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THE IMPLICATIONS OF MAJOR NEWS OUTLETS  
BROADCASTING LAW ENFORCEMENT-CITIZEN ENCOUNTERS:  
ARE THEY RELIABLE?

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**I. Introduction**

From video recordings displaying the death of Eric Garner to the beating of Richard Hubbard III, major news outlets have shown videos that have forever changed American policing.<sup>2</sup> Since 1991, the United States has experienced a handful of cases in which black men and women have died at the hands of police officers.<sup>3</sup> Twelve-year old Tamir Rice was shot and killed by Ohio police officers in a public park as he was playing with his BB gun.<sup>4</sup> Eighteen year-old Michael Brown, who was found to be unarmed, was shot and killed by a police officer in Ferguson, Missouri.<sup>5</sup> Forty-three year old Eric Garner, who was

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<sup>2</sup> See Mercy Benzaquen et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), archived at <https://perma.cc/957M-8JYP> (commenting that images of questionable police behavior towards black men and women have led to nationwide protests directed towards police departments).

<sup>3</sup> See Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016), archived at <https://perma.cc/PF2L-DLAB> (acknowledging that there have been a handful of cases in which unarmed black men and women have been gunned down by officers).

<sup>4</sup> See Raziye Akkoc, *A Timeline of Police Attacks in the USA*, TELEGRAPH (Mar. 3, 2015), archived at <https://perma.cc/6EPB-DPQZ> (citing further that police claimed Tamir Rice reached into his waistband for the toy gun when the two officers ordered him to raise his hands before fatally shooting him).

<sup>5</sup> See *id.* (offering witness accounts that suggest Michael Brown held his hands up in front of the officer before he was fatally shot).

found to be unarmed, was wrestled to the ground and killed after a police officer used a banned chokehold technique to restrain him.<sup>6</sup> These few examples, along with many others, have been recorded on witnesses' cell phones and have been broadcasted across major news outlets such as CNN and Fox News.<sup>7</sup> These recordings have led to numerous protests across the country, in which protestors demand for both justice and the reformation of the criminal justice system.<sup>8</sup>

In response to the public outcry of police violence, law enforcement officials are challenging the extent to which cell phone videos paint a full picture of the circumstances leading up to these deadly encounters.<sup>9</sup> Some law enforcement officials suggest that the media unfairly broadcasts cell phone recordings depicting police encounters by attaching negative headlines to these encounters.<sup>10</sup> Due

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<sup>6</sup> See *id.* (noting that while Eric Garner was being restrained, he stated to the officer: "I can't breathe.").

<sup>7</sup> See *Controversial Police Encounters Fast Facts*, CNN (June 27, 2018), archived at <https://perma.cc/V69A-HUBZ> (outlining major controversial police encounters in the news from 1991 to 2017); see also *Police Encounters Resulting in Black Deaths Span US*, FOX NEWS U.S. (Dec. 5, 2016), archived at <http://perma.cc/2XH3-UUWP> (tallying deadly police encounters involving black men and women in the past decade).

<sup>8</sup> See *Protests Against Police Violence Continue Across U.S.*, CBS NEWS (July 12, 2016), archived at <https://perma.cc/7E2D-WKEM> (reporting on several nationwide protests where civil rights groups criticized law enforcement conduct in encounters with minority communities).

<sup>9</sup> See Morgan Winsor, *Police Say It's Unclear if Charlotte Man Pointed Gun Before Shooting*, ABC NEWS (Sept. 21, 2016), archived at <https://perma.cc/BPZ5-5RCY> (publicizing cellphone video showing the scene of Keith Scott's fatal shooting by police). The video does not show whether Scott was holding or pointing a handgun at officers. *Id.* Police later testified that they gave Scott "loud, clear, verbal commands" to not exit his vehicle and to drop his gun. *Id.* Officers then fatally shot Scott for not obeying these commands. *Id.*; see also *Charlotte Police Major Says Body Cameras Could Put Tactical Officers at Risk*, CBS NEWS (Sept. 28, 2016), archived at <https://perma.cc/5GHP-4UMN> (raising the unanswered questions surrounding the death of Keith Scott, as the available recordings fail to show what exactly led to the fatal shooting); see also John Gramlich & Kim Parker, *Most Officers Say The Media Treat Police Unfairly*, PEW RES. CTR. (Jan. 25, 2017), archived at <https://perma.cc/V6RV-6BJX> (estimating that 81% of officers who work in departments of 100 or more say that the media generally treats the police unfairly).

<sup>10</sup> See Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015), archived at <https://perma.cc/D7VC-WETD>

to the recent media attention, police have been hypersensitive to being recorded by the public during dangerous encounters, and perhaps having the recording be misrepresented by the media, a number of police officers now fear routine encounters with the public.<sup>11</sup> Since there are competing and compelling arguments on both sides, many law enforcement agencies across the country have implemented police body-camera programs in the hopes of not only providing police officers with a safety net during dangerous encounters, but to also prevent police brutality against individuals.<sup>12</sup>

First, this Note will outline the legislative history of the Freedom of Information Act (“FOIA”), and how it has been amended over the years in order to properly balance the public’s interest in obtaining records from Federal agencies versus national security and privacy interests.<sup>13</sup> Second, this Note will discuss the role and history of major news outlets in regards to their coverage of serious crimes. Third, this Note will illustrate how the Fourth Amendment of the United States Constitution has been applied to an individual’s encounter with law enforcement.<sup>14</sup> Fourth, this Note will further discuss how advancements in technology have allowed individuals to use their cell phones to record encounters with law enforcement, and

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(suggesting that there are no reliable statistics on how many times a police officer killed someone in the line of duty). McLaughlin rather urges that the headlines sensationalized an unprecedented wave of police violence when such isn’t in fact the case. *Id.*; see also Andrea Noble, *Police Fear ‘YouTube Effect’ Affecting Work, Contributing To Rise In Violent Crime*, WASH. TIMES (Oct. 25, 2015), archived at <https://perma.cc/8L2F-KYJ4> (emphasizing that video recordings of police officers’ interactions with the public are being used to show the encounters in a negative light, and therefore creating a “YouTube effect”).

<sup>11</sup> See Noble, *supra* note 10, at 1 (highlighting the interplay between smartphones and police encounters). Noble suggests that smartphones, in conjunction with the increased use of social media, have given the public the ability to capture videos of police encounters and post them online. *Id.* However, such recordings may misrepresent the entirety of the exchange. *Id.* Lt. Gary Vickers of the Newark, New Jersey Police Department stated, “[cellphones have] given rise to the fear among law enforcement of ‘death by media.’” *Id.*

<sup>12</sup> See J. Weston Phippen, *Funding for Body Cameras*, ATLANTIC (Sept. 26, 2016), archived at <https://perma.cc/DJ9QB9JA> (recognizing the U.S. Department of Justice’s award of over \$20 million in funding to about 100 police departments). After several fatalities resulting from police shootings, the funding was an effort to restore the public’s trust in law enforcement by providing body-cameras to officers. *Id.*

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part II.

how such recordings are gathered by major news outlets and portrayed to the greater community.<sup>15</sup> The facts section of this Note will discuss how law enforcements across the country have received government funding to establish police body-camera programs.<sup>16</sup> Next, the facts section will examine the high-profile cases that led to the movement of law enforcement departments to utilize police body-cameras when conducting their duties in public.<sup>17</sup> The analysis section of this Note will examine how there could be possible civil claims, 42 U.S.C. § 1983, that may arise from the use of police body-cameras and public disclosure of these recordings by the media.<sup>18</sup> Additionally, the analysis section will further examine potential criminal violations that may arise from the use of police body-cameras by law enforcement when conducting warrant searches.<sup>19</sup> Finally, this Note will conclude that video recordings broadcasted by major news outlets should not be utilized in 42 U.S.C. § 1983 claims unless the footage shows the actual circumstances that preceded the deadly police encounter.<sup>20</sup>

## II. History

### A. *The Freedom of Information Act*

In 1967, Congress enacted the Freedom of Information Act (“FOIA”)<sup>21</sup> in an effort to provide the public with access to records from any Federal agency.<sup>22</sup> The FOIA requires Federal agencies to

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<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> See *Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings*, 5 U.S.C. § 552 (1967) (explaining the type of documents and information that Federal agencies must provide to individuals upon their requests for such records).

<sup>22</sup> See U.S. Dep’t of Justice, *What is FOIA?*, FOIA.GOV (Aug. 27, 2018), archived at <https://perma.cc/KNV5-DE86> (setting forth the main purpose of the Freedom of Information Act). The FOIA is often described as a law that keeps US citizens informed about the Federal agencies’ actions and role in society. *Id.*; see also Lonnie

disclose any information requested by citizens unless it falls under one of the nine exemptions created by the statute.<sup>23</sup> Courts liberally construe the FOIA statute in favor of disclosure of information to the public, while the statute has been construed narrowly in regards to its exemptions.<sup>24</sup> The original enactment of the FOIA was established by President Lyndon Johnson, who attempted to undercut the statute by primarily focusing on exemptions for national security and establishing a narrow interpretation of the statute.<sup>25</sup> Almost ten years after the enactment of FOIA, the statute was amended in the wake of the Watergate scandal, in which the House of Representatives focused on strengthening the administration of the statute rather than substantive changes to the exemptions.<sup>26</sup> The amendment required “public disclosure of agency information, timeframes for agency action on FOIA requests, appeals and litigation, recovery of reasonable attorney fees and costs, annual reporting on administration of the FOIA, and an expanded definition of an agency.”<sup>27</sup> The FOIA was

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E. Griffith, Jr., *Construction and Application of Exemption 7(E) of Freedom of Information Act (“FOIA”)*, 70 A.L.R. FED. 2d 493, 494 (2012) (emphasizing that FOIA was enacted to ensure that citizens were continuously informed, which is a basic principle of a democratic society, to have legislation check against corruption, and to hold governmental officials accountable).

<sup>23</sup> See U.S. Dep’t of Justice, *supra* note 22 (noting that individuals may obtain records from Federal agencies unless obtaining such records would be detrimental to personal privacy, national security, and law enforcement).

<sup>24</sup> See Griffith Jr., *supra* note 22, at 494 (pointing out that the statute places the burden on the Federal agency challenging the request to disclose certain records). The exemptions have been construed to the literal language as stated in the statute. *Id.*

<sup>25</sup> See The Nat’l Sec. Archive, *FOIA Legislative History*, THE NAT’L SECURITY ARCH. (Aug. 27, 2018), *archived at* <https://perma.cc/YS4U-4THP> (indicating that there was strong opposition in the enactment of the FOIA, and that it was intended to be applied strictly and narrowly in favor of Federal agencies); *see also* Electronic Frontier Foundation, *History of FOIA*, ELECTRONIC FRONTIER FOUND. (Aug. 27, 2018), *archived at* <https://perma.cc/N5JP-AJ75> (emphasizing that the enactment of FOIA was of major concern to members of Congress and the government).

<sup>26</sup> See The Nat’l Sec. Archive, *supra* note 25 (reiterating that the Watergate scandal involved top administration officials, and that controversy arose over access to President Nixon’s White House tape recordings). The aftermath of the Watergate scandal gave momentum to advocates of the FOIA. See The Nat’l Sec. Archive, *Veto Battle 30 Years Ago Set Freedom of Information Norms*, THE NAT’L SECURITY ARCHIVE (Nov. 23, 2004), *archived at* <https://perma.cc/8JEH-A3NB> (crediting the Watergate scandal for the movement towards amending the FOIA).

<sup>27</sup> See The Nat’l Sec. Archive, *Veto Battle 30 Years Ago Set Freedom of Information Norms*, THE NATIONAL SECURITY ARCHIVE (Nov. 23, 2004), *archived at*

further amended in 1976 as part of the Government in the Sunshine Act, and was additionally amended in 1986 through the Anti-Drug Abuse Act.<sup>28</sup> As part of the Government in the Sunshine Act of 1976, any meeting involving a quorum of board or commission members must be placed on the Federal Register within seven days, and members of the public must be able to attend such meeting.<sup>29</sup> The 1986 Anti-Drug Abuse Act amended the FOIA by broadening the exemptions for access to law enforcement records, specifically any information relating to investigations.<sup>30</sup> Additionally, President Ronald Reagan issued an executive order granting Federal agencies discretion to withhold information on the basis of preserving national security.<sup>31</sup>

Although many of the amendments and executive orders sought to restrict the public's access to government records, many of these tight restrictions were later reversed.<sup>32</sup> In 1995, President Bill Clinton set forth criteria that allowed a high number of public records that were more than twenty-five years old and of "permanent historical

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<https://perma.cc/8JEH-A3NB> (listing the factors that the House of Representatives focused on in amending the FOIA).

<sup>28</sup> See The Nat'l Sec. Archive, *supra* note 25 (noting that exemption 3 of the FOIA was amended); see also Electronic Frontier Foundation, *supra* note 25 (pointing out that the government amended FOIA to clarify terms and exemptions).

<sup>29</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, AMMO (Aug. 27, 2018), archived at <https://perma.cc/WK5Q-BM7U> (acknowledging that during the 1970s, most decision-making in the government occurred behind closed doors, in which members of the public were left uninformed as to the decision-making process and rationale).

<sup>30</sup> See *id.* (addressing the constant struggle of drug addiction and abuse in America that forced the government to tighten mandatory sentencing guidelines, which created a stronger interest for the public to gather information on such sentencing).

<sup>31</sup> See *id.* (reiterating that the classification and handling of sensitive information pertaining to the government was of major concern for the President). "If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified." *Id.* "If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification." *Id.*

"Information may be classified or reclassified after an agency has received a request for it." *Id.*; see also Electronic Frontier Foundation, *supra* note 25 (noting that the executive order about withholding potentially sensitive government information made it much easier to restrict the public's access to such records).

<sup>32</sup> See Electronic Frontier Foundation, *supra* note 25 (acknowledging that many of President Reagan's tight restrictions from his executive order were reversed or loosened in favor of the public).

value” to be declassified.<sup>33</sup> President Clinton then signed into law the Electronic Freedom of Information Act Amendments,<sup>34</sup> which were established recognizing that new technologies, specifically the internet, merited greater transparency in access to classified documents.<sup>35</sup> The Electronic Freedom of Information Act specifically mandated the sharing of Federal agency information through webpages and reading rooms.<sup>36</sup> However, the September 11, 2001 terrorist attacks forced President Bush’s administration to restrict public disclosure of government information.<sup>37</sup> Attorney General John Ashcroft introduced memoranda that encouraged the protection of national security, sensitive business information and personal privacy.<sup>38</sup> A major concern for Attorney General John Ashcroft was the high volume of information available to the public, and the increasing reach of the internet to reach individuals far beyond the U.S. domestic control, which was viewed as a major vulnerability in the wake of 9/11.<sup>39</sup>

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<sup>33</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (quoting Clinton’s executive order that stated: “If there is significant doubt about the need to classify information, it shall not be classified.”); see also Electronic Frontier Foundation, *supra* note 25 (pointing to President Clinton releasing many classified documents from the Cold War era for historical and archival purposes).

<sup>34</sup> See 5 U.S.C. § 552 (setting forth statute defining “Public Information”).

<sup>35</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (suggesting that these amendments by President Bill Clinton sought to bring Federal agencies into the electronic age and make information readily accessible to the public); see also Electronic Frontier Foundation, *supra* note 25 (indicating that the development of technology in the 1990s created a greater demand by the public for accessing information such as government documents).

<sup>36</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (observing that the Electronic Freedom of Information Act would allow access to government-provided documents from any location through the Internet, which would substantially reduce the number of requests by the public for information and create greater transparency).

<sup>37</sup> See Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 272 (2003) (discussing the new FOIA policy memorandum, which is referred to as the “Ashcroft Memorandum”).

<sup>38</sup> See *id.* (emphasizing that FOIA was not immune to restricting government documents in the wake of 9/11).

<sup>39</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (observing that under President Bush’s administration, a number of actions were performed to make the FOIA statute have more restrictive limits in regards to disclosure of government documents). Executive Order 13233 restricted

As national security progressed in the years following 9/11, President Bush decided to enact into law the OPEN Government Act of 2007.<sup>40</sup> One of the changes established by the OPEN Government Act of 2007 was that it extended prominent services to journalists and bloggers, defining them as members of the news media.<sup>41</sup> President Barack Obama further loosened the restrictions of the FOIA by signing the FOIA Improvement Act,<sup>42</sup> which required that Federal agencies make documents and information available to individuals, journalists and the news media in electronic formats.<sup>43</sup> Today, the FOIA allows

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the public's access to presidential records. *Id.* The order stated, "that a president's constitutional privileges 'subsume' privileges for records reflecting 'military, diplomatic, or national security secrets . . . communications of the President or his advisors . . . legal advice or legal work . . . and the deliberative processes of the President or his advisors.'" *Id.* Additionally, Congress passed the Intelligence Authorization Act for Fiscal Year 2003, which prohibited foreign access to intelligence community agency records. *Id.* In 2003, President Bush issued an executive order that established old precedent that when in doubt about whether the public should have access to government records, it shall be more difficult for such documents to be disclosed to the public. *Id.*

<sup>40</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (recognizing that the OPEN Government Act's centralized mission was to loosen the restrictions made by executive orders prior to the enactment of this act). The first sentence of the proposed act identified it as "an act to promote accessibility, accountability, and openness in Government by strengthening the Freedom of Information Act"); see also H.R. 2488, 110th Cong. (1st Sess. 2007) (stating the purpose of H.R. 2488 as promoting "accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act)"). Further, "the Freedom of Information Act establishes a 'strong presumption in favor of disclosure' as noted by the United States Supreme Court . . . a presumption that applies to all agencies governed by that Act." *Id.* Additionally, it has been noted that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act." *Id.*

<sup>41</sup> See Electronic Frontier Foundation, *supra* note 25 (noting that journalists and the news media have easier and cheaper access to government records).

<sup>42</sup> See Electronic Frontier Foundation, *supra* note 25 (pointing out that the FOIA Improvement Act specifically limited a Federal agencies' discretion to withhold records under the FOIA). The FOIA Improvement Act also required Federal agencies to establish a centralized online portal that would allow any individual to file a request with any government agency for documents. *Id.*

<sup>43</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (indicating that Federal agencies must disclose information to the public under the FOIA unless disclosure might harm a protected interest, such as national security).



any individual to request information from any Federal agency for any reason whatsoever.<sup>44</sup>

*B. News Outlets and Their Role in Broadcasting Police-Citizen Encounters*

The news media's prominent reliance upon pre-trial publicity in regards to law enforcement and citizen encounters has been prevalent since the 19<sup>th</sup> century.<sup>45</sup> It has been argued that the mixture of organizational structures, norms and influences in society has had and continues to have a significant impact on the newsgathering and framing processes that are cultivated by news outlets.<sup>46</sup> A major source of headlines for news outlets has typically been from law enforcement departments and courts, specifically from prosecutors and police officers within the system.<sup>47</sup> When it comes to deciding which crimes to forecast on national television, major news outlets look for incidents that are considered to be dramatic, so that the story catches the attention of views.<sup>48</sup> Research suggests that there is a correlation

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<sup>44</sup> See *U.S. Dept. of Justice v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989) (concluding that "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document]'", *quoting*, *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975)). The Court further concluded that the identity of the requesting party and the reasoning for the request of documents has no bearing on forbidding disclosure. *United States DOJ*, 489 U.S. at 771; *see also Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (making it known that any U.S. citizen, university, corporation, and organization can request any documents that a Federal agency may still possess).

<sup>45</sup> See Bryan Adamson, *Reconsidering Pretrial Media Publicity: Racialized Crime News, Grand Juries and Tamir Rice*, 8 ALA. C.R. & C.L. L. REV. 1, 22-23 (2017) (describing empirical pretrial publicity research that was conducted initially in the 1970s). The first studies consisted of work done by researchers Dorothy Imrich, Charles Mullin and Daniel Linz and how the study focused on news portraying high volumes of high-profile crimes and how such headlines could be biasing. *Id.* at 22. The second study conducted suggested that emotionally resonant information by the news, which may be unrelated to the core criminal issues or subjects, had somewhat of an affective impact on the views of the crime. *Id.* at 23.

<sup>46</sup> See *id.* at 29 (concluding that news outlets have a particularly strong interest in crime news with the belief that audiences of such news outlets are mainly interested in such headlines).

<sup>47</sup> See *id.* at 29-30 (indicating that media outlets rely heavily upon policing agencies and court systems for the collection of news about crimes that have occurred).

<sup>48</sup> See Alice Courtauld, *How the media controls our perceptions of crime*, SHOUT OUT UK (Aug. 11, 2014), *archived at* <https://perma.cc/95UJ-J2ZA> (suggesting that

between the public's fear of crime and the media's portrayal of such crimes.<sup>49</sup>

Major news outlets have significantly increased the coverage of crimes in their newscasts beginning in the 1990's, in which networks aired an average of 557 crime stories per year.<sup>50</sup> When looking at a more extensive study of the major news outlets from 1997, explicit crime stories received more publicity than public policy stories.<sup>51</sup> Major news outlets prefer broadcasting traumatic and explicit crime stories over other material because news outlets face economic pressures to drive their viewership up on a regular basis.<sup>52</sup> By focusing on sensational crime stories' investigations and trials, major news outlets are given the opportunity to provide prolonged and detailed coverage, which allows outlets to develop suspense and

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news events must be considered "significant or dramatic enough" to be shown by major news outlets). For example, crimes become newsworthy when the stories can be presented by the news outlets in a manner that appears random and unpredictable enough that a panic sets into the audience's mind. *Id.*

<sup>49</sup> See *id.* (explaining how the findings of Gerbner's research found that heavy users of television had higher levels of fear of crime than individuals who watched less television). Furthermore, Gerbner's research found that some of the media news outlets tend to exaggerate the extent of violent crimes that occur. *Id.* For example, the study points to "red top" newspapers that exploit the possibilities for good stories by dramatizing, exaggerating and over-reporting certain crimes out of proportion just to generate higher ratings and attract more viewers. *Id.*

<sup>50</sup> See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 W.M. & MARY L. REV. 397, 422-23 (2006) (depicting how although crime rates have fallen, major news outlets continue to dramatically increase the showing of crimes in their headlines). Specifically, in 1995, major news outlets broadcasted 2,574 crimes stories. *Id.* When looking at the remainder of the decade, the major news outlets broadcasted an average of 1,613 crime stories per year. *Id.*

<sup>51</sup> See *id.* at 423-24 (describing statistics of how major news outlets prefer to broadcast tabloid crimes stories than other non-crime stories). For example, the study suggests that there were eighty-six news stories on JonBenet Ramsay's murder investigation compared to that of only nineteen stories on campaign finance reform and thirty-five stories on the health care system. *Id.* Additionally, the O.J. Simpson trial was covered on average of ninety segments compared to non-crime stories. *Id.* at 424.

<sup>52</sup> See *id.* at 423-24 (pointing out the environment that presently puts pressure on major news outlets to focus their coverage on tabloid crime news over other non-crime news). The major news outlets have acknowledged that competition from rival outlets are forcing one another to find new ways to attract and keep viewers. *Id.* at 426.

interest in crime cases that are of high interest to viewers.<sup>53</sup> Major news outlets strongly place emphasis on “filmic” crime stories, which have discrete and dramatic elements to them along with visual incidents between individuals.<sup>54</sup> Furthermore, major news outlets can portray “subconscious stereotypes” when reporting different crime stories, to which they can cater to the stereotypes of their audiences.<sup>55</sup>

### C. Police Body-Cameras and the Fourth Amendment

The Fourth Amendment of the United States Constitution protects individual’s right of privacy from unwarranted and arbitrary intrusions into their everyday privacy.<sup>56</sup> In *Wilson v. Layne*<sup>57</sup>, the Supreme Court of the United States held that it was a violation of the Fourth Amendment for law enforcement to bring members of the media or other third parties into an individual’s home during the execution of a warrant.<sup>58</sup> However, due to the ability to conduct video recordings on cell phones, a number of circuit and district courts have held that individuals and law enforcement officers have the right to

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<sup>53</sup> See *id.* at 427 (acknowledging that as most serious crime cases last for weeks, months, or even years, such stories become prominent national headlines).

<sup>54</sup> See Sara Sun Beale, *supra* note 50 at 429 (indicating that the coverage of the investigation and trials of violent crimes have dramatic elements and news outlets portray the explicit details of the crime itself).

<sup>55</sup> See Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447, 1525 (2003) (noting that major news outlets may use images, pictures and stories with racial material to which their viewers will notice and will create stronger emotional responses to a crime story). Major news outlets depictions of crimes do not reflect the actual rates of crime generally. *Id.* at 1529-30. The news outlets tend to over report on the rarest types of crimes. *Id.* at 1530.

<sup>56</sup> See U.S. CONST. Amend. IV (stating that individuals are protected from unreasonable searches and seizures of property by the government). “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

<sup>57</sup> See *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (analyzing an objective inquiry as to whether a reasonable officer would believe that bringing the media into the home would be lawful when executing a search warrant).

<sup>58</sup> See *id.* (concluding that when the presence of third parties does not aid in the execution of a warrant, the third party’s presence violates an individual’s Fourth Amendment right).

record public encounters with one another.<sup>59</sup> Additionally, over the past several years, there has been an increase in public concern over police-citizen interactions, which has led to many communities beginning to incorporate and implement policies regarding the use of police body-cameras.<sup>60</sup> There currently are proposed pieces of legislation that are seeking to establish a national grant program to provide law enforcement with police body-cameras and to utilize the devices at all times.<sup>61</sup>

Police body-cameras are small video/audio devices worn by police officers that offer several advantages in terms of enhancing the quality of interactions between law enforcement and individuals.<sup>62</sup> Advocates for police body-cameras believe that implementing such policies will increase transparency and accountability for police, reduce police use of violence and complaints of police misconduct, provide protection for officers and individuals and improve evidence-gathering and case-processing.<sup>63</sup> However, the reason that most states have not fully implemented police body-cameras is due to the high financial costs, policy development issues and concerns over citizen

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<sup>59</sup> See *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (holding that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts); see also *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that the First Amendment protects an individual's right to record what law enforcement does out in public); see also *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (concluding that a First Amendment right to film matters of public interest exists); see also *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94 (Mass. Dist. Ct. 2002) (holding that the filming of a public official on a street outside his home by contributors to public access cable show was protected by the First Amendment).

<sup>60</sup> See *People v. Kosowski*, No. 27065, slip op. 475, 476 (N.Y.S. Mar. 3, 2017) (discussing the primary rationale for law enforcement to utilize police body-cameras).

<sup>61</sup> See Camera Accountability Maintenance and Transparency in Policing Act of 2017, H.R. 124, 115th Cong. (2017) (proposing a bill to establish a grant program providing for the acquisition, operation, and maintenance of police body-cameras).

<sup>62</sup> See Jonathan M. Birds & William H. Sousa, *Police Use of Body Cameras*, OXFORD HANDBOOKS ONLINE SCHOLARLY RES. REV. (Dec. 2016), archived at <https://perma.cc/D876-8BZ6> (discussing how interactions amongst police and individuals can improve and lead to less dangerous encounters).

<sup>63</sup> See Birds & Sousa, *supra* note 62 (listing the advantages for both police officers and individuals when it comes to implementing body-cameras in law enforcement departments).

privacy that come with using such devices in everyday interactions.<sup>64</sup> Current statistics show that only one-third of the 18,000 police departments in the United States are utilizing police body-cameras.<sup>65</sup>

*D. Civil Action for Deprivation of Rights and Qualified Immunity*

An individual may seek to recover damages or obtain other relief under 42 U.S.C. § 1983 when he or she has been subjected to mistreatment or deprived of her civil rights by a police officer, sheriff or other peace officer.<sup>66</sup> Under the Civil Rights Act of 1871 (42 U.S.C. § 1983), a police officer, acting under color of law, is liable when he deprives some person of his constitutional rights, privileges or immunities.<sup>67</sup> In civil rights lawsuits filed pursuant to 42 U.S.C. §

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<sup>64</sup> See Birds & Sousa, *supra* note 62 (listing the disadvantages of implementing police body-cameras and why most states don't require such devices in their law enforcement departments).

<sup>65</sup> See Katie Delong & CNN Wire Service, *One-Third of United States Police Departments Using Body-Cameras: They're Expensive, So Are They Worth It?*, FOX 6 NOW NEWS (Mar. 2, 2015), archived at <https://perma.cc/JSB7-2CQN> (suggesting that one reason why only one-third of police departments utilize police body-cameras is due to the Federal government possibly requiring police departments that receive Federal money to report all of its officer involved shooting data). Smaller police departments do not receive any Federal grants that would allow them to implement the use of police body-cameras. *Id.*

<sup>66</sup> See Ann Fagan Ginger & Louis H. Bell, *Police Misconduct Litigation-Plaintiff's Remedies*, 15 AM. JURIS. TRIALS 555 (2017) (discussing how individuals seek civil relief against police officers for any civil rights violations).

<sup>67</sup> See *id.* (laying out the basic interpretation of 42 U.S.C. § 1983); see also 42 U.S.C. § 1983 (1871) (depicting the actual language of the statute).

Every person, who, under color of any statute, ordinance, regulation, custom, or usage . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*; see also John Breads, *When Police Officers Are Sued An Overview of Police Misconduct Litigation in Maryland*, LOC. GOV'T INS. TR. (Jan. 11, 2018), archived at <https://perma.cc/5JRG-MZNH> (detailing the elements necessary to successfully establish a 42 U.S.C. § 1983 claim). The first element is known as the state action requirement, in which the plaintiff must prove that the police officer acted with the

1983, police officers that are defendants assert the qualified immunity defense before trial by filing a motion for dismissal through summary judgment.<sup>68</sup> In order for police officers to successfully raise the qualified immunity defense, the trial judge usually must find, with some exceptions, that the police officer didn't violate the plaintiff's constitutional rights, and even if a constitutional right was violated, the law must have been clearly established on the conduct in question.<sup>69</sup>

42 U.S.C. § 1983 is the primary statutory vehicle for victims of police misconduct or brutality in violation of their civil rights to rely upon and seek relief.<sup>70</sup> This statute was enacted as part of the Civil Rights Act of 1871, with the mission of eliminating oppressive conduct by the government and private individuals participating in vigilante groups.<sup>71</sup> Private individuals often utilize 42 U.S.C. § 1983 when they believe police falsely arrested them.<sup>72</sup> Another use of 42 U.S.C. §

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appearance of legal power, even though the plaintiff's conduct may have violated the law. *Id.* An example is when a police officer has made an arrest, which he or she has the right to do, but lacked probable cause to do so in that instance. *Id.* Most commonly, police officers are sued for alleged violations of the Fourth Amendment, the Fourteenth Amendment and the First Amendment. *Id.*

<sup>68</sup> See Mike Callahan, *The Extraordinary Value of Dash Cam Evidence in Police Civil Rights Litigation*, POLICEONE.COM (Oct. 4, 2017), archived at <https://perma.cc/UHU6-9E9D> (indicating that police officers almost always raise the qualified immunity defense against a plaintiff's 42 U.S.C. § 1983 claim).

<sup>69</sup> See *id.* (noting that the goal of the qualified immunity defense is to obtain an early dismissal of the lawsuit to avoid discovery and trial). When material facts are in dispute, the trial judge is required to adopt the plaintiff's version of the facts when deciding on the qualified immunity defense. *Id.* The Supreme Court in *Scott v. Harris* created an exception to the judge adopting the plaintiff's version of the disputed material facts, in which the Court determined that dash cam video evidence clearly contradicted the plaintiff's version of what happened in the pursuit. *Id.* The plaintiff stated he was driving carefully while the dash came video completely contradicted the plaintiff's version of facts. *Id.* The Court noted that lower courts must make use of reliable video evidence when resolving qualified immunity claims by police officers. *Id.*

<sup>70</sup> See *Police Misconduct and Civil Rights*, FINDLAW (Jan. 14, 2018), archived at <https://perma.cc/3CU6-XHBX> (describing how the Constitution and other laws place limits on how far police officers can go in trying to enforce laws on public citizens).

<sup>71</sup> See *id.* (acknowledging the reasoning behind the statute being enacted). The statute is now referred to as Section 1983 because that is where the law has been published. *Id.*

<sup>72</sup> See *id.* (pointing out that individuals bringing this claim assert that the police officer had violated his or her Fourth Amendment right). The individual is asserting that the police officer did not have probable cause to believe that the individual had

1983 by private individuals is in regards to excessive force by police officers, which most often deals with serious physical injury or death to the individual.<sup>73</sup> Additionally, individuals utilize 42 U.S.C. § 1983 in regards to police officers failing to intervene to prevent fellow police officers from violating a constitutional right of the individual.<sup>74</sup>

A landmark case involving the 42 U.S.C. § 1983 statute is *Monell v. Department of Social Services of the City of New York*.<sup>75</sup> The Court assigned liability to local governments for constitutional violations by their employees, such as police officers.<sup>76</sup> However, in 1997, the Supreme Court of the United States in *Commissioners of Bryan County v. Brown*,<sup>77</sup> set boundaries for which a municipality is liable for the actions of their employees, such as police officers.<sup>78</sup> The Supreme Court of the United States determined that municipalities are liable for the hiring of police officers, who have a history of criminal offenses indicating violent behavior, and who then went on to use excessive force against an individual.<sup>79</sup> Recently, there have been

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committed a crime and that the arrest was therefore unreasonable. *Id.* If the information that the police officer relied upon is determined to be false, the police officer is still not liable if the information was accurate at the time of the arrest. *Id.* <sup>73</sup> See *id.* (noting that excessive force claims receive the most publicity, which can be seen on several different news outlets on television and online). Whether the police officer's use of force was reasonable or not depends on the surrounding circumstances. *Id.*

<sup>74</sup> See *Police Misconduct and Civil Rights*, *supra* note 70 (pointing out that an officer who witnesses a fellow officer violating an individual's constitutional rights can be liable to the individual for failing to intervene with the fellow police officer).

<sup>75</sup> See *Monell v. Dep't of Soc. Serv. of N.Y.C.*, 436 U.S. 658, 661 (1978) (asserting injunctive relief and back pay for periods of unlawful, forced maternity leave).

<sup>76</sup> See *id.* at 690-91 (holding that local governments are liable for constitutional deprivations); see also *Shielded From Justice: Police Brutality and Accountability in the United States*, HUM. RTS. WATCH (Jan. 14, 2018), archived at <https://perma.cc/3H55-H9GH> (indicating the purposes for which the statute was enacted to fulfill).

<sup>77</sup> See *Commissioners of Bryan County v. Brown*, 520 U.S. 397, 415 (1997) ("Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.").

<sup>78</sup> See *id.* at 417 (discussing that Supreme Court set boundaries for municipality liability after the *Monell v. Department of Social Services of the City of New York* decision).

<sup>79</sup> See *id.* (discussing the limits of how an individual may use a 42 U.S.C. § 1983 claim against a municipality). The Supreme Court held that an individual must show that the municipality consciously disregarded the risk of hiring the police officer and that the injuries suffered by the individual were a "plainly obvious consequence" of the municipalities hiring of the police officer. *Id.* at 421.

prominent examples of police brutality all over the news, which involved civil rights violations all caught on camera, which has led to individuals raising 42 U.S.C. § 1983 claims.<sup>80</sup>

### III. Facts

In the past several years, a number of U.S. Circuit Courts have ruled that citizens have the right to record police encounters in public,<sup>81</sup> and that their recordings are protected by his or her First Amendment right.<sup>82</sup> In *Glik v. Cunniffe*,<sup>83</sup> the First Circuit Court held that it is well established that a citizen's right to film government officials, including law enforcement officers performing their duties in public, is a basic and vital liberty protected by the First Amendment.<sup>84</sup> In *Fields v. City of Philadelphia*,<sup>85</sup> the Third Circuit Court of Appeals held that the First Amendment applied to individuals who use their smartphones to record police interactions with a third party.<sup>86</sup> In

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<sup>80</sup> See *Civil Rights and Police Misconduct*, KECHES L. GROUP (Jan. 14, 2018), archived at <https://perma.cc/8KBY-Y7M8> (acknowledging that police brutality cases vary significantly and it can be challenging for courts to make a decision on liability or guilt).

<sup>81</sup> See Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK L. REV. 981, 986 (2009) (noting that several courts have held that an individual has the First Amendment right to document public officials, such as police officers in the performance of their duties).

<sup>82</sup> See U.S. CONST. Amend. I. ("The First Amendment guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely.").

<sup>83</sup> See *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (noting that a citizen's right to film government officials is a "basic, vital, and well-established liberty safeguarded by the First Amendment").

<sup>84</sup> See *id.* at 85 (holding that a citizen's right to record police officers is not absolute, but the right to record is protected by the First Amendment). The plaintiff was arrested for using his cell phone's digital video camera to film several police officers arresting a young man on the Boston Common. *Id.* at 79. The court held based on these facts that the plaintiff was exercising clearly-established First Amendment rights in filming the officers in a public space. *Id.*

<sup>85</sup> See *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 531 (E.D. Pa. 2016) (opining as to the First Amendment scope for individuals who use their smartphones to record police interactions).

<sup>86</sup> See *id.* at 528-31 (stating that Philadelphia police officers violated citizens' right to record under the First Amendment when the citizens were arrested); See Matt Ford, *A Major Victory for the Rights to Record Police*, THE ATLANTIC (Jul. 7, 2017), archived at <https://perma.cc/7S4G-Z6WC> (emphasizing how Judge Thomas Ambro



addition to these circuit court cases, there have been a number of instances involving police officers ordering individuals to turn off their cameras when the owners of such devices were attempting to capture footage of the police officers.<sup>87</sup> However, a number of individuals do not realize that as long as they are not disrupting the duties of the police officer, they have a right under the First Amendment to record police officers.<sup>88</sup>

Due to the advancements of cell phone capabilities and the popularity of different social media and video streaming platforms, there has been an increase in public awareness of police misconduct and interactions with individuals.<sup>89</sup> The first prominent police encounter caught on footage and released to the public involved Rodney King.<sup>90</sup> The graphic recording depicting the violent police

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noted that the right to record police officers is vital to promote the free discussion of governmental actions). The First Amendment requires police officers to bear bystanders recording them carrying out their public duties. *Id.* In *Fields v. City of Philadelphia*, the first plaintiff, a member of a local police-watchdog group, was filming police officers arresting a protester during an anti-fracking demonstration in the city. *Id.* The second plaintiff used his iPhone to film police officers breaking up a house party across the street. *Id.*

<sup>87</sup> See Saki Knafo & Carly Schwartz, *It's Perfectly Legal To Film The Cops*, HUFFINGTON POST (Dec. 6, 2017), archived at <https://perma.cc/RX2E-SANK> (acknowledging that there are instances in which individuals are either arrested for or are ordered to stop recording police officers in public).

<sup>88</sup> See *id.* (noting that if individuals do not get in the way of police officers performing their duties in public, it is perfectly legal to take photos and videos of the police officers). Intentional interference such as blocking or obstructing cameras or ordering an individual to cease recording constitutes censorship and violated the First Amendment. *Id.*

<sup>89</sup> See Peter Dreier, *Caught on Camera: Police Racism*, HUFFINGTON POST (Dec. 6, 2017), archived at <https://perma.cc/EYE3-YRKL> (stating that due to technological advancements in regards to recording and posting footage online, some may believe there is a growing wave of police abuse towards individuals). The author opines that there has been no sudden increase of racial profiling, arrests, and beatings of individuals by police officers. *Id.* Rather, individuals have become more aware of police encounters because more incidents of police abuse are being captured by cameras and broadcasted by the media. *Id.*

<sup>90</sup> See Anjuli Sastry & Karen Bates, *When LA Erupted In Anger: A Look Back At The Rodney King Riots*, NPR (Apr. 26, 2017), archived at <https://perma.cc/J7KB-5H8M> (describing the incident involving Rodney King and police officers in Los Angeles). Rodney King was involved in a high-speed police chase through Los Angeles, and when police finally stopped him, Rodney King was ordered out of the car. *Id.* The Los Angeles police officers then kicked Rodney King repeatedly and beat him with batons for a reported fifteen minutes. *Id.* The recorded video showed more than a dozen police officers standing by, watching and commenting on the beating of

brutality towards Rodney King was broadcasted into homes across the nation and worldwide.<sup>91</sup> In more recent years, there have been over ten high-profile police shootings involving individuals that were caught on camera and broadcasted by the media.<sup>92</sup> In July 2016, a Minnesota police officer pulled over Philando Castile and radioed to a colleague that he believed Mr. Castile matched the description of a robbery suspect.<sup>93</sup> As the police officer approached Mr. Castile's vehicle, a series of events occurred that eventually led to police officers fatally shooting Mr. Castile.<sup>94</sup> Although the result of this encounter was recorded on the passenger's cell phone, the recording does not show the entire series of events leading to the shooting.<sup>95</sup> Like the Rodney King encounter, the footage of Mr. Castile's shooting quickly spread throughout the media, which prompted responses from

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Rodney King. *Id.* Rodney King's injuries resulted in skull fractures, broken bones and teeth, and permanent brain damage. *Id.*

<sup>91</sup> See *id.* (commenting on the protests that occurred by residents across the country after the footage was released by the media of the police encounter). Residents set fires, looted and destroyed liquor stores, grocery stores, retail shops and fast food restaurants. *Id.*

<sup>92</sup> See The Associated Press, *10 High-Profile Police Shootings of Black Men*, THE TIMES-PICAYUNE (July 7, 2016), archived at <https://perma.cc/WG9U-6WNR> (outlining the shooting deaths of individuals by law enforcement officers that have made headlines nationwide).

<sup>93</sup> See Mitch Smith, *Video of Police Killing of Philando Castile is Publicly Released*, N.Y. TIMES (June 20, 2017), archived at <https://perma.cc/U968-YBE4> (describing the encounter that led to the fatal shooting of Philando Castile by a Minnesota police officer).

<sup>94</sup> See *id.* (describing the events shown on the cell phone recording by the passenger that led to the fatal shooting of Philando Castile). As the police officer walked up to Mr. Castile's window, he told Mr. Castile that his brake light was broken. *Id.* The officer then asks for proof of insurance and a driver's license. *Id.* Mr. Castile responds and hands his insurance card through the window. *Id.* Mr. Castile, who had a permit to carry a gun, told the police officer that he had a firearm on him. *Id.* The police officer told Mr. Castile not to reach for the gun. *Id.* Mr. Castile began to answer the police officer, but was cut off by the police officer who began to shout, "[d]on't pull it out!". *Id.* Mr. Castile responded that he was not pulling it out, but the police officer continued to yell, "[d]on't pull it out!". *Id.* The police officer then fired seven shots, fatally wounding Mr. Castile. *Id.*

<sup>95</sup> See *id.* (cautioning that the recording released by the media does not show images that might have been essential for jurors to determine the guilt of the police officer). For example, the recording does not show a full view of the front seat of Mr. Castile's vehicle, which would have showed where his hands were and what he was reaching for just before the shooting took place. *Id.*

protestors across the country, calling the shooting unreasonable and evidence of racism in law enforcement agencies.<sup>96</sup>

A day before the fatal shooting of Philando Castile, thirty-seven-year-old Alton Sterling was shot and killed during a confrontation with two police officers outside a Baton Rouge, Louisiana convenience store.<sup>97</sup> A cell phone recording released by the media showed Sterling seemingly incapacitated on the ground when one police officer yelled, “He’s got a gun!” which led to the other police officer drawing his gun into Sterling’s chest and shooting him.<sup>98</sup> Similar to the Castile recording, the cell phone recording does not show exactly what may have potentially given the police officer reason to use deadly force against Sterling.<sup>99</sup> Once again, the released recording by the media led to protests by community activists that set off violent protests across the country.<sup>100</sup>

There have also been cases depicted by the media involving police encounters with individuals that were not caught on camera, but still had the same negative effect on law enforcement agencies as if there were videos depicting the deadly police encounter.<sup>101</sup> For example, there have been debates on the details of the police encounter with Michael Brown, which resulted in the 18 year old being fatally

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<sup>96</sup> See Mitch Smith, *supra* note 93 (explaining the responses on social media calling for protest against law enforcements across the country).

<sup>97</sup> See The Associated Press, *supra* note 92 (examining the context of the police encounter involving Alton Sterling and Louisiana police officers).

<sup>98</sup> See Radley Balko, *Alton Sterling’s death appears to be another police shooting that was both legal and preventable*, WASH. POST (July 6, 2016), *archived at* <https://perma.cc/AXZ5-FP54> (describing what was depicted in the cell phone recording of the police encounter of Alton Sterling that led to him being fatally shot).

<sup>99</sup> See *id.* (cautioning that the recording released by the media does not show images that might have been essential in concluding whether the use of deadly force was reasonably required by the police officers). In the video that was released by the media, one of Sterling’s hands does not seem to be a threat to the police officers, however, Sterling’s other hand is not visible in the recording. *Id.* A nearby witness’ observation was that the police officers appeared to be escalating the situation isn’t contradicted by the released recording. *Id.* In this situation, there are witnesses who say Sterling posed no serious threat to the police officers, and a recording that strongly supports, but doesn’t completely make the witness’ account to be valid. *Id.*

<sup>100</sup> See The Associated Press, *supra* note 92 (suggesting that video recordings posted on social media platforms led to angry protests).

<sup>101</sup> See Larry Buchanan et al., *Q&A What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), *archived at* <https://perma.cc/DR2B-J3JW> (describing how the deadly shooting of Michael Brown has been only depicted by eye-witness accounts, since there is no footage captured of the deadly encounter).

shot by police in Ferguson, Missouri.<sup>102</sup> Some witnesses reported that the confrontation began as a scuffle at the police car window while the officer was still seated in his cruiser.<sup>103</sup> Allegedly, the officer then fired his weapon out the window at Michael Brown.<sup>104</sup> These witnesses further allege that Michael Brown was shot in the back as he was running away and then shot several more times when he turned around with his hands up.<sup>105</sup> Other witnesses alleged that Michael Brown pushed the police officer into his vehicle as he was trying to get out, and that Michael Brown attempted to take the police officer's gun.<sup>106</sup> Unlike other police encounters that have been portrayed by the media, this deadly police encounter was not captured on film, and therefore it is difficult to determine exactly what happened.<sup>107</sup>

A similar incident took place in Minnesota in which Justine Ruszyk was shot by police during an encounter that was not caught on film, but was prominently portrayed in the media headlines.<sup>108</sup> A woman was fatally shot by police officers, however, the police did not explain how or why the shooting took place.<sup>109</sup> The police officers

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<sup>102</sup> See Mitch Smith, *New Ferguson Video Adds Wrinkle to Michael Brown Case*, NY TIMES (Mar. 11, 2017), archived at <https://perma.cc/S39W-26R3> (emphasizing there has been conflicting witness reports that have not resolved the questions about Michael Brown's encounter with Officer Wilson in Ferguson, MO).

<sup>103</sup> See *id.* (illustrating the events that led to the shooting of Michael Brown).

<sup>104</sup> See *Ferguson Protests: What We Know about Michael Brown's Last Minutes*, BBC (Nov. 25, 2014), archived at <https://perma.cc/7MW9-EXEN> (acknowledging one group of witnesses' statements about what led to the fatal shooting of Michael Brown).

<sup>105</sup> *Id.* (noting that the witnesses' statements portray that Michael Brown was running away and that the police officer used deadly force against Michael Brown).

<sup>106</sup> See *id.* (pointing out similar witnesses' accounts that the police officer's encounter with Michael Brown occurred while the police officer was still in his vehicle).

<sup>107</sup> See Jason Hanna, *Audio Captured at Time of Michael Brown Shooting, Company Says*, CNN (Aug. 28, 2014), archived at <https://perma.cc/DC9B-BH9S> (demonstrating that it is difficult to prove with just an audio recording as to what took place or what witnesses' narrative it supports). In the audio recording, there is a quick series of shots that can be heard, followed by a pause, and then another quick succession of shots. *Id.*

<sup>108</sup> See Carma Hassan et al., *Family of Woman Killed by Minneapolis Police 'Desperate' for Information*, CNN (July 18, 2017), archived at <https://perma.cc/L9HR-KC7C> (noting that the family of a woman who was fatally shot by Minneapolis police is seeking to find out more information about exactly what had happened). There is no video or audio recording that gives any indication as to what led to the woman being fatally shot. *Id.*

<sup>109</sup> See *id.* (noting that the police officers involved in the shooting were wearing body-cameras, but they were not turned on during the incident). The woman

involved in the shooting were wearing body-cameras at the time of the incident, but did not have them turned on, which led to the American Civil Liberties Union of Minnesota accusing the police officers of “thwarting the public’s right to know what happened”.<sup>110</sup> Although these police officers had their body-camera turned off, there has been a push made by law enforcements across the country to implement a police body-camera program.<sup>111</sup>

In 2015, the United States Department of Justice announced a \$20 million increase in funding to support the police body-camera pilot program partnership to the immediate needs of local and tribal law enforcement organizations.<sup>112</sup> The program funding will help jurisdictions with the purchase of 50,000 body-worn cameras and provide evaluations as to how well the police body-camera program works.<sup>113</sup> The purpose in establishing the police body-camera program

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reportedly called 911 that night to report a sexual assault in an alley near her home. *Id.* The mayor stated that police body-cameras are supposed to be turned on prior to use of force “as soon as it is safe to do so” or during “any contact involving criminal activity”. *Id.*

<sup>110</sup> See *id.* (pointing out that by turning the body-camera off, the police officers made finding the truth about what exactly happened harder to find).

<sup>111</sup> See Kevin Fasick & Yoav Gonen, *NYPD Launches Court-Ordered Body Camera Program*, N.Y. POST (Apr. 27, 2017), archived at <https://perma.cc/VN4K-K2GF> (contending that 1,200 body-cameras will be deployed throughout the city of New York and predicting that by 2019, all 22,000 patrol cops will be wearing the devices). The cops are required to turn the cameras on when they’re using force, making arrests or summons, interacting with emotionally-distressed or criminally-suspicious people, searching property or people, and responding to crimes in progress. *Id.*

<sup>112</sup> See Office of Public Affairs, *Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program*, U.S. DEPT. OF JUST. (May 1, 2015), archived at <https://perma.cc/2U92-984D> (advocating that the implementation of police body-cameras will strongly enhance transparency, promote accountability, and advance public safety for law enforcement officers and the public). The investment includes \$17 million in competitive grants for the purchase of body-worn cameras, \$2 million for training and technical assistance and \$1 million for the development of evaluation tools to study best practices. *Id.* The pilot program was part of President Obama’s proposal to invest \$75 million over three years to purchase 50,000 body-worn camera for law enforcement agencies. *Id.*

<sup>113</sup> See David Jackson, *Obama Team Will Fund Police Body Camera Project*, USA TODAY (May 1, 2015), archived at <https://perma.cc/65M7-WSS3> (stressing that the Obama administration established a program to assess the effectiveness of having police officers wear body-cameras in order to record public interactions). Attorney General Loretta Lynch stated “body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability and advancing public safety for law enforcement officers and the communities they serve.” *Id.*

is to help local and tribal law enforcement agencies improve relationships with the public, specifically during a period of protests across the country aimed at police officers for using lethal force.<sup>114</sup> However, the White House Task Force on Policing, established after the protests in Ferguson, Missouri, New York and other cities, did not recommend that police officers be mandated in wearing body-cameras.<sup>115</sup> Despite this, the Task Force opposed requiring police officers to wear body-cameras, acknowledging that such body-cameras have been shown to reduce lethal use of force by police and total complaints against police officers.<sup>116</sup>

The White House Task Force on policing issued a report calling for independent investigations into all police shootings and to abolish all policing practices that rely on racial profiling.<sup>117</sup> Further, the Task Force called for more body-cameras on police officers, but emphasized that such body-cameras are not the sole solution to preventing lethal interactions amongst the public and police officers.<sup>118</sup> The Task Force report offered several solutions that can be accompanied with body-cameras to help improve police officers' relationships with the public, one of which being better record keeping about police use of force incidents.<sup>119</sup> Additionally, the report also

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<sup>114</sup> See Mark Berman, *Justice Dept. will spend \$20 million on police body cameras nationwide*, WASH. POST (May 1, 2015), archived at <https://perma.cc/H8JK-85JV> (quoting Attorney General Loretta Lynch's assertion: "This body-worn camera pilot program is a vital part of the Justice Department's comprehensive efforts to equip law enforcement agencies throughout the country with the tools, support, and training they need to tackle the 21st century challenges we face.").

<sup>115</sup> See *id.* (noting that government officials are not completely set on the idea of requiring police officers to wear police body-cameras).

<sup>116</sup> See *id.* (acknowledging that body-cameras help police departments ensure that public encounters are also captured from an officer's perspective).

<sup>117</sup> See Wesley Lowery, *WH Task Force: All Police Shootings Should be Independently Reviewed*, WASH. POST (Mar. 2, 2015), archived at <https://perma.cc/CA75-KHG9> (reasoning that it is time to transform how the public thinks about community law enforcement relations so that everyone feels safer and police officers feel fully supported).

<sup>118</sup> See *id.* (offering the White House task force on policing's belief that requiring police officers to wear body-cameras is not a silver bullet solution to the problems arising during encounters with the public).

<sup>119</sup> See *id.* (pointing out that currently there are no reliable statistics about how often police use their weapons and what the circumstances of those cases are). Philadelphia Police Commissioner Charles Ramsey, who as co-chair of the task force, stated "now that we know this does not exist, it is our responsibility to do everything we can to develop that information." *Id.*

sought for a renewed focus on and funding for community police programs, and for residency requirements that would ensure more police officers live in the cities that they patrol.<sup>120</sup> It has been noted that a number of the Task Force recommendations contain concepts of which national civil rights groups have sought for years.<sup>121</sup>

Over the past several years, there have been a number of court decisions involving police officers and individuals involved in excessive force or deadly encounters.<sup>122</sup> A high number of these cases have involved police officers being acquitted after he or she was involved in a deadly encounter with an individual.<sup>123</sup> One prominent example portraying the high number of acquittal cases involved an off-duty NYPD officer who fatally shot an individual during a road-rage incident in July 2016.<sup>124</sup> One of the prosecutors in the case presented evidence in the form of footage that suggested the police officer intended to kill the individual.<sup>125</sup> Even with the footage presented, the officer was acquitted of all charges.<sup>126</sup>

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<sup>120</sup> See *id.* (emphasizing that police departments should acknowledge the role of policing in past and present injustice and how it prevents the promotion of trust amongst members of the community).

<sup>121</sup> See Wesley Lowery, *supra* note 117 (concluding that trust between law enforcement agencies and members of the community they protect and serve is essential in a democracy). The White House task force on policing mentioned that “it is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing service.” *Id.*

<sup>122</sup> See Aaron Morrison, *16 Recent Police Brutality Cases That Show How Often Officers Aren’t Held Accountable*, MIC (Sept. 15, 2017), archived at <https://perma.cc/MX6K-K2YP> (stating that several families have lost loved ones due to questionable and excessive uses of force by the police in recent years).

<sup>123</sup> See *id.* (outlining the cases in which police officers have been acquitted in court after being involved in a deadly encounter with an individual). Jason Stokely, a former St. Louis police officer shot who shot and killed an individual in 2011, was acquitted in September 2017. *Id.* Betty Shelby, a former Tulsa police officer, shot and killed an individual in 2016 and was then acquitted in July 2017. *Id.* Baltimore police officers Edward Nero, Caesar Goodson and Brian Rice, who were charged after the in-custody injury and death of Freddie Gray in 2015, were found not guilty in separate trials. *Id.*

<sup>124</sup> See *supra* note 122 (discussing one example of a police officer being acquitted after being involved in a deadly encounter).

<sup>125</sup> See *supra* note 122 (indicating that footage was presented to the court of the alleged conduct by the police officer).

<sup>126</sup> See *supra* note 122 (noting that the police officer was ultimately acquitted of the charges brought against him).

#### IV. Analysis

The FOIA<sup>127</sup> allows all news outlets to obtain public records from Federal agencies, which are prevalent in cases involving investigations into deadly police encounters with the public.<sup>128</sup> However, FOIA has nine exemptions that strongly apply to cases involving deadly police encounters in a number of different ways.<sup>129</sup> Although there are nine exceptions, FOIA has been liberally interpreted in favor of disclosure of information to the public and news outlets.<sup>130</sup> This liberal interpretation can be seen in most of the cases involving police brutality being discussed frequently by the media through the release of footage involving the police encounter.<sup>131</sup>

President Clinton signed into law the Electronic Freedom of Information Act Amendments,<sup>132</sup> which was established recognizing that continuing technological advancements result in a need for greater transparency through public access to information.<sup>133</sup> However, a major concern has always been the high volume of information available to the public and the increasing reach of the Internet, which is arguably one of the reasons for the number of attacks and protests

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<sup>127</sup> See 5 U.S.C. § 552, *supra* note 34 (explaining the type of documents and information that Federal agencies must provide to individuals upon their requests for such records).

<sup>128</sup> See U.S. Dept. of Justice, *supra* note 22 (setting forth the main purpose of the Freedom of Information Act and how the public will continuously have information in order to maintain a democratic society).

<sup>129</sup> See U.S. Dept. of Justice, *supra* note 22 (noting that individuals may obtain records from Federal agencies unless obtaining such records would be detrimental to personal privacy, national security, and law enforcement). In police brutality cases, there may be recordings of the encounter, however, the detriment of the recording as to an individual's right of privacy or to a law enforcement's ability to protect the public may prohibit such news outlets from obtaining footage of the incident. *Id.*

<sup>130</sup> See Griffith Jr., *supra* note 24 (pointing out that the statute places the burden on the Federal agency challenging the individual's request to disclose certain records).

<sup>131</sup> See *id.* (discussing that it can be strongly argued that the statute heavily favors the news media outlets).

<sup>132</sup> See 5 U.S.C. § 552, *supra* note 34 (expanding on the access of information to the public).

<sup>133</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (suggesting that these amendments by President Bill Clinton sought to bring Federal agencies into the electronic age and make information readily accessible to the public).



against law enforcements across the country.<sup>134</sup> Today, FOIA allows individuals to request information from any Federal agency for any reason whatsoever, leaving media outlets access to information pertaining to police brutality investigations that could have a detrimental impact on the way the public views the circumstances surrounding the incident.<sup>135</sup>

Due to the enactment and amendments of the FOIA, which has granted the media extensive access to crimes, major news outlets have had a prominent interest in regards to covering law enforcement and citizen encounters, which can be readily seen by turning on any of the major news outlets today.<sup>136</sup> One of the major sources of headlines for news outlets has typically been from law enforcement departments and courts disclosing somewhat sensitive information about particular crimes.<sup>137</sup> When deciding which crimes to forecast on national television, major news outlets look for incidents that catch the attention of viewers, and it can be argued law enforcement-citizen encounters are the stories that news outlets strive to headline.<sup>138</sup> Based on research conducted on the correlation between news coverage and crimes involving law enforcement and citizen encounters, there is a strong interest by the public in gathering information about such encounters,

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<sup>134</sup> See *Right to Know: A Historical Guide to the Freedom of Information Act (FOIA)*, *supra* note 29 (observing that under President Bush's administration, a number of actions were performed to make the FOIA statute have more restrictive limits in regards to information being released to the public).

<sup>135</sup> See *Reporters Comm. for Freedom of Press*, *supra* note 44 at 769 (concluding the FOIA gives any member of the public as much right to disclosure of information pertaining to an investigation as one with a special interest in the matter).

<sup>136</sup> See Adamson, *supra* note 45 (referencing two studies about pretrial publicity). The first study consisted of work done by researchers Dorothy Imrich, Charles Mullin and Daniel Linz and focused on news portraying high volumes of high-profile crimes and how such headlines could be biasing. *Id.* The second study conducted suggested that emotionally resonant information by the news, which may be unrelated to the core criminal issues or subjects, had somewhat of an affective impact on the views of the crime. *Id.*

<sup>137</sup> See Adamson, *supra* note 45 (indicating that media outlets rely heavily upon policing agencies and court systems for the collection of news about crimes that have occurred).

<sup>138</sup> See Courtauld, *supra* note 48 (suggesting that news events must be considered "significant or dramatic enough to be shown by major news outlets"). For example, crimes become newsworthy when the stories can be presented by the news outlets in a manner that appears random and unpredictable enough to that a panic sets into the audience's mind. Courtauld, *supra* note 48.

and such media coverage contributes to the public's fear of such incidents.<sup>139</sup>

Throughout the years, major news outlets have significantly increased their coverage of traumatic and explicit crime stories over other material, because news outlets continually try to outperform their competitor's coverage of similar stories.<sup>140</sup> By focusing on the investigations and trials pertaining to law enforcement and citizen encounters, major news outlets are given the opportunity to have access to recorded images of such encounters, and to provide prolonged and detailed coverage of such encounters.<sup>141</sup> Such recordings of law enforcement and citizen encounters that are accessed and broadcasted by major news outlets can create an undue suspense and intense interest in crime cases to viewers.<sup>142</sup> Major news outlets place emphasis on the visual elements of encounters between law enforcement and citizens, where the media and public viewers violate the privacy rights of both officers and citizens.<sup>143</sup> Furthermore, such coverage records between law enforcement and citizen encounters are portrayed in a "subconscious stereotype" that suits to the particular audience viewer.<sup>144</sup>

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<sup>139</sup> See Courtauld, *supra* note 48 (explaining how the findings of Gerbner's research found that heavy users of television had higher levels of fear of crime than individuals who watched less television). Furthermore, Gerbner's research found that some of the media news outlets tend to exaggerate the extent of violent crimes that occur. *Id.* For example, the study points to "red top" newspapers that exploit the possibilities for good stories by dramatizing, exaggerating and over-reporting certain crimes out of proportion just to generate higher ratings and attract more viewers. *Id.*

<sup>140</sup> See Beale, *supra* note 50, at 424 (pointing out the environment that presently puts pressure on major news outlets to focus their coverage on tabloid crime news over other non-crime news). The major news outlets have acknowledged that competition from rival outlets are forcing one another to find new ways to attract and keep viewers. *Id.* at 426.

<sup>141</sup> See Beale, *supra* note 50, at 427 (acknowledging that as most serious crime cases last for weeks, months, or even years, such stories become prominent national headlines).

<sup>142</sup> See Beale, *supra* note 50, at 427 (acknowledging that most serious cases involving law enforcement and citizen encounters become prominent national headlines to viewers).

<sup>143</sup> See Beale, *supra* note 50, at 429 (indicating that the coverage of the investigation and trials of violent crimes have dramatic elements and news outlets portray the explicit details of the crime itself).

<sup>144</sup> See Feld, *supra* note 55, at 1525 (noting that major news outlets may use images, pictures and stories with racial material to which their viewers will notice and will

The Fourth Amendment of the United States Constitution protects individual's right of privacy from unwarranted and arbitrary intrusions into their everyday privacy.<sup>145</sup> With continuing advancements in everyday technology, such as a cellphone's capability to record in high quality for extended periods of time, a number of courts have held that individuals and law enforcement officers have the right to record public encounters with one another.<sup>146</sup> Such court decisions have had an important and serious impact on the public's concern and awareness over police-citizen interactions, both by raising awareness to unethical police actions and the implementation of police body-camera programs.<sup>147</sup> The police body-camera program will increase transparency and accountability for unethical police officers by reducing the use of violence and providing protection for both ethical officers and individuals.<sup>148</sup>

An individual may seek relief under 42 U.S.C. § 1983 when he or she has been subjected to unethical mistreatment by a police officer, sheriff, or other peace officer.<sup>149</sup> A police officer's action can be considered unethical when they deprive an individual of their constitutionally protected rights.<sup>150</sup> However, since a police officer's

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create stronger emotional responses to a crime story). Major news outlets depictions of crimes do not reflect the actual rates of crime generally. *Id.* at 1529-30. The news outlets tend to over report on the rarest types of crimes. *Id.* at 1530.

<sup>145</sup> See U.S. CONST. Amend. IV, *supra* note 56 (stating that individuals are protected from unreasonable searches and seizures of property by the government).

<sup>146</sup> See *Glik v. Cunniffe*, *supra* note 59 at 82 (acknowledging that the First Amendment protects the filming of government officials in public spaces).

<sup>147</sup> See *People v. Kosowski*, *supra* note 60 (discussing the underlying reasons for the increase in awareness of unethical law enforcement agency actions against individuals).

<sup>148</sup> See *Birds & Sousa*, *supra* note 62 (noting the benefits for both police officers and individuals when it comes to implementing body-cameras in law enforcement departments).

<sup>149</sup> See *Ginger & Bell*, *supra* note 66 (discussing how individuals may seek civil relief against police officers for any civil rights violations).

<sup>150</sup> See *Ginger & Bell*, *supra* note 66 (detailing that a police officer is liable for his or her unethical actions under 42 U.S.C. § 1983). The first element of an unethical violation is known as the state action requirement, in which the plaintiff must prove that the police officer acted with the appearance of legal power, even though the plaintiff's conduct may have violated the law. *Id.* An example is when a police officer has made an arrest, which he or she has the right to do, but lacked probable cause to do so in this instance. *Id.* Most commonly, police officers are sued for alleged violations of the Fourth Amendment, the Fourteenth Amendment and the First Amendment. *Id.*

actions can make it difficult to determine whether such actions were unethical at the time they occurred, police officers can reasonably protect themselves by the qualified immunity defense.<sup>151</sup> Due to edited footage or footage that did not capture the whole incident, the line between determining whether an officer unreasonably arrested an individual or unreasonably used excessive force against an individual makes a successful 42 U.S.C. § 1983 claim difficult.<sup>152</sup> This difficulty is prominent in cases over the last several years involving the news outlets portraying police brutality cases involving 42 U.S.C. § 1983 claims.<sup>153</sup>

It has been widely established that public citizens have the right to record police encounters in public with their cell phones,<sup>154</sup> and that their recordings are protected by his or her First Amendment right.<sup>155</sup> Due to the advancements of cell phone capabilities and the ability of major news outlets to gain access to such recordings, there has been an increasing public awareness of police misconduct and interactions with individuals.<sup>156</sup> Recently, there have been over ten high-profile police shootings involving individuals that were caught on camera and broadcasted by major news outlets, along with the proceedings that

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<sup>151</sup> See Callahan, *supra* note 68 (indicating the qualified immunity defense against a 42 U.S.C. § 1983 claim can protect police officers from unnecessary litigation).

<sup>152</sup> See *Police Misconduct and Civil Rights*, *supra* note 70 (noting that excessive force claims receive the most publicity, which can be seen on a number of different news outlets on television and online). Whether the police officer's use of force was reasonable or not depends on the surrounding circumstances. *Id.*

<sup>153</sup> See *Civil Rights and Police Misconduct*, *supra* note 80 (acknowledging that police brutality cases vary significantly and can be challenging for courts to decide on liability or guilt).

<sup>154</sup> See Skehill, *supra* note 81 (noting that an individual has the "First Amendment right to document public officials, such as police officers in the performance of their duties").

<sup>155</sup> See U.S. CONST. amend. I., *supra* note 82 (noting the First Amendment guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely).

<sup>156</sup> See Dreier, *supra* note 89 (stating that due to technological advancements in regards to recording and posting footage online, some may believe there is a growing wave of police abuse towards individuals). The author opinionates that there has been no sudden increase of racial profiling, arrests, and beatings of individuals by police officers. *Id.* Rather, individuals have become more aware of police encounters because more incidents of police abuse are being captured by cameras and broadcasted by the media. *Id.*

took place in court.<sup>157</sup> In July 2016, a Minnesota police officer pulled over Philando Castile and radioed to a colleague that he believed Mr. Castile matched the description of a robbery suspect.<sup>158</sup> As the police officer approached Mr. Castile's vehicle, a series of events led to the fatal shooting of Mr. Castile.<sup>159</sup> The recording does not show the whole series of events in specific detail that would further show what exactly led to the shooting.<sup>160</sup> The footage quickly spread throughout the major news outlets, which prompted responses from protestors across the country, calling the shooting unreasonable and evidence of racism in law enforcement.<sup>161</sup> It is this type of recording that makes it difficult to determine who is at fault in a situation involving deadly force amongst a police officer and an individual, which is why it is difficult for individuals to succeed in a 42 U.S.C. § 1983 claim.

A similar situation occurred when thirty-seven-year-old Alton Sterling was shot and killed during a confrontation with two police officers outside a Baton Rouge, Louisiana convenience store.<sup>162</sup> A cell phone recording released by the major news outlets showed Sterling seemingly incapacitated on the ground, however, the recording does not show exactly what gave the police officer reason to use deadly

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<sup>157</sup> See The Associated Press, *supra* note 92 (outlining the shooting deaths of individuals by law enforcement officers that have made headlines nationwide).

<sup>158</sup> See Smith, *supra* note 93 (describing the encounter that led to the fatal shooting of Philando Castile by a Minnesota police officer).

<sup>159</sup> See Smith, *supra* note 93 (discussing that as the police officer walked up to Mr. Castile's window, he told Mr. Castile that his brake light was broken. *Id.* The officer then asks for proof of insurance and a driver's license. *Id.* Mr. Castile responds and hands his insurance card through the window. *Id.* Mr. Castile, who had a permit to carry a gun, told the police officer that he had a firearm on him. *Id.* The police officer told Mr. Castile not to reach for the gun. *Id.* Mr. Castile began to answer the police officer, but was cut off by the police officer who began to shout "[d]on't pull it out!" *Id.* Mr. Castile responded that he was not pulling it out, but the police officer continued to yell "[d]on't pull it out!" *Id.* The police officer then fired seven shots, fatally wounding Mr. Castile. *Id.*

<sup>160</sup> See Smith, *supra* note 93 (cautioning that the recording released by the media does not show images that might have been essential for jurors to consider in determining the guilt of the police officer). For example, the recording does not show a full view of the front seat of Mr. Castile's vehicle, which would have showed where his hands were and what he was reaching for just before the shooting took place. *Id.*

<sup>161</sup> See Smith, *supra* note 93 (explaining the responses on social media calling for protest against law enforcements across the country).

<sup>162</sup> See The Associated Press, *supra* note 92 (examining the context of the police encounter involving Alton Sterling and Louisiana police officers).

force against Sterling.<sup>163</sup> Once again, the released recording by the media led to protests by community activists that set off violent protests across the country.<sup>164</sup>

There have also been cases depicted by the major news outlets involving police encounters that were not caught on camera, but still had the same negative effect on law enforcement agencies.<sup>165</sup> There have been debates as to exactly what happened during the police encounter with Michael Brown, which resulted in the 18 year old being fatally shot in Ferguson, Missouri.<sup>166</sup> Some witnesses reported that the confrontation began as a scuffle at the police car window while the officer was still seated in his cruiser. Allegedly, the officer then fired his weapon out the window at Michael Brown.<sup>167</sup> These witnesses further allege that Michael Brown was shot in the back as he was running away and then shot several more times when he turned around with his hands up.<sup>168</sup> Other witnesses have alleged that Michael Brown pushed the police officer into his vehicle as he was trying to get out, and that Michael Brown attempted to take the police officer's

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<sup>163</sup> See Balko, *supra* note 98 (cautioning that the recording released by the media does not show images that might have been essential in concluding whether or not the use of deadly force was reasonably required by the police officers). In the video that was released by the media, one of Sterling's hands does not seem to be a threat to the police officers, however, Sterling's other hand is not visible in the recording. *Id.* A nearby witness's observation was that the police officers appeared to be escalating the situation isn't contradicted by the released recording. *Id.* In this situation, there are witnesses who say Sterling posed no serious threat to the police officers, and a recording that strongly supports, but doesn't completely make the witness' account to be valid. *Id.*

<sup>164</sup> See The Associated Press, *supra* note 92 (explaining the responses on social media calling for protest against law enforcements across the country).

<sup>165</sup> See Buchanan et al., *supra* note 101 (describing how the deadly shooting of Michael Brown has been depicted by eye-witness accounts).

<sup>166</sup> See Smith, *supra* note 102 (emphasizing there has been conflicting witness reports that have not resolved the questions about Michael Brown's encounter with Officer Wilson in the town of Ferguson).

<sup>167</sup> See *Ferguson Protests: What We Know about Michael Brown's Last Minutes*, *supra* note 104 (acknowledging one group of witnesses' statements about what led to the fatal shooting of Michael Brown).

<sup>168</sup> See *Ferguson Protests: What We Know about Michael Brown's Last Minutes*, *supra* note 104 (noting that the witnesses' statements portray that Michael Brown was running away and that the police officer unreasonably used deadly force against Michael Brown).

gun.<sup>169</sup> Unlike other police encounters that have been portrayed by major news outlets, this deadly police encounter was not captured on film, so it is difficult to determine exactly what happened.<sup>170</sup>

## V. Conclusion

Law enforcement and citizen encounters have been occurring daily in society for centuries. Most encounters end safely for both parties without any physical altercation. Unfortunately, however, there have also been encounters that have resulted in deaths to either public citizens or law enforcement officers, which has resulted in more than several 42 U.S.C. § 1983 claims. Before the technological advancements of cell phones, law enforcement and citizen encounters were mostly depicted by word-of-mouth or from security footage from nearby security cameras. However, modern day cell phones allow individuals to instantly record law enforcement and citizen encounters at any given moment. Not only do individuals have the First Amendment right to record law enforcement officers conducting their duties out in public, but also major news outlets have the right to access such recordings and broadcast them to the entire country due to the FOIA amendments.

Major news outlets have a prominent incentive to broadcast law enforcement and citizen encounters which is to gain the highest viewership ratings as possible compared to that of competitors. Therefore, major news outlets tend to broadcast crimes involving law enforcement and citizen encounters and depict an individual's recording of such encounter to give viewers an image of what occurred during the encounter. Major news outlets broadcasted footage of Tamir Rice being shot and killed by Ohio police officers in a public park as he was playing with his BB gun. Eighteen-year-old Michael Brown, who was found to be unarmed, was shot and killed by a police officer in Ferguson, Missouri. Forty-three year old Eric Garner, who was found to be unarmed, was wrestled to the ground and killed after a

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<sup>169</sup> See *Ferguson Protests: What We Know about Michael Brown's Last Minutes*, *supra* note 104 (pointing out other witnesses' accounts that have stated that the use of force by the police officer towards Michael Brown was reasonable).

<sup>170</sup> See Hanna, *supra* note 107 (emphasizing that it is difficult to prove with just an audio recording as to what took place or what witnesses' narrative it supports). In the audio recording, there is a quick series of shots that can be heard, followed by a pause, and then another quick succession of shots. *Id.*

police officer used a banned chokehold technique to restrain him. These are just a few of over several incidents involving deadly law enforcements encounters with citizens. The ability of cell phones to record, along with the implementation of police body-cameras, should focus on decreasing such deadly encounters. These technological tools, however, cannot show the whole sequence of events that led to such fatal encounters. Therefore, individuals looking to file a 42 U.S.C. § 1983 should not be allowed to use recordings released by the major news outlets in their claims, unless such footage depicts the *entire* encounter from start to finish.