them from liability.[22] To determine eligibility for immunity, the Supreme Court has created a two-pronged test that officials must satisfy: Whether the facts alleged comprise a violation of a constitutional right, and if so, whether the right was clearly established at the time of the violation.[23] To assess whether the right was "clearly established,"

18. 655 F.3d at 80. The defendants moved to dismiss the complaint under FED. R. CIV. P. 12(b)(6), arguing the complaint failed to support Glik's claims, and offered qualified immunity as an affirmative defense. 655 F.3d at 80. When hearing the motion, the district court focused on the qualified-immunity defense. *Id.*

19. *Id.*

20. *Id.*

21. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806-07 (1982) (recognizing need to shield public officials from personal liability arising out of discretionary actions). The qualified-immunity doctrine applies to mistakes of law or fact by the official. Groh v. Ramirez, 540 U.S. 551, 567 (2004) (stating application of qualified immunity). The Supreme Court initially developed this doctrine as a "good faith" defense with both subjective and objective aspects. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (summarizing development of qualified-immunity doctrine). The Court shifted to a purely objective standard, articulated as whether the defendant reasonably should have known that his actions violated the plaintiff's constitutional rights. *Id.* at 815-18 (explaining shift from subjective standard). The shift to an "objective legal reasonableness" test aligned with the Court's earlier decision aimed at preventing Section 1983 claims from proceeding to trial. *Id.* at 815, 819 (noting subjective element's incompatibility with earlier decision); *see also* Butz v. Economou, 438 U.S. 478, 508-12 (1978) (examining qualified-immunity doctrine applied to executive and judicial positions).

22. *See* Pearson v. Callahan, 553 U.S. 223, 231 (2009) (holding public officials accountable who "exercise power irresponsibly").

23. *See* Pearson v. Callahan, 553 U.S. 223, 232, 236 (2009) (setting out two-prong qualified-immunity test and flexible application). The Supreme Court initially held in *Saucier v. Katz* that the qualified-immunity test must be resolved by first answering whether the alleged facts describe a constitutional violation; if a violation occurred, the court would continue to the "clearly established" prong. 533 U.S. 194 (2001) (requiring proper sequence in considering qualified-immunity prongs). The Court receded from the rigidity of requiring courts to assess the two prongs in a particular order, stating courts, in their sound discretion, may decide which prong to tackle first. Pearson v. Callahan, 553 U.S. 223, 236 (2009) (relaxing sequence for analyzing qualified immunity). Generally, courts have used this discretion to dispense with complex constitutional rights questions by first declaring that the constitutional right is not clearly established, thereby avoiding consideration of whether any infringement of constitutional rights occurred based on the particular facts of the case. *See* Karen M. Blum, *Qualified Immunity: Further Developments in the Post*-Pearson *Era*, 27 TOURO L. REV. 243, 248 (2011) (concluding majority of courts assess second prong first to avoid analyzing whether constitutional rights violation occurred).

courts must examine the clarity of the law at the time of the violation, and whether, in light of the facts of a particular case, a reasonable defendant would understand that his conduct violated the plaintiff's constitutional rights.[24]

When determining the level to which the constitutional right has been established, the Supreme Court has advised lower courts to define the contours of the right with caution; the more generally drawn the constitutional right, the easier it is for the plaintiff to claim its clear establishment at the time of the violation.[25] Further, when lower courts exercise their discretion to answer the "clearly established" inquiry first, they must consider the precedential consequences of holding novel or complex constitutional rights as clearly established.[26] The Supreme Court has provided surprisingly little guidance to lower courts regarding precisely how they should draw their precedents for the qualified-immunity analysis.[27] Lower courts have responded differently in

24. Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The First Circuit in *Maldonado* further stated: "[T]he salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." *Id.* While the test for the existence of the constitutional right does not require a case on point establishing that right, the constitutional question of the existence of the right must be "beyond debate." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011). Justice Scalia further clarified the definition of "beyond debate" as follows: "'The contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Supreme Court has recognized the potential for unfairness in expecting "officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges"; however, federal officials are required to "act in a way that is consistent with an awareness of the fundamental constitutional rights enumerated in the Bill of Rights of the Constitution." Anderson v. Creighton, 483 U.S. 635, 649 n.2 (1987) (Stevens, J., dissenting).

25. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) (cautioning lower courts against defining "clearly established law at a high level of generality"); *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (requiring courts to define constitutional right in more particularized manner, increasing relevance to facts alleged); Iacobucci v. Boulter, 193 F.3d 14, 22 (1st Cir. 1999) (dismissing freedom from arrest absent probable cause right as drawn too broadly). How a court chooses to define the constitutional right at issue frames the entire qualified-immunity analysis, as the scope of relevant precedent will expand with more generally framed rights. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (linking contours of right defined to determination of its clarity).

26. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (warning courts against resolving complex constitutional interpretations of little relevance to issue). Although the Court grants discretion to the lower courts to resolve the prongs in either order, it makes a strong argument for first analyzing whether the facts alleged result in a constitutional rights violation. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (recognizing difficulty of assessing "clearly established" prong without first defining right at issue). Additionally, the Court recognized the importance of following the original layout of the *Saucier* test because it develops constitutional precedent, which can be "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* However, the advantages of leaving the analysis to the lower courts' discretion outweighs the potential for abuse; because qualified immunity aims to immunize the official from suit, rather than provide a defense from liability, allowing courts to exercise discretion may dispense with potentially frivolous claims at an earlier stage. *Id.*; *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (explaining *Harlow* Court crafted qualified-immunity doctrine to dismiss insubstantial claims on summary judgment).

27. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32 (1982) (refusing to decide from which level court precedent must come); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605 n.41 (1989) (discussing lack of guidance from Supreme Court in determining "clearly

assessing whether the First Amendment right to freedom of expression encompasses a right to record video or audio.[28]

Because expressive conduct may take many different forms, and receive protection from a patchwork of constitutional rights, courts struggle to define the limits of this right.[29] Freedom of expression clearly includes speaking,

established" prong). Kinports addressed four ambiguities clouding the assessment of the "clearly established" prong, starting with the Court's refusal to consider whether lower courts can create precedent upon which other courts can rely and state the right is "clearly established." Kinports, *supra*. Kinports also discusses the ambiguity surrounding which jurisdiction's precedent guides the inquiry—the defendant's own jurisdiction or others. *Id.* Because the Supreme Court has refused to set a standard, courts are free to include or exclude precedent from other circuits, potentially engendering different manifestations of the same constitutional rights. *Id.* Jonathan M. Stemerman discussed how this issue is handled in the Third Circuit, adding another consideration to the already muddled issue by asking whether authority other than case law may be used to determine the "clearly established" contours of the right. Jonathan M. Stemerman, *Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law Is "Clearly Established" in the Third Circuit?*, 47 VILL. L. REV. 1221, 1227 (2002). The First Circuit has declared that precedent need only stem from its own circuit to determine whether a right is clearly established at the time of its alleged violation, regardless of whether other circuits disagree on the issue. Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989). Limiting the analysis to the court's own jurisdiction creates the potential for constitutional rights to develop differently among the circuits. *See* MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION § 3:6 (2011) (noting one court's analysis of "clearly established" prong more favorable to plaintiff than another).

28. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 249 (2004) (distinguishing between right to gather information as "news" and gathering for other uses). *Compare* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing right to record public officials on public property), *and* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (establishing First Amendment right to film matters of public interest), *with* Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (finding no right to record police during traffic stop), *and* Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009) (finding right to record police activity on public property not clearly established in Fourth Circuit). In the context of a right to record public officials executing their duties in public, one commentator suggests the right to record may more sensibly stem from freedom of the press or association, rather than free speech. McDonald, *supra*, at 354-55. Disagreement between courts and among analysts over the right to record and its foundations has potentially occurred because the phenomenon of citizen recording has increased on pace with developing technology and also because the Supreme Court has not yet addressed the issue. *Id.*; *see also* Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 655 (2009) (discussing potential conflicts arising from nature of distinct rights alleged). While the right to gather newsworthy information under the Freedom of the Press Clause undeniably applies to journalists, courts generally recognize the extension of this right to other citizens. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing citizens' right to record subject to reasonable time, place, and manner restrictions); Caycee Hampton, Case Comment, *Confirmation of a Catch-22:* Glik v. Cunniffe *and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549, 1552-53 (2011) (discussing First Circuit's extension of right to record to ordinary citizen in *Iacobucci*); Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 292 n.147 (2011) (listing various circuit courts affirming right of citizens to record). According to Kies, *Glik* is the first decision to explicitly define citizen journalists as members of the press. Kies, *supra*, at 292.

29. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 262-63 (3d Cir. 2010) ("[T]he cases addressing the right of access to information and the right of free expression do not provide a clear rule regarding First Amendment rights to obtain information by videotaping . . . police officers during traffic stops."); *see also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 367 (2011) (noting some commentators and courts believe source of right to record lies outside First Amendment); McDonald, *supra* note 28, at 255 ("[T]he Court has created a legal scheme

writing, publishing, and other recognizable communicative acts, but other less traditional forms of communication prove more challenging to characterize.[30] The United States Supreme Court has interpreted the First Amendment's protection as extending beyond its literal meaning to incorporate a general freedom to disseminate and receive information and ideas through various forms of expression.[31] While the case law surrounding the First Amendment and its offspring has broadened the contours of the First Amendment right to expression, the right to record public officials carrying out their duties on public property has not yet earned widespread acceptance.[32] In the First Circuit, *Iacobucci v. Boulter*[33] established the First Amendment right to record public officials during town meetings; however, Iacobucci's Section 1983 claim was rooted in the Fourth Amendment, accusing the defendant officer of lacking probable cause for arrest.[34] Further, Massachusetts's open-meeting law

governing a First Amendment right to gather information that is . . . fragmented and inconsistent.").

30. *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Kaplan v. California, 413 U.S. 115, 119-20 (1973) ("Pictures, films, paintings, drawings, and engravings . . . have First Amendment protection."); McDonald, *supra* note 28, at 250 (recognizing courts' difficulty in defining scope of freedom of expression).

31. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (discussing undoubted right to gather news from any lawful means); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (reasoning First Amendment prevents government from limiting stock of information from which public may draw); Branzburg v. Hayes, 408 U.S. 665, 681-82 (1972) (discussing right to lawfully gather news from anonymous source); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (reiterating well-established, constitutionally protected right to receive information and ideas). In addition to speech, the First Amendment also protects expressive conduct through which information is exchanged. *See* Ward v. Rock against Racism, 491 U.S. 781, 790 (1989) (concluding First Amendment protects music as form of expression); Kaplan v. California, 413 U.S. 115, 119-20 (1973) (expanding First Amendment protection to pictures, films, paintings, drawings, and engravings); McDonald, *supra* note 28, at 258-59 (discussing protection of conduct necessarily related to acts of expression).

32. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing right to record public officials on public property); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (establishing First Amendment right to film matters of public interest); Demarest v. Athol/Orange Cmty. Television, Inc., 188 F. Supp. 2d 82, 94–95 (D. Mass. 2002) (recognizing constitutionally protected right to film matters of public interest); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding police interference with reporter's filming constituted unlawful prior restraint); Connell v. Town of Hudson, 733 F. Supp. 465, 471–72 (D.N.H. 1990) (denying qualified immunity to police chief who prevented photographer from taking pictures of car accident). Other courts deny the existence of this right to record public officials. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (finding no right to record police during traffic stop); Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009) (finding right to record police activity on public property not clearly established in Fourth Circuit); Gilles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (finding filming police on public property possibly protected); Banks v. Gallagher, No. 3:08-1110, 2010 U.S. Dist. LEXIS 55308, at *29-37 (M.D.Pa. Mar. 18, 2010), *adopted by* Banks v. Gallagher, No. 3:08-1110, 2010 U.S. Dist. LEXIS 45364 (M.D.Pa. May 10, 2010) (holding police officer entitled to qualified immunity because right to film not clearly established); *see also* Kreimer, *supra* note 29, at 369 (questioning whether "pervasive image capture" earns First Amendment protection). In the First Circuit, the right to record was established under a citizen's Fourth Amendment Section 1983 claim. Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999).

33. 193 F.3d 14 (1st Cir. 1999).

34. Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999) ("[B]ecause Iacobucci's activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the officer] lacked the authority to stop them.").

gives any attendee the right to videotape such meetings, buttressing the court's conclusion that such a right was clearly established at the time of Iacobucci's conduct.[35]

In *Glik v. Cunniffe*, the First Circuit answered the question of whether police officers could invoke qualified immunity after arresting a citizen for openly recording the officers' arrest of an individual on Boston Common.[36] The court began its analysis by considering whether the facts alleged in Glik's complaint showed a violation of his First Amendment rights.[37] Basic First Amendment principles and case law from several circuits guided the court toward holding that the right to record was clearly established.[38] Filming government officials, the court found, "fits comfortably" within the principles established by the Supreme Court regarding the scope of First Amendment protections, which recognize the importance of gathering and disseminating information to support "the free discussion of governmental affairs."[39] The court then explicitly clarified that the First Amendment does not limit the right to gather information about public officials to only reporters; the right extends equally to private individuals.[40]

35. *See* MASS. GEN. LAWS ANN. ch. 39, § 23B (1975) (repealed 2009) ("A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting."); Iacobucci v. Boulter, 193 F.3d 14, 24 (1st Cir. 1999) (finding constitutional right to record sufficiently clear, plaintiff's arrest unreasonable).

36. *See* 655 F.3d at 79 (stating issue under review).

37. *See id.* at 82. The court recited the issue as the parties framed it—whether there exists "a constitutionally protected right to videotape police carrying out their duties in public." *Id.*

38. *See id.* (presenting narrow issue before court). The court expounded on the various sources forming the basis for this constitutional right. *Id.* (citing Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)). *Houchins* prevents the government from limiting the public's available stock of information, while establishing a right to receive information and ideas and gather news from any lawful sources. Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978); *see also supra* notes 31-32 and accompanying text (discussing various rights laying foundation for right to record). While the court relied on its precedent in *Iacobucci* to definitively find the right to record was clearly established, it recognized its decision aligned with those of other circuits. 655 F.3d at 83 (citing Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999)); *see also, e.g.*, Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to film matters of public interest); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding police interference with filming crime scene, seizure of video camera constituted unlawful prior restraint).

39. 655 F.3d at 82 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). The court went on to discuss the policy rationales encouraging the right to record, noting freedom of expression with respect to the state requires greater respect because of the state's interest in suppressing opposition. *Id.* The court showed particular concern regarding the substantial discretion afforded law enforcement officials, suggesting that the right to record these officials "may have a salutary effect on the functioning of government more generally." *Id.* at 82-83.

40. *Id.* at 83-84 (finding public's right to access information equal to that of press). The court reasoned that society expects police officers to bear the burden of the citizens' right to record, because enabling this form of First Amendment expression separates a free nation from a police state. *Id.* at 84 (quoting City of Houston

In assessing the "clearly established" prong of the qualified-immunity analysis, the court turned to *Iacobucci* as its First Circuit case on point establishing the right to record public officials in public places.[41] The court found notable the brevity of discussion surrounding the right to record established in *Iacobucci*.[42] From this brevity, the court had "no trouble" concluding that the police officers had fair warning their conduct was unconstitutional because the state of the law at the time of the violation was sufficiently clear.[43] The court dismissed the cases upon which respondents relied to cast doubt on the establishment of the right to record.[44] One such case, an unpublished opinion, lacked precedential value, while the other denied the existence of the right in the context of a traffic stop—"worlds apart" from Glik's arrest for conspicuously recording police making an arrest in Boston Common.[45] According to the court, even if cases from other circuits cast doubt on the clarity of the right to record, First Circuit precedent declared the right need only be clearly established within its own circuit for qualified-immunity purposes.[46] While subject to reasonable time, place, and manner restrictions,

v. Hill, 482 U.S. 451, 461 (1987)); *see also* Kies, *supra* note 28, at 292 (discussing *Glik*'s conclusion that citizens' right to film coextensive with journalists).

41. 655 F.3d at 83. The court cited *Iacobucci* as its case on point, establishing precedent for the right to record public officials exercising their duties in public spaces. *Id.* In his Section 1983 claim, Iacobucci alleged violations of his Fourth Amendment rights against the officer, claiming the officer lacked probable cause to arrest him for disorderly conduct and disrupting a public assembly, and therefore violated Iacobucci's clearly established Fourth Amendment right to be free from arrest absent probable cause. *See* Iacobucci v. Boulter, 193 F.3d 14, 22 (1st Cir. 1999). Recognizing Iacobucci's claim "swe[pt] so broadly" that it bore "little relationship to the objective legal reasonableness" of the officer's actions, the court narrowed the claim to "whether a reasonable police officer, standing in [the officer's] shoes, would have known that arresting Iacobucci for disorderly conduct, under all the attendant circumstances, would contravene clearly established law." *Id.* Because Iacobucci's activity—filming local officials—was peaceful, lawful, and protected by the First Amendment, the officer lacked probable cause to arrest him. *Id.* at 25.

42. 655 F.3d at 84-85. Influenced by the brevity of discussion establishing this right in *Smith v. City of Cumming* and *Fordyce v. City of Seattle*, the First Circuit found the right to record public officials in public space was clearly established because "[t]his terseness implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area." *Id.* at 85.

43. *Id.* The court cited *Lee v. Gregory* for the proposition that "self-evident" constitutional rights "do not require particularized case law to substantiate them." *Id.* (citing Lee v. Gregory, 363 F.3d 931, 936 (9th Cir. 2004)).

44. *Id.*

45. *Id.* The first case, *Szymecki v. Houck*, was promptly dismissed as lacking precedential force because it was unpublished and lacked substantive discussion of why the right to record was not clearly established. *Id.*; *see also* Merrimac Paper Co. v. Harrison, 420 F.3d 53, 60 (1st. Cir. 2005) (stating unpublished opinions have no precedential force). The Third Circuit case of *Kelly v. Borough of Carlisle* presented a twist on the right to record; instead of recording officials in a public place, the plaintiff recorded officials in an "inherently dangerous situation," a traffic stop orchestrated for speeding and a violation of bumper height restriction. Kelly v. Borough of Carlisle, 622 F.3d 248, 251, 262 (3d Cir. 2010). The First Circuit distinguished Glik's arrest from this case based on clear differences in the nature of the police actions being videotaped. 655 F.3d at 85.

46. 644 F.3d at 85; Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989). Even if the defendant could show a circuit split existed on whether the right was clearly established, the court determined such a split would not set aside the fact that the violated right was clearly established under First Circuit case law. 655 F.3d at 85.

the court held that the right to record public officials discharging their duties in public space was a clearly established liberty protected by the First Amendment.[47]

Though the First Circuit had discretion in sequencing its two-part qualified-immunity analysis, it first answered whether a constitutional violation occurred according to the facts alleged, and narrowly framed the constitutional right.[48] However, when extrapolating upon well-established First Amendment liberties, the court lumped together subtly different rights to form the legs upon which the freedom to record could stand, failing to first evaluate the threshold question of whether recording the officers' activity even constitutes "speech."[49]

47. 655 F.3d at 85.

48. *See id.* at 82 (initiating *Saucier* analysis by first examining whether Glik's First Amendment rights violated); *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) (cautioning lower courts against defining "clearly established law at a high level of generality"); Anderson v. Creighton, 483 U.S. 635, 640 (1987) (requiring courts to define constitutional right in more particularized manner, increasing relevance to facts alleged); Iacobucci v. Boulter, 193 F.3d 14, 22 (1st Cir. 1999) (dismissing freedom from arrest absent probable cause right as drawn too broadly). By narrowly defining the constitutional right at issue, the court prevented itself from creating dangerous precedent that overgeneralizes constitutional rights on the one hand, or simply reiterates a generalized, well-known constitutional right on the other. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) (explaining overgeneralizing right does little to help analysis of whether right clearly established). The Court gave the following instructive example: "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." *Id.* Were the First Circuit to define the right at issue in terms of a generalized First Amendment right to freedom of speech or expression, it would similarly provide a useless framework from which to analyze whether the specific right to record police officers performing their duties in public exists. *Id.*; *see also* 655 F.3d at 82 ("The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public?").

49. *See* Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (discussing undoubted right to gather news by any lawful means); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (reasoning First Amendment prevents government from limiting stock of information from which public may draw); Branzburg v. Hayes, 408 U.S. 665, 681-82 (1972) (discussing right to lawfully gather news from anonymous source); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (reiterating well-established, constitutionally protected right to receive information and ideas); *see also* Kreimer, *supra* note 29, at 366-69 (noting not all courts convinced that right to record falls under First Amendment). Kreimer argues that cases finding the right to record public officials as clearly established merely state its protection falls under the First Amendment, rather than analyzing why this activity constitutes a form of communication. Kreimer, *supra* note 29, at 368-69. Skeptics maintain that "[i]mage capture . . . records data rather than communicat[es] ideas." *Id.* at 370. Others struggle to pinpoint what First Amendment tenet engenders the right to record. *See* McDonald, *supra* note 28, at 354-55 (distinguishing between right to gather newsworthy information and right to disseminate such information); Wasserman, *supra* note 28, at 654 (claiming right to record not fully theorized). According to one commentator, the right to record comes from different First Amendment freedoms: the right to gather information on matters of public interest and the right to access public spaces and meetings. Wasserman, *supra* note 28, at 654-55. Not only are there subtle differences between these First Amendment freedoms, but the court also failed to first assess whether the simple act of recording can constitute "expression" or "speech" under the First Amendment. *See* Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (asserting First Amendment right to gather news); Branzburg v. Hayes, 408 U.S. 665. 681-82 (1972) (discussing right to lawfully gather news from anonymous source); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (reiterating well-established, constitutionally protected right to receive information and ideas); *see also* McDonald, *supra* note 28, at 270 (claiming right to record, by itself, does not qualify as expressive activity under First Amendment). The First Circuit's analysis did not clearly explain whether "image capture," as Wasserman calls it, constitutes a protected First Amendment right if, in fact, it was not gathered with the intent to disseminate the information as news. *See* 655 F.3d at 82 (finding

Moreover, when promoting the policy rationales behind the right to record, the court assumed Glik planned to disseminate the videotape, indicating an intent requirement may be necessary to substantiate the right to record.[50] In *Iacobucci*, the case establishing the right to record in the First Circuit, the court explicitly discussed Iacobucci's news-gathering role as a journalist, and while his freedom to record did not hinge on his journalistic status, he undoubtedly harbored intent to disseminate the recording to the public.[51] Rationalizing the importance of the right to record public officials based on the preconception that the recorder will disseminate the information for public consumption may have unintentionally attached an intent requirement onto the right to record, potentially limiting the right based on the recorder's subjective intent.[52]

The court also failed to recognize the circularity of its argument regarding the clarity of the right to record public officials performing their public function: The lack of analysis surrounding the authority for the right to record noted in other cases does not unequivocally indicate the self-evident nature of the right.[53] Further, while the court found the cases cited by the respondents

right to record officials fits within First Amendment news-gathering principles). The court grounded the right to record within the context of news-gathering and dissemination without examining whether Glik gathered the information for that purpose. *Id.*

50. *See* 655 F.3d at 83-84 (discussing significance of right to gather newsworthy information). In extending the right afforded journalists to gather newsworthy information, the court assumed Glik documented the arrest for that purpose—to disseminate the video for public consumption as a matter of public concern. *See id.* at 84 (arguing "news-gathering protections of the First Amendment cannot turn on professional credentials or status").

51. *See* Iacobucci v. Boulter, 193 F.3d 14, 17 (1st Cir. 1999) (stating Iacobucci's filming of town meetings conducted for weekly news program he produced and broadcasted).

52. 655 F.3d at 80. Nothing in the record stated that Glik intended to disseminate the video as newsworthy information. *Id.* at 79-80. The implications of this statement lend itself just as easily to the conclusion that he intended to help the victim potentially redress the use of excessive force against him, as it does to the conclusion that he intended to post the video online. *See id.* Glik admitted he recorded the officers because he feared their use of excessive force. *Id.* at 79-80. By basing the right to record public officials executing their duties in public on First Amendment news-gathering principles, the court left open the issue of whether recording public officials for any other purpose besides news-gathering will receive First Amendment protection. *Id.* at 82.

53. *See* 655 F.3d at 84-85 (claiming brevity of discussion indicates self-evident nature of right); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (explaining intent of qualified immunity to dispel with frivolous claims at summary judgment stage). If the right to record public officials is as self-evident as the court claims, the officers would have been unable to raise the qualified-immunity defense in good faith. *See* Kinports, *supra* note 27, at 600-01 ("On the one hand, the Supreme Court recognized the need to remedy and deter the deprivation of constitutional rights. At the same time, however, the Court wished to protect public officials from being sued for every error in judgment, thereby diverting their attention from their public duties, preventing them from independently exercising their discretion because of the fear of damages liability, and discouraging qualified persons from seeking public office at all."). Qualified immunity is intended to provide officials, acting within reason, with an affirmative defense; if the right to record public officials was as clearly established as the First Circuit claims, arresting Glik for violating the wiretap statute by recording the arrest could not be deemed reasonable. *See* 655 F.3d at 80 (noting Glik arrested for allegedly violating wiretap statute by recording arrest); Kinports, *supra* note 27, at 603 ("Thus, after *Harlow*, defendants are protected by qualified immunity unless the constitutional right they allegedly violated was a clearly established right at the time they acted.").

unavailing, it did not recognize that if other circuits are in doubt as to whether this right exists, perhaps its existence is not as self-evident as the court suggests.[54] Though the court distinguished *Kelly v. Borough of Carlisle*[55] based on the location of the parties when recording—one from his vehicle during a traffic stop, the other in a public park—further analysis shows little difference between the two scenarios.[56] Traffic stops may be considered inherently dangerous, but in this instance, the officers pulled Kelly over for fairly mundane reasons, and the police officer was recorded on a public street—a traditional public forum like Boston Common.[57]

Courts may differ on the nature of the precedent required for the "clearly established" prong of qualified-immunity analysis; however, when relying on the brevity of analysis in prior opinions and declaring the right so established as to be self-evident, logic argues against confining the "clearly established" analysis to a single jurisdiction and potentially limiting constitutional rights based on location.[58] The court considered Supreme Court precedent and cases from other circuits in its analysis of the first prong of the test—whether the facts alleged constituted an infringement on constitutional rights.[59] Yet, when confronting the broader issue of whether the constitutional right is clearly established, it confined its analysis to a single First Circuit case that declared the right to record was clearly established based on statutory authority

54. *See* 655 F.3d at 85 (discussing other circuits' treatment of right to record); *see also* Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (finding no right to record police during traffic stop); Szymecki v. Houck, 353 F. App'x 852 (4th Cir. 2009) (finding right to record police activity on public property not clearly established in Fourth Circuit); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing right to record public officials on public property); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (establishing First Amendment right to film matters of public interest).

55. 622 F.3d 248 (3d Cir. 2010).

56. 655 F.3d at 85; *see also* Kelly v. Borough of Carlisle, 622 F.3d 248, 251, 262 (3d Cir. 2010) (noting right to record subject to reasonable time, place, and manner restrictions). Because of the "inherently dangerous nature" of traffic stops, the court distinguished *Kelly* from the Supreme Court precedent on which the plaintiff relied. 655 F.3d at 85.

57. Kelly v. Borough of Carlisle, 622 F.3d 248, 251 (3d Cir. 2010) (noting Kelly stopped for speeding and violating bumper height restriction). While one can argue that filming police officers during a traffic stop somehow infringes on an expectation of privacy, the nature of the public performance of an officer's duties inherently limits any expectation of privacy the officer may have. *See* Kies, *supra* note 28, at 300 (discussing tension between officers' privacy rights and public nature of occupation).

58. *See* Kinports, *supra* note 27, at 605 n.41 (discussing ambiguity surrounding which jurisdiction's precedent guides "clearly established" analysis). While the First Circuit considered precedential cases outside its own jurisdiction, it relied mainly on *Iacobucci*, with little analysis, to declare the right to record officially established. *See* 655 F.3d at 84 ("Though the 'clearly established' inquiry does 'not require a case directly on point,' . . . we have such a case in *Iacobucci*."). However, Iacobucci's right to record town hall meetings came directly from Massachusetts's Open Meeting Law, which explicitly granted the right to record meetings of governmental bodies. MASS. GEN. LAWS ANN. ch. 39, § 23B (1975) (repealed 2009). Although this limitation does not necessarily negate the court's conclusion that the right to record police officials executing their duties in public was clearly established at the time of Glik's conduct, it demonstrates the potential for courts to incorrectly evaluate the constitutional right by unnecessarily confining the scope of the inquiry. 655 F.3d at 84.

59. 655 F.3d at 85.

surrounding meetings of governmental bodies.[60] The court justified confining its analysis based on its own precedent, yet its discussion of other circuits' treatment of the First Amendment right acknowledges the foundations of this right should be broader than its own precedent.[61]

In the First Circuit, the right to record public officials discharging their duties in public is clearly established. Both journalists and ordinary citizens may record public officials; yet, whether the right to record hinges on the intent of the recorder remains unclear. By couching its analysis in terms of precedent touting the virtues of disseminating information for public consumption, the First Circuit assumed Glik planned to distribute his recording—less clear is whether the right to record is protected if the recorder does not plan to enrich the public discourse with the captured images. Further, the First Circuit failed to recognize the danger in following precedent solely from its own circuit. Although the United States Supreme Court has not provided guidance in terms of how courts should assess the "clearly established" prong of the qualified-immunity analysis, when relying on the self-evident nature of the right, or brevity of discussion surrounding its establishment, reason dictates casting a broader net than one's own jurisdiction to find the basis for this right. If courts are allowed to restrict the "clearly established" inquiry within their jurisdictional precedent, we run the risk of jurisdictions creating their own "clearly established" constitutional rights.

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60. *See id.* at 82-86 (beginning analysis with broad strokes and finishing with single case); Iacobucci v. Boulter, 193 F.3d 14, 24 (1st Cir. 1999) (justifying right to record on Massachusetts's Open Meeting Law). Although the right to record governmental bodies carrying out meetings in public is clearly established by this statute, this right does not obviously extend to recording the police executing an arrest of a private citizen in a public forum. *See* ch. 39, § 23B (repealed 2009).

61. *See* 655 F.3d at 82 ("The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative."). Although the Supreme Court's decision in *al-Kidd*, and the First Circuit's decision in *Newman*, granted the court the authority to confine its analysis of the "clearly established" prong to its own jurisdiction, the court should have analyzed the "clearly established" prong just as broadly as it did in assessing whether Glik's First Amendment rights were violated. *Id.* at 82-85.