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REASONABLE TIME, PLACE, AND MANNER
RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES**

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Monterey, CA; Naval Postgraduate School

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**NAVAL
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MONTEREY, CALIFORNIA

THESIS

**CIVIL RIGHTS AUDITORS: DEFINING REASONABLE
TIME, PLACE, AND MANNER RESTRICTIONS ON
FIRST AMENDMENT ACTIVITIES**

by

Gary Cummings

December 2019

Co-Advisors:

David W. Brannan (contractor)
Carolyn C. Halladay

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REPORT DOCUMENTATION PAGE			<i>Form Approved OMB No. 0704-0188</i>
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington, DC 20503.			
1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE December 2019	3. REPORT TYPE AND DATES COVERED Master's thesis	
4. TITLE AND SUBTITLE CIVIL RIGHTS AUDITORS: DEFINING REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES			5. FUNDING NUMBERS
6. AUTHOR(S) Gary Cummings			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000			8. PERFORMING ORGANIZATION REPORT NUMBER
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) N/A			10. SPONSORING / MONITORING AGENCY REPORT NUMBER
11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.			
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release. Distribution is unlimited.			12b. DISTRIBUTION CODE A
13. ABSTRACT (maximum 200 words) Police increasingly encounter citizens who challenge constitutional boundaries between civil rights and police power. These so-called "civil rights auditors" and "copwatchers" record government officials with cell phones or body cameras, while baiting or challenging them to cross constitutional lines established by the First Amendment. An officer reacting incorrectly in these encounters can—through action or inaction—create conflict, loss of police legitimacy, or liability for the officers or their agencies. Preliminary examination of auditor activities and current legal and scholarly works leads to the thesis question: What are reasonable time, place, and manner restrictions to civil liberties with regard to recording police, government property, and the public? The author conducts a qualitative analysis of 59 auditor videos representing audits around the nation and identifies common tactics and targets among auditors, which provides scenarios for legal analysis and a policy review. This thesis reveals two things. First, auditors are not part of the legal, scholarly, and policy discussions and decision making; and second, through other areas of First Amendment case law, the Supreme Court has developed a framework for First Amendment challenges that directly applies to auditors. The author applies this framework to the 10 locations commonly targeted by auditors.			
14. SUBJECT TERMS civil liberties, Bill of Rights, police, legitimacy, trust, video, citizen journalism, police force, critical infrastructure, media, open carry, privacy, officer safety, public relations, social media warfare, accountability, activism, cameras, cell phones, speech, press, oppression, misconduct, recording police, sovereign citizen, militia, surveillance, technology, transparency, synopticism, violence, unrest, incivility, national security, destabilization, delegitimation			15. NUMBER OF PAGES 197
			16. PRICE CODE
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UU

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**CIVIL RIGHTS AUDITORS: DEFINING REASONABLE TIME, PLACE, AND
MANNER RESTRICTIONS ON FIRST AMENDMENT ACTIVITIES**

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Submitted in partial fulfillment of the
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES
(HOMELAND SECURITY AND DEFENSE)**

from the

**NAVAL POSTGRADUATE SCHOOL
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ABSTRACT

Police increasingly encounter citizens who challenge constitutional boundaries between civil rights and police power. These so-called “civil rights auditors” and “copwatchers” record government officials with cell phones or body cameras, while baiting or challenging them to cross constitutional lines established by the First Amendment. An officer reacting incorrectly in these encounters can—through action or inaction—create conflict, loss of police legitimacy, or liability for the officers or their agencies. Preliminary examination of auditor activities and current legal and scholarly works leads to the thesis question: What are reasonable time, place, and manner restrictions to civil liberties with regard to recording police, government property, and the public? The author conducts a qualitative analysis of 59 auditor videos representing audits around the nation and identifies common tactics and targets among auditors, which provides scenarios for legal analysis and a policy review. This thesis reveals two things. First, auditors are not part of the legal, scholarly, and policy discussions and decision making; and second, through other areas of First Amendment case law, the Supreme Court has developed a framework for First Amendment challenges that directly applies to auditors. The author applies this framework to the 10 locations commonly targeted by auditors.

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LIST OF ACRONYMS AND ABBREVIATIONS

1A	First Amendment auditor
ACLU	American Civil Liberties Union
AGP	Angry Gay Pope
BPD	Baltimore Police Department
CFR	Code of Federal Regulations
CSO	court security officer
DHS	Department of Homeland Security
DMV	Department of Motor Vehicles
DoD	Department of Defense
DOJ	Department of Justice
DOT	Department of Transportation
FBI	Federal Bureau of Investigation
IACP	International Association of Chiefs of Police
IRAC	issue rule analysis conclusion
ISIS	Islamic State of Iraq and Syria
NNO	News Now Omaha Copblock
NYPD	New York Police Department
PD	police department
PROP	Public Recording of Police
TPM	time, place, and manner

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EXECUTIVE SUMMARY

In recent years, police officers across the country have increasingly encountered citizens who challenge the constitutional boundaries between civil rights and police power. These so-called “civil rights auditors” and “copwatchers” record government officials, including police, with cell phones or body cameras, while baiting or challenging them to cross constitutional lines established by the First and Fourth Amendments. While the copwatcher seeks out and films officials performing their duties in public, the auditor targets protected places and exhibits behavior intended to solicit a police response. Targeted locations include federal buildings, post offices, jails, courts, and even private organizations.¹ Auditors record these locations, as they anticipate and welcome the ensuing police-citizen conflict.² This thesis introduces the issue of civil rights auditors and explains the difference between the auditor and the copwatcher. The distinction between copwatchers and auditors is significant and highlights a growing problem for law enforcement where auditors intentionally create police-citizen conflict that undermines police legitimacy and engagement.

Agency administrators must understand the specific legal challenges presented by auditors and develop responsive policies to address the reasonable time, place, and manner (TPM) restrictions applicable to their organizations. Unfortunately, the higher courts have yet to delineate “reasonable” restrictions concerning auditing (recording government facilities or other buildings).³ Most court decisions address copwatching groups (those recording police performing their duties in public) and rule that the First Amendment

¹ “Live at Furry Shooting Scene,” YouTube video, 42:00, posted by Kattila The Hun Freedom Fighter, February 14, 2019, https://www.youtube.com/watch?v=FvfjLKM_uqs.

² “Live at Furry Shooting Scene.” (When asked why they were recording a church, which has nothing to do with the police, “Kat” admitted it was to solicit a police response.)

³ Stephanie Johnson, “Legal Limbo: The Fifth Circuit’s Decision in *Turner v. Driver* Fails to Clarify the Contours of the Public’s First Amendment Right to Record the Police,” *Boston College Law Review* 59, no. 9 (2018): 245, Proquest.

protects the activity.⁴ These cases also stipulate that “reasonable time, place, and manner restrictions” may be imposed upon this activity.⁵ Consequently, while generally asserting that a right exists to record police in public—subject to undefined TPM restrictions—higher courts have yet to address auditing. Literature on the subject either echoes court decisions or embraces copwatching for its perceived potential to increase police accountability and transparency. This information and discussion gap created ambiguity in the constitutional protections and boundaries for auditing activities; specifically, when the auditor target is a protected facility or private institution.

Preliminary examination of auditor activities and current legal and scholarly works leads to the thesis question: What are reasonable TPM restrictions to civil liberties with regard to recording police, government property, and the public? To answer this question, the author conducted a qualitative analysis of auditor videos. In this analysis, the author finds common tactics and targets exist among auditors around the nation. By examining the legality of these tactics and related case law, the author discovers that the Supreme Court has developed a framework for First Amendment challenges that directly applies to auditors. This framework is systematically applied to the 10 common target locations of auditors.

By defining constitutional boundaries, this thesis expands the scholarly knowledge about auditors, allows agencies to develop accurate training and policies, and equips officers for these encounters. Common auditor-created legal challenges and issues emerge in the research, and provide scenarios for legal analysis. In a review of the Baltimore Police and International Association of Chiefs of Police (IACP) policies for police response to

⁴ Brittany S. Mercer, “Policing the Police: A ‘Clearly Established’ First Amendment Right to Record the Police,” *American Journal of Trial Advocacy* 41, no. 1 (Summer 2017): 187–209, Proquest; Evan Bernick and Paul J. Larken Jr., “Filming the Watchmen: Why the First Amendment Protects Your Right to Film the Police in Public Places,” Legal Memorandum, no. 127, *Heritage Foundation*, 3, June 12, 2014, <https://www.heritage.org/the-constitution/report/filming-the-watchmen-why-the-first-amendment-protects-your-right-film-the>. (Bernick and Larken discuss that the Third Cir. Court did not find a right existed to record traffic stops, which the court labeled “inherently dangerous.”)

⁵ *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017); Clay Calvert, “The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward,” *Texas Wesleyan Law Review* 3 (2015): 131–445, [http://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=7327&sr=cite\(3+Tex.+Wesleyan+L.+Rev.+131\)](http://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=7327&sr=cite(3+Tex.+Wesleyan+L.+Rev.+131)).

First Amendment activities, the author affirms an auditor-related policy blindness in the Baltimore and IACP policies. Furthermore, specific language of these policies and the mutual confusion of the terms of “public place” and “public space” potentially position agencies for failure. This thesis is paramount to law enforcement and the community, because an officer reacting incorrectly in these encounters can—through action—create conflict, loss of police legitimacy, or liability for the officers or their agencies, or conversely—through inaction—miss an opportunity to intercept a genuine threat.⁶

⁶ Ashley K. Farmer and Ivan Y. Sun, “Citizen Journalism and Police Legitimacy: Does Recording the Police Make a Difference?,” *Sociology of Crime, Law, and Deviance, The Politics of Policing: Between Force and Legitimacy*, 21 (June 10, 2016): 239–56, Proquest.

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ACKNOWLEDGMENTS

The completion of this thesis and the rigorous program that inspired it could not have occurred without the encouragement and support of many people, and I take this moment to acknowledge those champions of my cause who made completion possible.

First, I thank my administration, who trusted me to represent our agency well and believed in the value this program would return to our organization. Without the endorsement of former Chief Mitch Bates and current Chief Jeff Bryan, my participation and success would not have been possible. Next, I thank my friends, Mike, Patrick, and Chris, who listened to my “logic” on different issues and offered advice and counterpoints to sharpen my focus and improve my content.

Future readers of this thesis will join me in thanking Dr. Carolyn Halladay and Dr. David Brannan for improving the quality of this thesis and challenging assumptions. This particular research area is ripe for research and could easily have produced several thesis topics; I am grateful for their scholarly guidance and oversight as my advisors in helping me to narrow the focus to a manageable scope.

Finally, I thank my family, who patiently endured the hours of studying and the limits that studying placed on family events. To my wife, Tanya, thank you for carrying the load of household responsibilities, listening to my latest discovery with interest, and affirming my frustration at various stages of the research process. While your support made this thesis look easy to the outside world, we both know the work involved for both of us, and I will always appreciate your unending love and patience.

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I. INTRODUCTION

In recent years, police officers across the country have increasingly encountered citizens who test and challenge the constitutional boundaries between civil rights and police power. These so-called “civil rights auditors” and “copwatchers” record government officials, including police, with cell phones or body cameras, while baiting or challenging them to cross constitutional lines established by the First and Fourth Amendments. While the copwatcher seeks out and films officials performing their duties in public, the auditor targets protected places and exhibits behavior intended to solicit a police response. Targeted locations include federal buildings, post offices, jails, courts, and even private organizations.¹ Auditors record these locations, as they anticipate and welcome the ensuing police-citizen conflict.²

Auditors also target citizens, and these encounters can go wrong even before police respond. When Zhoie Perez targeted a Jewish Synagogue wearing a backpack and recording the building, the nervous civilian security guard put the school on lockdown and confronted her. During the exchange, the guard shot auditor Zhoie Perez in the leg. Zhoie’s friend, “Kat” (Kattila the Hun Freedom Fighter), told reporters that audits are about testing whether police will violate her rights, but a puzzled reporter retorts inquisitively that this location has nothing to do with the police.³ Zhoie Perez (aka Furry Potato) told reporters that she audits to shine a light on “crooked bad cops,” but “an even brighter light on the

¹ “Live at Furry Shooting Scene,” YouTube video, 42:00, posted by Kattila The Hun Freedom Fighter, February 14, 2019, https://www.youtube.com/watch?v=FvfjLKM_uqs.

² Kattila The Hun Freedom Fighter. (When asked why they were recording a church, which has nothing to do with the police, “Kat” admitted it was to solicit a police response.)

³ Kattila The Hun Freedom Fighter.

good cops. You put yourself in places where you know chances are the cops are going to be called. Are they going to uphold the Constitution, uphold the law ... or break the law?”⁴

A quick review of Perez’s “Furry Potato” YouTube channel for one year (July 8, 2018 to July 8, 2019) shows that none of the 325 videos directed positive light; much less “a brighter light on the good cops.” She did post a video titled “The Good Cop,” but it characterized police as deceptive punishers and intimidators who pursue “citizen ignorance” while taking their freedom and money.⁵ In other audits, the encounter produced no conflict, but Perez still insulted police through the posted video title, text overlays, and video thumbnails referring to the officers as pigs.⁶ Perez and Kat often mocked and insulted officers, while also joining up and using such tactics as wearing all black, donning a full face mask, and carrying a backpack to create alarm.⁷ Eric Brandt is more abrasive and direct. Brant carries signs that read “Fuck the Blue,” blatantly declares his desire to see officers killed, and uses crude profanity or wears masks to incite police responses.⁸

⁴ Kayla Epstein and Avi Selk, “What Is ‘Auditing,’ and Why Did a YouTuber Get Shot for Doing It?,” *Washington Post*, February 15, 2019, https://www.washingtonpost.com/technology/2019/02/15/what-is-auditing-why-did-youtuber-get-shot-doing-it/?utm_term=.fddd00812639. (The reporter response highlights the general sentiment of the public that—while the First Amendment permits the recording of police performing their duties—nothing extends that right to the recording of private persons. The reporters implied that without a story or reason for the auditor’s presence, no basis or justification exists for recording private parties.)

⁵ “The Good Cop,” YouTube video, 26:22, posted by Furry Potato, July 24, 2019, https://www.youtube.com/watch?v=_thMx_MbNFo.

⁶ “Some Animals Are More Equal Than Others!,” YouTube video, 11:38, posted by Furry Potato, February 7, 2019, <https://www.youtube.com/watch?v=wGUL9OrI4vc>. (The video thumbnail shows three pigs and the caption, “All animals are equal, but some animals are more equal than others.” This posting occurred after an audit with Katilla The Hun Freedom Fighter, who said good things about Officer J. Deere. Perez did not complement the officer or “shine a bright light” on him as she claims to do.)

⁷ “ICE Prison,” YouTube video, 30:20, posted by Furry Potato, January 4, 2019, <https://www.youtube.com/channel/UCI-eyk19DEhWzmFhiSdQZuw>; “Masked,” YouTube video, 39:20, posted by The Real Mr Brandt, December 9, 2018, <https://www.youtube.com/watch?v=1QQjpcunkPM>.

⁸ “Masked”; “Epic Showdown! Denver Police vs Protesters,” YouTube video, 11:00, posted by James Freeman, November 21, 2018, <https://www.youtube.com/watch?v=lUaBMqRPqY4>. (Brandt insults officers and tries to coach one into crossing the road just as a bus flew by, which demonstrated his desire to see the officer killed.); “Lakewood,” YouTube video, 50:10, posted by The Real Mr Brandt, August 14, 2019, https://www.youtube.com/watch?v=URiBS3EO_rI&feature=youtu.be. (The day officers were killed in another city, Brandt told this officer he was sorry it was not he who was killed.)

Not all auditors are equal in terms of initial tactics or motives. Approaches range from the mild libertarian-style auditor, who seeks to improve policing and promote civil rights, to the abrasive, antagonistic, or crude anarchist-type auditor, who exploits the Constitution as a tool to harass officials, increase social media views, and earn money.⁹ Learning from each other, auditors often share tactics or team up, which further complicates law enforcement efforts to distinguish civil rights advocates from such threats as pre-attack surveillance activity.

A. PROBLEM SPACE

Agency administrators must understand the specific legal challenges presented by auditors and develop responsive policies to address the reasonable time, place, and manner (TPM) restrictions applicable to their organizations. Unfortunately, the higher courts have yet to delineate “reasonable” restrictions concerning auditing (recording government facilities or other buildings).¹⁰ Most court decisions address copwatching groups (those recording police performing their duties in public) and rule that the First Amendment protects the activity.¹¹ These cases also stipulate that “reasonable TPM restrictions” may be imposed upon this activity.¹² It is in the auditing activities where the First Amendment protections are blurred. YouTube videos highlight police reactions and suggest an overall law enforcement certainty that reasonable TPM restrictions are applicable. Auditors

⁹ “Anti Bullying: Asserting Rights and Defending against Bullies, Bowie Police Department,” YouTube video, 25:18, posted by James Freeman, November 3, 2018, <https://www.youtube.com/watch?v=k83b9GoPBKQ>; “Masked.”

¹⁰ Stephanie Johnson, “Legal Limbo: The Fifth Circuit’s Decision in *Turner v. Driver* Fails to Clarify the Contours of the Public’s First Amendment Right to Record the Police,” *Boston College Law Review* 59, no. 9 (2018): 245, Proquest.

¹¹ Brittany S. Mercer, “Policing the Police: A ‘Clearly Established’ First Amendment Right to Record the Police,” *American Journal of Trial Advocacy* 41, no. 1 (Summer 2017): 187–209, Proquest; Evan Bernick and Paul J. Larken Jr., “Filming the Watchmen: Why the First Amendment Protects Your Right to Film the Police in Public Places,” Legal Memorandum, no. 127, *Heritage Foundation*, 3, June 12, 2014, <https://www.heritage.org/the-constitution/report/filming-the-watchmen-why-the-first-amendment-protects-your-right-film-the>. (Bernick and Larken discuss that the Third Cir. Court did not find a right existed to record traffic stops, which the court labeled “inherently dangerous.”)

¹² *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017); Clay Calvert, “The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward,” *Texas Wesleyan Law Review* 3 (2015): 131–445, [http://www.lexisnexis.com/hottopics/inacademic/?verb=sr&csi=7327&sr=cite\(3+Tex.+Wesleyan+L.+Rev.+131\)](http://www.lexisnexis.com/hottopics/inacademic/?verb=sr&csi=7327&sr=cite(3+Tex.+Wesleyan+L.+Rev.+131)).

believe that, suspicious or not, the Constitution protects them from even inquiry, and in some cases, gives them license to behave in fringe behavior; those otherwise socially unacceptable and borderline unlawful manners, merely because they are holding a camera.¹³

Developing training and policy to equip officers for these encounters requires research into the common issues and legal challenges that officers create, as well as a clear framework for evaluating potential TPM restrictions. An officer reacting incorrectly in these encounters can—through action—create conflict, loss of police legitimacy, or liability for the officers or their agencies, or conversely—through inaction—miss an opportunity to intercept a genuine threat.¹⁴

B. RESEARCH QUESTIONS

This thesis seeks to answer the question: What are reasonable time, place, and manner (TPM) restrictions to civil liberties with regard to recording police, government facilities, and critical infrastructure? A secondary question is how agencies should reflect these restrictions in policy and training to balance civil rights properly against the preservation of site security and functionality, particularly in response to civil rights audits.

C. LITERATURE REVIEW

First Amendment literature applicable to civil rights audits comprises three sections: legal issues, social issues, and public safety issues. Legal issue sources cover statutory authority, prohibitions, and gaps. The literature on social issues argues in support or opposition to the practice and benefit of citizens recording police, while public safety literature studies the influence of cameras on police legitimacy and engagement. Although capturing police activity on camera and video has only recently appeared in legal and social

¹³ “Terrorists Charge Indy Blue News with 2 Felonies,” YouTube video, 1:08:03, posted by James Freeman, January 14, 2018, <https://www.youtube.com/watch?v=Zuue5aBTgIc>.

¹⁴ Ashley K. Farmer and Ivan Y. Sun, “Citizen Journalism and Police Legitimacy: Does Recording the Police Make a Difference?,” *Sociology of Crime, Law, and Deviance, The Politics of Policing: Between Force and Legitimacy*, 21 (June 10, 2016): 239–56, Proquest.

debates, the courts have examined foundational legal issues for nearly a century.¹⁵ Most of the reviewed literature overlooks or skims past the public safety issue, and that category has the fewest useful source materials.

1. Legal Issues for Video Recording Police and Government Officials

The literature on legal issues centers on First Amendment law and the right to record the police in public spaces; however, court decisions and scholarly literature present a latent and often muted response to the challenge audits create. By focusing on activities in the public forum, they fail to acknowledge and delineate the requisite framework for analyzing current or potential First Amendment restrictions that impact auditing activities.

a. Recording Police

First Amendment literature consists of court statutes, legal reviews, and scholarly publications related to the right to record police and reasonable restrictions on that activity. This literature is presented in a mixed-method format, because current reviews and publications, which generally echo the courts, provides a broader view at times and clouds the picture at other times.

For the issue of recording police, courts have mostly heard copwatch cases, but few controlling courts have considered the auditor scenario or reasonable TPM limitations for recording buildings, military bases, or critical infrastructure. Circuit courts support First Amendment protection for recording police performing public duties, but they have not

¹⁵ Vincent A. Blasi, “Rights Skepticism, and Majority Rule at the Birth of the Modern First Amendment,” in *The Free Speech Century*, ed. Lee C. Bollinger and Geoffrey R. Stone (New York: Oxford University Press, 2019), 13–15. (First amendment protections were argued as early as 1917–1919 by Learned Hand, Oliver Wendell Holmes, and Louis Brandeis.)

specified the time, place, or manner that this recording can occur; in fact, they often skirt the issue and resolve these cases on other grounds.¹⁶

Even for copwatching, the courts are inconsistent. The Sixth Circuit found that the right to record police exists in “certain contexts,” but is not uniformly established, particularly for traffic stops.¹⁷ Calling traffic stops “inherently dangerous,” the Third Circuit advised that if a right existed, it would be a qualified right, subject to reasonable restrictions.¹⁸ As the right must be established “in light of the specific context of the case,” courts often rule that it was not clearly (specifically) established, even when suggesting that it was generally recognized.¹⁹

Haviland writes that the right to record presumes the recorder wants to publish the video, but questions whether the activity even constitutes “speech.”²⁰ Bernick and Larken argue that four “federal circuits recognize a First Amendment right to film the police in public.” Derrick names those courts as the “First, Seventh, Ninth, and Eleventh Circuit Courts” of Appeal.²¹ Writing in the *Suffolk University Law Review*, Haviland takes a counter position on the right to record police and argues that in *Glick*, the court used

¹⁶ Johnson, “Legal Limbo,” 245; *Turner v. Driver*, 678. (In this sole appellate case examining the right of an individual to record a police building, the court is presented with the First Amendment question. Rather than addressing the question, the court examines whether the right, if it exists, was clearly established. Determining that the right is not clearly established, allows the court to avoid formally deciding whether it exists. In this case, however, the court takes a different approach and declares that although the right was not clearly established, it is now unambiguously established, “subject to reasonable time, place, and manner restrictions.” The court finds—and plainly states—that it is not going to spell out possible restrictions. This case raises important questions that could have clarified the proper examination of the case facts and elements, but are not first, is the right to record police absolute? Or is this application more akin to copwatch cases because the videographer was standing on the sidewalk [a traditional public forum]. Is it reasonable in the court’s view for officers to be concerned when subjects survey and record police personnel entering and leaving the building? In her dissent, Judge Edith Brown suggests that it is.)

¹⁷ Calvert, “The First Amendment Right,” 152.

¹⁸ Calvert, 157. (The Third Circuit took the opposite position when the plaintiff was a protestor arrested for her actions. See *Fields v. City of Philadelphia* [2017].)

¹⁹ Johnson, “Legal Limbo,” 2.

²⁰ Jane T. Haviland, “First Circuit Protects Right to Record Public Officials Discharging Duties in Public Space—*Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011),” *Suffolk University Law Review*, Constitutional Law, XLV, no. 4 (2012): 1337, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388.

²¹ Bernick and Larken Jr., “Filming the Watchmen,” 2–3; Geoffrey Derrick, “Qualified Immunity and the First Amendment Right to Record Police,” *The Boston University Public Interest Law Journal* 22 (2013): 249, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388.

circular reasoning to establish the right.²² Haviland also postulates that recording police is not a self-evident right because the conduct may not constitute speech.²³ Potere counters that prohibiting recording constitutes an unconstitutional form of “prior restraint” on First Amendment activity.²⁴ This view argues with Haviland that recording the police is a precursor to the later release of the video and expression of dissent, which bring this activity within First Amendment protection.²⁵ Mercer and Calvert independently acknowledge that some courts are divided on the issue and urge the Supreme Court to clarify the extent of First Amendment privileges to record police by outlining reasonable restrictions.²⁶ While acknowledging division among the circuits, Calvert concludes that a Constitutional right has been established for most courts.²⁷ Calvert concedes that a “reasonable restriction” may be imposed if filming interferes with police duties, but counters that a police officer and citizen-journalist are not likely to agree on what is reasonable.²⁸ One probable area for this disagreement is over acceptable places for recording, including government facilities, and reasonable restrictions that the government can impose on that activity.

b. Recording Buildings

In *Illinois v. Alvarez*, the American Civil Liberties Union (ACLU) argued that citizens should be permitted to record police “when (1) the officers were performing their public duties, (2) the officers were in public places, (3) the officers were speaking at a volume audible to the unassisted human ear, and (4) the manner of recording was otherwise

²² Haviland, “First Circuit Protects Right to Record,” 1338. (“The court also failed to recognize the circularity of its argument regarding the clarity of the right to record public officials performing their public function: the lack of analysis surrounding the authority for the right to record noted in other cases does not unequivocally indicate the self-evident nature of the right.”)

²³ Haviland, 1337.

²⁴ Michael Potere, “Who Will Watch the Watchmen?: Citizens Recording Police Conduct,” *Northwestern University Law Review* 106, no. 1 (2012): 279, Proquest.

²⁵ Potere, 279.

²⁶ Mercer, “Policing the Police,” 207–9, Proquest; Calvert, “The First Amendment Right to Record,” 249.

²⁷ Calvert, 157.

²⁸ Calvert, 160–61.

lawful.”²⁹ Descriptions like “public place” and “public duties” are more applicable to copwatching than auditing, but the ACLU suggestion is relevant to both discussions. Although the First Amendment permits recording police in public places, it does not require the granting of free access “on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.”³⁰

Turner is the only known First Amendment case involving auditing to be evaluated by a federal Circuit Court of Appeals. *Turner* concludes: “First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist [copwatching], subject only to reasonable time, place, and manner restrictions.”³¹ However, dissenting Judge Edith Brown debates whether the right was clearly established within the particularities of the case (auditing a police station).³² In the footnotes for *Turner*, the judges agree with every circuit that concludes, “that the First Amendment protects the right to record the police,” but add that “like all speech, filming the police” may be subject to restrictions.³³ The *Turner* court, while specifically declining to define which restrictions would be reasonable in this context, writes that such “restrictions must be narrowly tailored to serve a significant governmental interest,” but do not have to be “the least restrictive or least intrusive means of serving” that interest.³⁴

c. First Amendment Restrictions

Kathleen Ruane writes that the government may limit First Amendment rights “on the basis of content,” when the regulation promotes “a compelling interest and is the least

²⁹ Bernick and Larken Jr., “Filming the Watchmen,” 3.

³⁰ Bernick and Larken Jr., 5.

³¹ *Turner v. Driver*, 688.

³² *Turner v. Driver*, 690.

³³ *Turner v. Driver*, 690.

³⁴ *Turner v. Driver*, 690.

restrictive means to further the articulated interest.”³⁵ She provides three types of unprotected speech examples (obscenity, child pornography, and fighting words or threats).³⁶ Unprotected speech falls outside of constitutional protection because the courts conclude it lacks societal value in the expression of ideas.³⁷

The earliest example of “fighting words” or those words that advocate “imminent lawless action” and a breach of the peace was the act of “falsely shouting fire in a theater and causing panic.”³⁸ The “fighting words” shares concepts applied in the “clear and present danger” test, which removes protection from words used for and likely to create “the substantial evils that Congress has a right to prevent.”³⁹ “Fighting words” are one of those “substantial evils” when examined in the light of citizen-police encounters, and they are generally protected when directed at a police officer.⁴⁰ Early situations led to arrests for expression of displeasure about or vague threats to officers, but *Gooding v. Wilson* (1972) refined the meaning of fighting words to those likely to incite violence from the recipient.⁴¹ *Houston v. Hill* (1987) concluded that even fighting words may be protected when the recipient is a police officer who should have training enabling greater restraint.⁴² *Benavidez v. Shutiva* agreed, “that police officers are not ordinary citizens,” and properly trained officers should “be less likely to respond belligerently.”⁴³

³⁵ Kathleen A. Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CRS Report No. 950815 (Washington, DC: Congressional Research Service, 2014), 1, <https://fas.org/sgp/crs/misc/95-815.pdf>.

³⁶ Ruane, 2–3.

³⁷ Ruane, 2–3. (Obscenity is “patently offensive ‘hard core’ sexual conduct,” and can be adult or child pornography that “lacks serious literary, artistic, political, or scientific value”; child pornography is unprotected, obscene or not; fighting words are those that tend to incite an immediate breach of the peace.”)

³⁸ Ruane, 4–5; “*Schenck v. United States*,” Oyez, 52, accessed June 2, 2019, <https://www.oyez.org/cases/1900-1940/249us47>.

³⁹ *Schenck v. United States*, 249 US 47 S. Ct. (1919).

⁴⁰ *Chaplinsky v. New Hampshire*, 315 US 568 S. Ct. (1942).

⁴¹ *Gooding v. Wilson*, 405 US 518 S. Ct. (1972).

⁴² *Houston v. Hill*, 482 US 451 S. Ct. (1987).

⁴³ *Benavidez v. Shutiva*, 350 P. 3d 1234 (Court of Appeals 2015).

Ruane does not apply these rulings to the civil rights auditor or delves into the applicability of reasonable limitations on auditing behavior. However, her categories of unprotected and protected speech directly apply to the auditor targets and methods revealed further in this research. Ruane writes that—outside of threats or fighting words—government restrictions on fully protected speech will only be upheld if it furthers “a compelling interest” and is the “least restrictive” option; but “lesser procedural safeguards are [presumably] adequate” for forms of speech that do not receive full First Amendment protection.”⁴⁴ On the other hand, *Turner* emphasized that imposed restrictions need not be the least restrictive available when establishing content-neutral and reasonable TPM restrictions for recording police.⁴⁵

Aside from the nature of restrictions, as content-neutral or content-based, Ruane explains that the location affects court requirements for potential limitations and notes that public forums have a higher bar against restrictions than nonpublic forums.⁴⁶ Quoting *U.S. v. Kokinda*, Ruane writes that in a nonpublic forum, “A government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.”⁴⁷ She then lists “military bases, prisons, and school mail systems” as examples of nonpublic forums.⁴⁸

Miller advises federal law enforcement that the “order to stop recording can be constitutionally imposed when an officer can reasonably conclude that the filming is subject to a reasonable time, place, or manner restriction.”⁴⁹ A publication from the Bureau

⁴⁴ Ruane, *Freedom of Speech and Press*, 5.

⁴⁵ *Turner v. Driver*, 690.

⁴⁶ Ruane, *Freedom of Speech and Press*, 8.

⁴⁷ Ruane, 8–9.

⁴⁸ Ruane, 9.

⁴⁹ Tim Miller, “Remember the First Amendment—So Smile . . . You May Be on Candid Camera,” *Monthly Legal Resource and Commentary for Law Enforcement Officers and Agents*, *Informer*, 15, no. 2 (2015): 6, <https://www.fletc.gov/sites/default/files/2Informer15.pdf>. (Tim Miller is listed as an attorney advisor and senior instructor for the Department of Homeland Security (DHS) Federal Law Enforcement Training Center. The examples he offers where recording can be limited are reasonable expectation of privacy, the protection of a witness, and the prevention interference in a traffic stop. No actionable direction is offered with regard to how the officer should apply those restrictions or interact with copwatchers. A brief reference to recording federal buildings states that officers can contact the person and talk to them, but will require reasonable suspicion or probable cause to take any action. Without either, he advises the officer simply to “smile for the camera.”)

of Justice Assistance and the Department of Homeland Security draws a similar conclusion.⁵⁰ While the former provides more examples, neither offers substantive and applicable indications of what these restrictions entail for civil rights audits.⁵¹ Little or no literature addresses First Amendment protections specific to auditors and their targeting of public buildings, military bases, critical infrastructure, or private organizations. Some aspects of auditing are similar enough to copwatching to infer rights or limitations from relevant First Amendment jurisprudence. Others require further inquiry to determine which court rulings on forum classifications and relevant standards of constitutional review apply.

The single case involving an auditor shows that the First Amendment generally protects copwatching, but offers little direction toward identifying reasonable TPM restrictions on auditing activities. In *Turner v. Driver*, the Fifth Circuit writes that the plaintiff relied on decisions supporting protections for “gathering information,” but failed to “demonstrate whether the specific act at issue here—video recording the police or a police station—was clearly established.”⁵² Dissenting Judge Edith Brown speculates that the majority granted qualified immunity to the arresting officer “perhaps because it would be reasonable for security reasons to restrict individuals from filming police officers entering and leaving a police station.”⁵³ The court responds, “[b]ecause the issue continues to arise in the qualified immunity context, we now proceed to determine it for the future. We conclude ... that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.”⁵⁴

⁵⁰ National Criminal Intelligence Resource Center, “Responding to First Amendment-Protected Events: The Role of State and Local Law Enforcement Officers” (online training, National Criminal Intelligence Resource Center, 2019), https://www.ncirc.gov/onlinetraining/modules/first_amendment_rollcall/index.html. The Public Recording of Police (PROP) project provides guidance and training for copwatching, but does not directly address auditors.

⁵¹ National Criminal Intelligence Resource Center.

⁵² *Turner v. Driver*, 697.

⁵³ *Turner v. Driver*, 697.

⁵⁴ *Turner v. Driver*, 688.

Regarding First Amendment applicability, Brown writes, “[t]o the extent there is any consensus of persuasive authority, those cases focus only on the narrow issue of whether there is a First Amendment right to film the police carrying out their duties in public” (copwatching).⁵⁵ Rather than arguing for a right to record police in public, Turner argued that he was filming a police station (auditing), for which the court found no established right. Legal reviews of this case tend to ignore this distinction, and focus instead on the court’s explicit support of copwatching.

Furthermore, because this case is not controlling over other Circuit Courts of Appeal—and the Supreme Court has been silent on this specific subject—most agencies remain unclear about whether they can lawfully prevent someone from surveilling their station, a local military base, a critical infrastructure, or a private institution. The issues of myopic scholarly distinctions between copwatchers and auditors, and court inconsistencies in First Amendment cases, suggest a limited understanding of the auditor issues and an ambiguous framework for analyzing and applying First Amendment law to the challenges raised by auditors. By systematically identifying and analyzing these challenges, this thesis seeks to resolve these questions.

Most court decisions address copwatching groups (those recording police performing their duties in public) and rule that the First Amendment protects the activity.⁵⁶ These cases also acknowledge that “reasonable TPM restrictions” may be imposed upon this activity.⁵⁷ Unfortunately, the higher courts have yet to clearly delineate “reasonable” restrictions concerning auditing (recording government facilities or other buildings).⁵⁸ It is in the auditing activities where the First Amendment protections are blurred. YouTube

⁵⁵ *Turner v. Driver*, 697.

⁵⁶ Mercer, “Policing the Police,” 187–209; Bernick and Larken Jr., “Filming the Watchmen,” 3. (Bernick and Larken discuss that the Third Cir. Court did not find a right existed to record traffic stops, which the court label as “inherently dangerous.”)

⁵⁷ *Turner v. Driver*, 678; Calvert, “The First Amendment Right to Record,” 131–445.

⁵⁸ Johnson, “Legal Limbo,” 245.

videos highlight police reactions and suggest an overall law enforcement certainty that reasonable TPM restrictions are applicable. Auditors believe that, suspicious or not, the Constitution protects them even from inquiry, and in some cases, gives them license to behave in fringe behavior—those otherwise socially unacceptable and borderline unlawful manners, merely because they are holding a camera.⁵⁹ Without legal clarity, civil rights auditors and law enforcement will increasingly clash as ambiguous and contested boundaries destabilize the civil rights–law enforcement equilibrium.

2. Social Issues, Motives, and Concerns

Only recently has scholarly work surfaced related to the auditor issue, and it mostly considers and supports copwatching activity.⁶⁰ Much of this literature, in fact, does little more than echo and comment on court findings while demonstrating little understanding of the question of reasonable TPM restrictions on auditors.⁶¹ A few authors offer writings in support of copwatching and activism and welcome its impact on police legitimacy, although their reasons vary widely from desiring government accountability to advocating for government collapse.⁶²

⁵⁹ “Terrorists Charge Indy Blue News with 2 Felonies.”

⁶⁰ Brown, “The Blue Line on Thin Ice,” 293–312; Don E. Lindley, “Control Balance Theory and Adverse Citizen-Police Interactions: A Phenomenological Study” (PhD diss., Northcentral University, 2014), 154, Proquest; Justin Nix and Justin T. Pickett, “Third-Person Perceptions, Hostile Media Effects, and Policing: Developing a Theoretical Framework for Assessing the Ferguson Effect,” *Journal of Criminal Justice* 51 (June 2017): 31, <http://dx.doi.org/10.1016/j.jcrimjus.2017.05.016>.

⁶¹ Ruane, *Freedom of Speech and Press*. (The exception to that statement is found in the work of Ruane, which offers a thorough overview of First Amendment cases. The design of her case review would also preclude discussion of auditors, when no cases were available to discuss at the time of publication.)

⁶² Police legitimacy and its effects are issues beyond the scope of this thesis, except to note that police legitimacy is one of those social issues where the information gap regarding reasonable TMP restrictions can create negative consequences for police. In other words, police should be concerned about the auditor conflict because it can at the least have unknown consequences, and at the worst, result in de-legitimation and de-policing.

The loss of police legitimacy has some administrators concerned about secondary effects, including de-policing and its impact on the community.⁶³ Brucato argues that recording the police in the performance of their job improves policing by increasing transparency and highlighting social injustice.⁶⁴ For example, Andrew Goldsmith writes that police are subject to a new visibility (“secondary visibility”) that can create an “institution of distrust,” which undermines effective “policing by consent.”⁶⁵ Brucato quotes Goldsmith and activists who believe recording police shifts the social power to the citizen, by using legitimacy as leverage for change, but then argues that police are too “resilient” for the new visibility to prompt long-term change.⁶⁶ Brucato expounds, saying the police “know they are now visible, and yet the police institution and its use of violence do not appear to be changing in any fundamental way.”⁶⁷

⁶³ Justin Nix, Scott E. Wolfe, and Bradley A. Campbell, “Command-Level Police Officers’ Perceptions of the ‘War on Cops’ and De-Policing,” *JQ: Justice Quarterly* 35, no. 1 (February 2018): 49, <https://doi.org/10.1080/07418825.2017.1338743>. (The author argues that copwatcher belief that recording police will promote change, premise that belief on three assumptions: recording “circumvents filtering,” “shapes the agenda,” and protect the [recorder].); Lindley, “Control Balance Theory and Adverse Citizen-Police Interactions.” (The author evaluates current research on adverse citizen-police relations and finds a gap, where research is lacking on the subject from the view of the officer. Conducting interviews of retired officers, the author seeks to add a qualitative phenomenological assessment of the impact of citizen complaints on police. The author finds that some officers respond to citizen video and complaints by withdrawing from the job, or what others have labeled depolicing. This dissertation is slightly behind the curve for the current discussion on police-citizen interactions. While it provides insight into officers’ perspectives, it skims over the issue of civil rights activists or hostile citizen journalists. It is also slightly dated, being four years old, and interviews retired police, who are less likely to have been active officers engaging the public. It does, however, serve to highlight the research gaps where the police perspective and the de-policing effects of citizen complaints need further inquiry.); Brown, “The Blue Line on Thin Ice,” 294. (The authors study 231 Canadian officers and officials to assess the behavioral impact of the increased use of camera phones and video cameras upon police practices. The authors conclude that cameras reduce the use of “illegitimate” force, without considering the impact or acknowledging the need for legitimate force, even noting that lower levels of force result in higher levels of perceived legitimacy. The conclusion does reference the need for studies regarding the “potential for risk averse front-line police” as a product of increased public scrutiny.)

⁶⁴ Brown, “The Blue Line on Thin Ice,” 294–95.

⁶⁵ Andrew John Goldsmith, “Police Reform and the Problem of Trust,” *Theoretical Criminology* 9, no. 4 (November 1, 2005): 443, <https://doi.org/10.1177/1362480605057727>; Andrew John Goldsmith, “Policing’s New Visibility,” *British Journal of Criminology* 50, no. 5 (September 2010): 917–18, <http://dx.doi.org/10.1093/bjc/azq033>.

⁶⁶ Ben Brucato, “The New Transparency: Police Violence in the Context of Ubiquitous Surveillance,” *Media and Communication* 3, no. 3 (2015): 50, <http://dx.doi.org.libproxy.nps.edu/10.17645/mac.v3i3.292>.

⁶⁷ Brucato, 50.

Farmer, Parry, and Lindley evaluate the impact of recording police on legitimacy.⁶⁸ Farmer and Parry examine the behavioral impact, while Lindley explores the implications of recording police on officer effectiveness and such societal consequences as de-policing (the idea that undesirable public exposure causes police to disengage from their enforcement responsibilities). Lindley finds that some officers report de-policing effects from media scrutiny, but he concludes that the subject calls for further study.⁶⁹

Without clear boundaries, police face increasing liability, as courts draw conflicting conclusions about enforceable lines of protection between civil liberties and civil authorities. Qualified immunity hearings and court cases draw these lines during civil suits challenging the constitutionality of police conduct, or state or local statutes, which typically follow a police-citizen conflict. Each case decision offers a piece of the puzzle within the convoluted framework of First Amendment jurisprudence. This thesis seeks to clarify First Amendment liberties and limits by examining specific issues and legal questions raised by the analysis of auditor tactics and targets.

D. RESEARCH DESIGN

The design for this thesis research is iterative qualitative data analysis, with elements of legal analysis and policy analysis. Qualitative data analysis “is the process of identifying patterns in written information, audio recordings, video, or images.”⁷⁰ Jensen and Laurie describe two broad qualitative data analysis components, understanding the scope of the data and how to describe it, and conducting several “practical activities” required to examine and interpret that data.⁷¹ Saldaña refers to this analysis as first cycle and second cycle coding, where the first cycle is more general and exploratory, and the

⁶⁸ Megan Marie Parry, “Watching the Watchmen: How Videos of Police-Citizen Encounters Influence Individuals’ Perceptions of the Police” (PhD diss., Arizona State University, 2017), 1–181, https://repository.asu.edu/attachments/186564/content/Parry_asu_0010E_17096.pdf; Ashley K. Farmer, “Copwatchers: Citizen Journalism and the Changing Police-Community Dynamic” (PhD diss., University of Delaware, 2016), 1–200, Proquest; Lindley, “Control Balance Theory and Adverse Citizen-Police Interactions,” 96.

⁶⁹ Lindley, 96.

⁷⁰ Eric Jensen and Charles Laurie, “An Introduction to Qualitative Data Analysis,” Sage Research Methods, 2017, <http://methods.sagepub.com/video/srmpromo/BJv9FI/an-introduction-to-qualitative-data-analysis>.

⁷¹ Jensen and Laurie.

second cycle—directed by the research question—zeros in on themes and priorities.⁷² The qualitative data analysis for this thesis consisted of these two cycles, presented in four phases: first cycle (the initial review) and second cycle (secondary review, data validation, and data interpretation).

The initial review examined 10 unique auditors and used Excel to document objective information. For example, I documented the auditor name, location type, and video title, and subjective information, as well as auditor actions likely to create conflict, to identify the scope of auditing methods and prioritize issues for analysis. The research applied that information to develop categories (e.g., location type) to track with generalized groupings for potential attributes within each category (like government buildings or police stations). These content-based observations were then grouped and generalized to create the coding for application to a larger dataset in a secondary video review.

In the secondary review, 50 videos—one from each state—expanded the dataset. Newly identified attributes and elements modified existing categories or descriptions to more clearly reflect “which [codes] in the research are the dominant ones and which are the less important ones.” This Axial coding “reorganize [d] the data set: synonyms [were] crossed out, redundant codes [were] removed and the best representative codes [were] selected,” and provided a better picture of auditor styles, methods, targets, and results.⁷³

Next, a systematic legal analysis examined the legality of common behaviors, challenges, location regulations, and officer responses, by loosely applying the issue, rule, analysis, and conclusion (IRAC) legal analysis method.⁷⁴ Finally, a policy analysis compared the research observations against the model policy on Public Recording of Police (PROP), published by the International Association of Chiefs of Police (IACP), and sought

⁷² Johnny Saldaña, *The Coding Manual for Qualitative Researchers*, 2nd ed. (Los Angeles: SAGE, 2013), 68.

⁷³ Saldaña, 244.

⁷⁴ “Part 2: Learn the Secret to Legal Reasoning,” LawNerds, accessed October 5, 2019, <http://www.lawnerds.com/guide/irac.html>.

to discover additional TPM restrictions.⁷⁵ This evaluation explored the degree to which the policy addressed commonly represented auditor scenarios and the alignment of policy and First Amendment jurisprudence.

E. CHAPTER OVERVIEW

Chapter I introduces the problems examined in this thesis and consolidates them to one question: What are reasonable TPM restrictions to civil liberties with regard to recording police, government facilities, and critical infrastructure?

Chapter II begins with a methodological overview, and offers further details into the specific activities for each of the four phases of research and explains the basis for coding decisions and modifications as the research progressed. Some of this discussion includes information about assumptions driving the coding process, particularly for Cycle One's initial video review, where unavoidably subjective decisions provided a starting place for data point inclusion or exclusion. As expected, the net was initially wide, but it narrowed as the research progressed.

Chapter III evaluates the identified legal issues and challenges identified in recurring auditor tactics and targets. This legal analysis examines each issue, then discusses relevant rules (in the form of case law and legal statutes) to analyze the question and offer a conclusion.⁷⁶ In some cases, the conclusion is that the legality of the conduct is unclear or inconsistent among current court cases.

By comparing several sample policies with the legal analysis and observed auditor targets and tactics, Chapter IV highlights gaps and offers policy recommendations related to auditor training and response. Chapter V concludes with a discussion about the challenges of this research and potential areas for further research related to this thesis.

⁷⁵ International Association of Chiefs of Police, *Public Recording of Police Activities: Instructor's Guide* (Alexandria, VA: International Association of Chiefs of Police, 2017), 1–40, <https://www.theiacp.org/sites/default/files/pdf/PROP%20Instructor's%20Guide.pdf>.

⁷⁶ Nelson Miller and Bradley Charles, "Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework," *Journal of Legal Education* 59, no. 2 (January 11, 2009): 193, <https://jle.aals.org/home/vol59/iss2/3>.

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II. RESEARCH METHODOLOGY

This chapter describes the auditor video analysis process and findings in greater detail, explains the theoretical foundations for coding and recoding each cycle to identify the data most relevant to the thesis question, and locates the patterns in auditor identity, video naming, narrative, audit tactics and targets. The process of iteration changed the data relevance and prioritization throughout the research and enabled exclusion of elements irrelevant to the research question. In this way, the research question influenced the data parameters and drove the research iteratively, rather than in linear fashion.

A. FIRST CYCLE—INITIAL VIDEO REVIEW

In the first cycle, I searched YouTube videos for 10 First Amendment audits posted by the authors on the creation date, and chose the most recent video from each search return. I avoided “mirrored” videos—those reposted to another user’s channel—and “reposts” or “re-ups,” or old videos posted by users to keep their channel active. The research sought to study audits, not copwatching, so that audits only included those instances in which the auditor initiated police contact. Titles were assessed to identify the information they revealed about the audit type, location, tactics, target reaction, and outcome. As I recorded the video dates, I watched for indicators of strategic significance for selected dates. Examples of strategic date selection might include an audit of a federal building on the anniversary of September 11 or of a police station during an officer funeral. In these cases, I theorized that auditors would capitalize on elevated emotions to influence officer response and create the desired conflict, which would provide a negative video to shift media coverage from sympathetic to critical.⁷⁷ Appendix C provides the documentation to for the research for this thesis.

⁷⁷ This author has personal knowledge of James Freeman using this tactic (without success) in Richardson, Texas when they buried Officer David Sherard on February 13, 2018.

As I documented auditor actions, observing patterns in auditor methods allowed for the development of recurring tactics later generalized and grouped for the second cycle analysis. I observed the individuals openly filming locations and people to generate concern and cause a police response to be a universal tactic for auditors. The patterns for some tactics surfaced less conspicuously. Each time I discovered a new means to trigger police notification or create conflict with responding officers, I added a column to the spreadsheet until I had five columns for secondary tactics. Most auditors used more than one method, and some—like Patrick Roth—use as many as six tactics on a single police-citizen encounter.⁷⁸ As I logged the auditor YouTube names, I observed naming patterns suggesting that the research might glean an understanding of the auditor’s self-image and worldview from YouTube names. Patterns in the auditor activity methods allowed me to group them into two categories, actions to trigger police and actions to create conflict for their videos.

When someone records the gates, personnel, and security features of a building, it raises understandable concerns within those entrusted to protect it. When the citizen or officer voiced their concerns, I recorded it in the spreadsheet, until a pattern emerged and distinguished methods as either bait or traps. The application and apparent purpose of auditor tactics distinguish their classification as bait or traps; bait tactics seek to solicit the initial reaction from the public resulting in police notification, while traps seek to challenge protective or defensive police instincts to generate citizen-police conflict, and then capture a perceived legal, policy, or constitutional error for YouTube viewers. As targets and responding officers voiced concerns, I recorded them for future legal and policy analysis.

YouTubers, including auditors, have increasingly included video previews in the form of thumbnail images, outlandish text captions, or both to draw viewers to the video in a click-bait fashion. Some previews are clear honor challenges that seek to attract viewers by insulting the officer or highlighting failed efforts to exercise authority. When the video contained a custom thumbnail and text caption, I assigned it the code of clickbait

⁷⁸ “Cockrell Hill, Tx.- ‘It’s Simple I.D. or Jail Buddy!’ -Police Department,” YouTube video, 10:31, posted by Patrick Roth, May 10, 2019, <https://www.youtube.com/watch?v=bPkIJ5WSTcc>.

(conflict-based information not representing the actual events), negative honor challenge (insulting text or images of responding officials or public) or a legitimacy claim (indicating a successful effort to shame the target).⁷⁹ If multiple coding categories applied, I documented the most apparent one. Although most of the videos could be considered clickbait, legitimacy claims and honor challenges were prioritized on the premise that they predispose the viewer to perceive the video account of officer actions in a negative light.⁸⁰ The first cycle review offered useful insights and vague categories for auditor types, tactics, and targets, but the small sampling precluded confidence that the spreadsheet represented the full range of auditing activities.

B. SECOND CYCLE—SECONDARY REVIEW

To increase data confidence and represent national auditing methods and targets, I analyzed 50 new videos. After removing a duplicate and combining the data from the 10 previous videos, the spreadsheet contained 59 unique videos from around the nation that comprised 48 different auditors and representing 48 states.⁸¹ I expected the date of audits to be relevant, based on personal experience when James Freeman intentionally audited an agency on the day of its officer's funeral. During data filtration and interpretation, however, I found no significance for audit date selection, so I removed it from further consideration.

⁷⁹ Honor challenges, legitimacy claim, and identity (self and group) are analytical markers for the Social Identity Theory and framework for analyzing individual behavior within a group context. For more information on this subject, see David Brannan, Kristin Darken, and Anders Strindberg, *A Practitioner's Way Forward* (Salinas, CA: Agile Press, 2014) and Henri Tajfel, ed., *Social Identity and Intergroup Relations (European Studies in Social Psychology)* (Cambridge: Cambridge University Press, 2010).

⁸⁰ Filippo Menczer and Giovanni Luca Ciampaglia, "Misinformation and Biases Infect Social Media, Both Intentionally and Accidentally," *The Conversation*, June 20, 2018, <http://theconversation.com/misinformation-and-biases-infect-social-media-both-intentionally-and-accidentally-97148>.

⁸¹ Frequent auditor methods, targets, and legal challenges, as well as public or police responses, were also captured for a secondary legal inspection of agency requirements and options. This analysis excluded copwatch activity and focused solely on auditor-specific relevant themes, tactics, and targets, unless the data generated a question that required further inquiry to answer.

Through the iterative video reviews, place and setting data formed patterns for specific target location types that became increasingly relevant in the legal analysis.⁸²

Data interpretation required examining the video notes and data, then filtering duplicates and forming generalized groups from the types that emerged in the second cycle review. Patterns in the video notes fields revealed common responses and concerns. Using Excel sort and conditional formatting, auditor methods formed groups, labeled as bait (methods to trigger police notification) and traps (methods to cause police to make a mistake). The groups were then examined for their relevance to the thesis question, and categorized as relevant, not relevant, and documentation. When this process was complete, four data types remained: bait, traps, issue, and target. These groups represented specific scenarios to evaluate using the IRAC framework to examine applicable statutes and case law. I then applied the results of the video research and legal analysis to existing or model First Amendment-related policies to guide the analysis and make policy recommendations.

Table 1 shows the development of data types and groupings among the research cycles, as the data progressed from unique fields to field types, to groups, to removal.

⁸² Data validation was considered and the design of the search to locate videos in every state could arguably skew search results to show only videos with location information in the titles. To validate location information and the trends toward users identifying the location further, a case study analyzed 76 videos on the James Freeman channel, and found that location inclusion remained the primary consistent title attribute; however, the title data is not included in this thesis, as it fails to advance the research question.

Table 1. Research Data Cycle

	FIRST CYCLE	SECOND CYCLE	DATA INTERPRETATION	LEGAL ANALYSIS
Category	Fields	Types	Groups	Specific
Data Fields	Date	Date	Date	Date
	YouTube Identity	YouTube Identity Type	YouTube Identity	YouTube Identity
	Video Title	Video Title Type	Video Title	Video Title
	Auditor Activity	Auditor Bait Methods	Bait	Bait
	Secondary Activity	Auditor Trap Methods	Traps	Traps
	Response to Auditor	Response Type	Expressed Concerns	Issue
	Location	Location Type	Target Location	Location
Added Fields	URL	URL	URL	URL
	Notes	Notes	Notes	Notes
	Caption	Caption Types	Caption Theme	Caption
	Thumbnail	Thumbnail Types	Thumbnail Narrative	Thumbnail
Total Videos	10	+50 (-1)	59	59
Collected data condensed through analysis and moved from relevance to exclusion.				
Relevance	Excluded	Relevant	Not Relevant	Documented

Finally, policies for copwatching or auditing were reviewed to identify the degree to which they addressed common legal issues observed and aligned with case law. The Baltimore Police Department formed policies under a consent decree and the direction of the Department of Justice (DOJ). This research also evaluated IACP coverage of responses to civil rights audits by examining the PROP model policy.⁸³ Police, auditors, and legal aspects were analyzed to offer policy guidance for interacting with auditors that agencies can use to train officers and better prepare them for these encounters. Ultimately, this thesis sought to highlight the issues and pitfalls of auditor activity, applicable to law enforcement

⁸³ International Association of Chiefs of Police, *Recording Police Activity: Model Policy* (Alexandria, VA: International Association of Chiefs of Police, 2015), 1–2.

and homeland security, identify reasonable time, place, or manner restrictions for each, and provide officials with the information to develop effective policy and training to prepare and equip their officers for civil auditor encounters.

C. AUDITOR CATEGORICAL OBSERVATIONS

Analysis of auditor methods, tactics, and targets provided specific scenarios to examine for suitable TPM restrictions. While many of the bait and traps fall within the purview of a criminal statute or no statute at all, the legal issues created and locations targeted apply most to First Amendment discussions.⁸⁴ Video analysis produced the following relevant categories.

- Bait—auditor methods for soliciting a police response
- Traps—secondary tactics and various honor challenges
- Issues—police and public reactions and voiced concerns
- Target—location type selected
- Response—police action

Aside from the date, each of these elements provides insight into the perspective of the auditor, as well as responding officials or citizens.

1. Bait-Auditor Methods for Soliciting a Police Response

Auditors bait police and the public with several tactics designed to provoke a response. By far, the most common incitement observed was using a camera to record a building. In many cases, it was the location recorded that raised more concern than the act

⁸⁴ YouTube auditor identity and in-group-outgroup dynamics were evaluated and documented during the second cycle video review. This analysis found legitimacy claims in 69 percent of auditor names and negative honor challenges in 66.7 percent of narratives propagated through video captions and thumbnail images. Full details of those findings are not included because they do not further the research questions.

itself.⁸⁵ Two auditors concealed their faces, one with a bandana and the other with a plastic mask.⁸⁶ Angling for conflict, Brandt wears a mask because, in his words, “the only thing that freaks people out more than the word ‘fuck’ or ‘cunt,’ or a camera—is masks.”⁸⁷ A stranger publicly filming children without explanation also causes alarm, as reflected in the HATETHESTATE video at a children’s water park. In this video, an enraged mother called the police, only to learn that they could not help her.⁸⁸

Two auditors carried signs bearing offensive statements or symbols to instigate a public and law enforcement reaction. HATETHESTATE carried a “Fuck the County” sign, while Eric Brandt’s sign read, “Fuck the Blue” and “Fuck cops.”⁸⁹ Finally, in one of the videos, a person carried a weapon to elicit a police response (in this case, she brandished a bat, covered her face with a bandana, and then strolled down the streets of Hagerstown, Maryland until someone called the police).⁹⁰ Auditors often focused video recording on security features, particularly at government buildings, where they also recorded employees coming and leaving, as well as personal vehicles and license plates. The NewsNow Alaska video of the FBI building and Fusion Center demonstrates an auditor recording employees and their personal vehicles, as he worked his way around the building

⁸⁵ “First Amendment Audit: Nashville TSA—Nashville, TN,” YouTube video, 14:25, posted by Civil Unrest News, February 11, 2019, <https://www.youtube.com/watch?v=R4IgZH6gu5o>; “1st Ammendment (sic) Audit Part 1 Sioux Falls Federal Court House,” YouTube video, 9:16, posted by Freedom is Watching, April 7, 2015, https://www.youtube.com/watch?v=osZm_fBSelM; “Oklahoma City,OK.-Bureau of Narcotics-‘I Want Your ID,’” YouTube video, 10:52, posted by Patrick Roth, September 25, 2018, <https://www.youtube.com/watch?v=HnOPfz5W92I>; “1st Amendment Audit US Post Office Fayetteville North Carolina,” YouTube video, 22:35, posted by Jeff Is Here, April 24, 2019, <https://www.youtube.com/watch?v=u5qPCFFcHG8>.

⁸⁶ “Hey You Stop! Give Me ID (CopWatch),” YouTube video, 4:53, posted by BLACKLAB3L, May 12, 2019, https://www.youtube.com/watch?v=r5weko_Cx0o; “Masked.”

⁸⁷ “Masked.”

⁸⁸ “Dont Film (Sic) My Kids in Public! 911 Called! Public Park 1st Amendment Audit,” YouTube video, 26:36, posted by HATETHESTATE, May 26, 2019, <https://www.youtube.com/watch?v=uh20OKSZN5k>.

⁸⁹ “Dont Film (Sic) My Kids in Public!; “Masked.”

⁹⁰ “Hey You Stop! Give Me ID (CopWatch).”

to the non-public entrances to seek a reaction.⁹¹ Whether recording federal buildings, private facilities, children in a water park, or wearing masks and carrying weapons, auditor methods have shifted from the sideline observation of police in the performance of their duties to tactics triggering police response and interaction. Only the former (sideline copwatching) has been considered by higher courts, and it is the latter engagement (auditing) that tests an officer's legal knowledge and makes evident the quality of their auditor-related agency training.

A thematic analysis of audit baiting techniques expanded categories beyond the first three (security, safety, and offensive methods) to comprehend auditor tactics for motivating citizens, military, and government officials to call the police. Baiting techniques fell into two categories, direct and indirect. For First Amendment audits, the common denominator is the use of recording equipment, which is present in every audit available for review. Most auditors used indirect baiting methods targeting expected concerns for security (49.2 percent), safety (22 percent), policy (16.9 percent), or privacy (3.4 percent).

The location may affect baiting methods, as some are more safety-focused (a church), while others are more security-focused (a military base). Federal buildings and courts are increasingly becoming places where auditors use security as bait for employees or law enforcement. Quite often, this tactic involves the indirect approaches of loitering and the prolonged recording of the exterior of a government building.⁹² When recording outside fails to get a response, auditors enter buildings and record until confronted, often

⁹¹ "F.B.I/Fusion Center Downtown Anchorage Alaska 1st Amendment Audit! ☆Silent Treatment☆," YouTube video, 14:44, posted by NewsNow Alaska, March 6, 2018, <https://www.youtube.com/watch?v=YRplmo1UxLY>.

⁹² "1st Amendment Test FBI Building (Birmingham, Alabama): Fail," YouTube video, 13:20, posted by Bama Camera, August 25, 2015, <https://www.youtube.com/watch?v=6KvfRQD1fv0>; "They Tried to Intimidate, They Failed!," YouTube video, 6:54, posted by Constitutional Corner, December 8, 2016, <https://www.youtube.com/watch?v=C0C8vO81ZqI>; "First Amendment Audit-Fail US Naval Academy. Annapolis Maryland," YouTube video, 22:32, posted by Chef Justice, August 25, 2017, https://www.youtube.com/watch?v=ZSN-OZT_CdA.

dismissing with disdain any polite attempts to assist them.⁹³ Some auditors trigger safety concerns by recording personal vehicles, recording school buses, or recording while armed.⁹⁴ Other auditors challenge locations where posted signs proscribe recording.⁹⁵

Aggressive auditors prefer to create direct conflict and the resulting police response through such tactics as insulting, harassing, or intentionally alarming citizens or officials.⁹⁶ Direct baiting, which is less common, accounts for only 18.6 percent of videos analyzed and includes wearing weapons (5.1 percent) or masks (5.1 percent), nuisance actions (5.1 percent), or harassment (3.4 percent). Table 2 illustrates the baiting methods observed in the 59 audits analyzed that reflect both direct and indirect tactics. The numbers do not total 59 because some auditors use multiple tactics, which typically progressed from indirect to direct tactics until a response was triggered.

⁹³ “Denver International Airport—Operations and Denver Police—1st Amendment Audit—Fail,” YouTube video, 22:40, posted by First Amendment Strike Team, October 8, 2018, https://www.youtube.com/watch?v=oTN_XlfNSLE; “First Amendment Audit—Stanton, KY Courthouse,” YouTube video, 21:19, posted by Eastern Kentucky Accountability, April 25, 2018, <https://www.youtube.com/watch?v=74CP4aOfgBo>.

⁹⁴ “F.B.I/Fusion Center Downtown Anchorage Alaska 1st Amendment Audit! ☆Silent Treatment☆”; “1st & 4th Amendment Violation Middletown, CT,” YouTube video, 5:53, posted by Justice Watch, April 17, 2019, <https://www.youtube.com/watch?v=0LP8onMH9N4>; “1st Amendment Audit of the Kootenai County Courthouse, Idaho (Pt. 1),” YouTube video, 14:39, posted by Rockman AL, June 22, 2018, <https://www.youtube.com/watch?v=PoeG0X6A968>; “Northmoor, Mo.- ‘He’s Armed and Filming!’ -Police Department Audit,” YouTube video, 6:17, posted by Patrick Roth, December 2, 2018, <https://www.youtube.com/watch?v=iM0UFyC1mFM>.

⁹⁵ The act of recording personal vehicles is perceived as a threat to government employees, even though auditors argue that license plates are public information and visible to anyone. Officials view this act as a form of doxing, because the auditor is tying that license plate to a specific official, who they are likely arguing is a tyrant who should be taught lesson. This act places the official and their family at risk. State statutes should proscribe such activity under retaliation and doxing statutes.

⁹⁶ “Unlawfully Detained and Trespassed, 1st Amendment Audit, Lessburg FL”; “First Amendment Audit Winder Police Department. (“I Need to Identify Who You Are”),” YouTube video, 24:16, posted by Georgia Guardian, January 1, 2019, https://www.youtube.com/watch?v=8WqSn_GyTPQ; “(Fail) ‘Hospital Lobby’ ‘Stop Filming Now!!!’ 1st Amendment Audit,” YouTube video, 31:39, posted by Auditing America, June 10, 2019, <https://www.youtube.com/watch?v=aRmFFTvDFBE>; “1st Amendment Audit, Chicago Rush Hospital,” YouTube video, 7:37, posted by NastyNathanel, November 12, 2018, <https://www.youtube.com/watch?v=sRTZI5S8eS0>.

Table 2. Baiting—Direct and Indirect Methods to Trigger a Police Response

Tactic	Count	% (of 59)
Direct Bait	11	18.6%
Harassment	2	3.4%
Nuisance	3	5.1%
Masks	3	5.1%
Weapons	3	5.1%
Indirect Bait	54	91.5%
Policy	10	16.9%
Privacy	2	3.4%
Safety	13	22.0%
Security	29	49.2%

2. Traps—Efforts to Facilitate Police Mistakes on Camera

Auditors created traps to lead the employee or official toward a decision that would provide viewer-pleasing conflict. Some auditors limited their activity solely to filming locations and publishing the outcome.⁹⁷ Other auditors walked the perimeter, overtly focusing on security features.⁹⁸ The more confrontational auditors carried weapons or offensive signs, wore masks, or engaged in harassing activity toward government officials, the police, or the public. Conflict often occurred between the auditor and the community or the auditor and responding officers. Secondary tactics or traps, including offensive signs or gestures directed at officials, recording children, recording a specific person, or using crude language, were coded as challenges to police, to a government employee, or to the public.

⁹⁷ “Patrick AFB/Civil Rights Audit (Precious Rights),” YouTube video, 14:41, posted by HonorYourOath Civil Rights Investigations, May 25, 2015, <https://www.youtube.com/watch?v=qv27T4WN2z0>.

⁹⁸ “Cockrell Hill, Tx.- ‘It’s Simple I.D. or Jail Buddy!’ -Police Department.”

In the comprehensive video assessment, traps used to generate a police response—like refusing to identify or answer questions concerning the purpose of their activity—are also used to test responding officers’ knowledge of the state and local laws.⁹⁹ Traps generally fall within one or more of three categories: legal challenge, policy issue, or personal authority challenge.

Legal challenge traps—a favorite auditor tool—include the refusal to provide identification and the refusal to explain the reason for actions that many targets will find suspicious.¹⁰⁰ Sixteen of the 28 auditors asked for identification refused to provide it, and eight refused to answer questions or even speak when contacted.¹⁰¹ Auditor Trey Citizen refused to provide his identification and initially refused to speak to the officer dispatched to contact him as a suspicious person recording personal vehicles of police and citizens.¹⁰² Before the officer spoke, Trey demanded, “name and badge number!” The officer provided it and then explained the reason for his contact and tried to ascertain the motives and intentions of Trey Citizen.¹⁰³ Following the trends observed in other videos, Trey asked, “what crime have I committed?”¹⁰⁴ The officer advised Trey that he had reasonable suspicion to contact him and determine his intent, given the citizen complaint, a recent shooting, and Trey’s unwillingness to explain himself.¹⁰⁵ Trey responded—“suspicious—

⁹⁹ “1st Amendment Audit South Bend Indiana Department of Transportation,” YouTube video, 34:31, posted by Freedom 2 Film, November 15, 2018, <https://www.youtube.com/watch?v=G-bmoAzhrhg>; “1st Amendment Audit USPS Worth II (All for Us?),” YouTube video, 19:31, posted by ChiTown Sue, June 19, 2019, <https://www.youtube.com/watch?v=8pCOWI3RDds>; “First Amendment Audit|You Need Permission to Film in Here|Augusta Maine Bureau of Motor Vehicles,” YouTube video, 14:44, posted by TRG4You TV, November 30, 2018, <https://www.youtube.com/watch?v=J2oYr3Zn5aQ>.

¹⁰⁰ “Cockrell Hill,Tx.-‘It’s Simple I.D. or Jail Buddy!’-Police Department.”

¹⁰¹ “First Amendment Audit Winder Police Department. (‘I Need to Identify Who You Are’); “They Tried to Intimidate, They Failed!”; “Michigan Cops Lose It Over Silent Photography! 1st Amendment Audit Fail!!,” YouTube video, 8:21, posted by Freedom News Now, May 2, 2017, <https://www.youtube.com/watch?v=dAa4iiushVg>.

¹⁰² “1st Amendment Audit Greer Police Department South Carolina...,” YouTube video, 8:44, posted by Trey Citizen, June 18, 2019, https://www.youtube.com/watch?v=utMO_NnQR7c.

¹⁰³ “1st Amendment Audit Greer Police Department South Carolina...”

¹⁰⁴ “1st Amendment Audit Greer Police Department South Carolina...”

¹⁰⁵ “1st Amendment Audit Greer Police Department South Carolina...”

is that a felony or misdemeanor?”¹⁰⁶ The first officer told him it was a misdemeanor, but the Sergeant correctly stated that it is “neither [a felony nor misdemeanor].”¹⁰⁷

Visibly flustered, a lieutenant demanded identification, but Trey kept repeating, “What crime have I committed?”¹⁰⁸ The Lieutenant responded that Trey was “gonna be [committing the crime of] failure to listen to a law enforcement officer ask you for ID.”¹⁰⁹ Trey retorted, “Is that a crime?”¹¹⁰ The Lieutenant answered, “Yes sir—in this day and age it is,” and then referred to Trey Citizen’s suspicious behavior.¹¹¹ Ultimately, Trey Citizen created a scenario intended to draw suspicion and concern, and then he refused to identify or offer any reasonable explanation to the officers, so they arrested him; the officers took the bait (recording vehicles) and then stepped into the trap (refusal to identify).¹¹² This video exemplifies how traps and baiting techniques amplify the conflicting concerns for civil liberties and public safety, which then prompt street-level policy decisions likely to be criticized by the public and the courts. Knowledge and training in local laws tested by auditors are critical to ensuring audit responses align with legal jurisprudence.

One area that an officer’s knowledge of local state law potentially impacts audit outcomes is with the refusal to identify trap. The Supreme Court ruled in *Hiibel* that with reasonable suspicion that individuals have or are about to commit a crime, police may contact them and *request* or *require* identification; the line between *request* and *require* is drawn by state law, in the creation of “Stop and ID” statutes.¹¹³ States can implement “Stop

¹⁰⁶ “1st Amendment Audit Greer Police Department South Carolina...”

¹⁰⁷ “1st Amendment Audit Greer Police Department South Carolina...”

¹⁰⁸ “1st Amendment Audit Greer Police Department South Carolina...”

¹⁰⁹ “1st Amendment Audit Greer Police Department South Carolina...”

¹¹⁰ “1st Amendment Audit Greer Police Department South Carolina...”

¹¹¹ “1st Amendment Audit Greer Police Department South Carolina...”

¹¹² “1st Amendment Audit Greer Police Department South Carolina...”

¹¹³ *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 US 177 S. Ct. (2004).

and ID” statutes requiring persons stopped on reasonable suspicion of a particular crime to present identification. With a Stop and ID statute, the officers interacting with Trey Citizen in the previous example would have been legally authorized to arrest Trey Citizen for failure to identify. Without the statute, they would not. According to court notes in *Hiibel* and documents published by the Immigrant Legal Resource Center, *South Carolina* is not a Stop and ID state.¹¹⁴ As demonstrated in this case, the state statute may ultimately determine the reasonableness of officer actions and the resulting impact on expressive activity.

The auditor refusing to stop, or walking away while the officer is speaking to them, creates another trap for the officers.¹¹⁵ This tactic, which creates a perceived urgency for the officer to respond and increases the likelihood of conflict, was only observed in four of the 59 audits. Over 40 percent (n=24) of the auditors challenged the officer’s or citizen’s understanding of the law or specifically cited a legal document, court ruling, or statute. Fourteen citizens took a less confrontational approach and asked, “Am I being detained,” “why am I being detained,” or “am I free to go” questions.¹¹⁶ The last question is so popular among auditors that they post and discuss audits on the topic-specific Reddit channel *r/AmIFreeToGo*.¹¹⁷ Refusing to stop when contacted and walking away while the official or officer is speaking to the auditor are substantially further tests of the “Am I Free to Go” question (or rather, laws on detentions and investigative stops). Eighteen auditors

¹¹⁴ *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 181; Immigrant Legal Resource Center, *Stop-and-Identify State Statutes in the United States* (Sacramento, CA: Immigrant Legal Resource Center, 2018), 20, https://www.ilrc.org/sites/default/files/resources/stop_identify_statutes_in_us-lg-20180201v3.pdf.

¹¹⁵ “Unlawfully Detained and Trespassed, 1st Amendment Audit, Lessburg FL”; “Oklahoma City,OK.-Bureau of Narcotics-’I Want Your ID.’”

¹¹⁶ “1st Amendment Test FBI Building (Birmingham, Alabama)”; “Denver International Airport—Operations and Denver Police—1st Amendment Audit—Fail”; “Joint Base Pearl Harbor-Hickam—Part I—First Amendment Audit,” YouTube video, 31:25, posted by Honolulu City News, March 22, 2017, <https://www.youtube.com/watch?v=rBvKgo77udg>.

¹¹⁷ “R/AmIFreeToGo—The After Effects of Turner V Driver: Austin PD DWI Stop,” Reddit comment, posted by Myte342, July 22, 2019, https://www.reddit.com/r/AmIFreeToGo/comments/cgbqx9/the_after_effects_of_turner_v_driver_austin_pd/.

(more than 30 percent) use a form of this tactic. Policy traps attempt to get the officer to violate a known policy and include tactics like requesting a complaint form, demanding the officer's name and identification, or requesting a supervisor.¹¹⁸ Requests for complaint forms were rare and typically occurred as bait to create the police-citizen conflict. Only three of 59 audits involved this tactic. Demanding an officer's name and identification was a more common diversionary trap observed in 44 percent of audits (n=26).

Statements like "you work for me" and "you're dismissed" challenged the authority of the officer and attempted to invoke a reaction.¹¹⁹ Officer overreaction increased auditor in-group validity, generated higher video views, and potentially increased funding sources. Citizen-police conflict also served to delegitimize police by driving the narrative that all police are tyrants. Auditors did not universally insult or harass police, but both auditors and law enforcement are generally familiar with those who did. Only 12 of the 59 audits included insults or harassment, while four used the "you're dismissed" challenge. Table 3 depicts the counts and percentages for personal ploys for trapping police to respond improperly.

¹¹⁸ "Assaulted by Wyoming State Patrol 1st Amendment Audit at Wyoming Department of Transportation," YouTube video, 34:12, posted by watching wyco, January 15, 2019, <https://www.youtube.com/watch?v=9lNnzW2xylQ>.

¹¹⁹ "Michigan Cops Lose It Over Silent Photography! 1st Amendment Audit Fail!!"; "Arizona Police (Dismissed) Intimidation Fail! 1st Amendment Audit with Surprise Ending," YouTube video, 13:21, posted by Freedom News Now, February 13, 2019, <https://www.youtube.com/watch?v=vafh1tfJzqw>.

Table 3. Ten Legal, Policy, and Personal Traps Observed in 59 Audit Videos

Legal Traps	Count	% of Audit
Refusing to ID	32	54.2%
Refusing to speak or answer questions	24	40.7%
(Why) Am I detained? Am I Free to Go?	14	23.7%
Refusing to stop walking away	4	6.8%
Policy Traps	Count	% of Audit
Demanding Officer Name & ID	26	44.1%
Demanding Supervisor	8	13.6%
Requesting Complaint Form	3	5.1%
Personal Traps	Count	% of Audit
Knowledge or authority challenge (policy, statute, or ruling)	24	40.7%
Insults or Harassment	12	20.3%
You're Dismissed	4	6.8%

Some auditors deploy multiple methods, while others, only a camera.

3. Issues Expressed in Response to Audits

When someone records the gates, personnel, and security features of a building, it raises reasonable anxiety within those entrusted to protect it. The targets commonly asked variations of the questions “what are you doing?” and “who are you?” In one video, an uneasy private warehouse guard asked the auditor what he was doing, and then told someone on the phone, “he’s recording, and I don’t know why; he’s not answering.”¹²⁰ In a similar audit, another nervous guard asked, “Why are you filming this institution [a Jewish Synagogue];” when the auditor did not answer, the matter escalated until the

¹²⁰ “Security Guard Leaves His Work Boundary,” YouTube video, 29:55, posted by News Now California, May 24, 2019, https://www.youtube.com/watch?v=tRmxO_vmIv8.

guard—thinking he had fired a warning shot—accidentally shot the auditor in the leg.¹²¹ These incidents highlight the evolving issues that develop when auditors shift their initial focus away from police and target individuals and private companies to trigger a police response. Target reactions have been coded based on an expressed concern for safety (for themselves or their location), security (personal, governmental, or national), organizational policy, or privacy.

The three primary categorical responses indicate that the auditor represented a perceived threat, regulatory violation, or a new form of harassment. In 53 of 59 videos analyzed, the statements of employees, citizens, or responding officials suggested a perception of threat, a concern for rules, or a feeling of harassment. Perceived threats made up 52.5 percent of responses and included concerns for security (23.7 percent), safety (22 percent), and terrorism (6.8 percent). Only three of the 59 audits (5.1 percent) failed to prompt the desired concerns. Interestingly, auditors quickly dismissed (if even acknowledged) expressed concerns as irrelevant.¹²² Officers in the Stanton Kentucky courthouse expressed concern about terrorism, adding “we don’t want people coming in and getting shots of our area and then planning it out;” the auditor assured them that he had no ill intentions, but refused to identify himself or his purpose.¹²³ Agents at an FBI building state, “you’re allowed to take pictures, but we’re also allowed to protect our office and figure out who you are,” referencing the “[t]error threat we have in this country.”¹²⁴

¹²¹ “Mirrored Furry Potato Shot,” YouTube video, 38:52, posted by News Now Wisconsin, February 15, 2019, <https://www.youtube.com/watch?v=a-e83D9z3rE>; James Queally, “Guard Won’t Be Charged in Shooting of Youtube Activist ‘Furry Potato.’ She’s Suing Him,” *Los Angeles Times*, March 13, 2019, <https://www.latimes.com/local/lanow/la-me-ln-furry-potato-lawsuit-20190313-story.html>. (The District Attorney refused to accept charges against the guard, stating “Perez went to a Jewish school, and place of worship, dressed in all black and with a backpack secured to her body by a harness, [...] Perez’s backpack could have contained a bomb, and her attire could have concealed a firearm or other deadly weapon.”)

¹²² “1st Amendment Audit US Post Office Fayetteville North Carolina.” When asked if he could see how recording might make postal employees uncomfortable, Jeff tells the officer, “I supposed, but their uncomfortable (sic) doesn’t trump my rights.”

¹²³ “First Amendment Audit—Stanton, KY Courthouse.”

¹²⁴ “1st Amendment Test FBI Building (Birmingham, Alabama).”

Officers, administrators, or staff responsible for enforcing the law, policies, or privacy requirements, often expressed regulatory concerns for the target location. Twenty-two people (37.3 percent) expressed regulatory concerns, pointing out a policy (23.7 percent), the law (8.5 percent), or privacy concerns for employees, citizens, or police (5.1 percent).¹²⁵ Courts and hospitals refer to policies and privacy concerns when telling the auditor to stop recording.¹²⁶ When an administrator referred to policy, the auditor would quickly respond that policy is not law, or demand to know which law prohibited the exercise of their First Amendment right to record.¹²⁷ As this analysis reveals, auditors commonly test security measures, policies, and harassment laws under the protection of the First Amendment. While harassment made up only 5.1 percent of cases examined, it is known to be a primary tool for auditors.¹²⁸ Table 4 depicts concerns expressed by the targets of audits or by responding officers on their behalf.

¹²⁵ “First Amendment Audit Winder Police Department. (‘I Need to Identify Who You Are’); Patrick Roth, “Leavenworth,KS.-‘It’s State Law No Recording!’-First Amendment Audit,” YouTube video, 11:42, posted by Patrick Roth, October 31, 2018, <https://www.youtube.com/watch?v=B4RxFmGB2r8>; “Northmoor,Mo.-‘He’s Armed and Filming!’-Police Department Audit.”

¹²⁶ “(Fail) ‘Hospital Lobby’ ‘Stop Filming Now!!!’ 1st Amendment Audit”; “Little Rock,AR-Federal Courthouse 1st Amendment Audit,” YouTube video, 6:05, posted by News Now Houston, April 15, 2017, <https://www.youtube.com/watch?v=kBwOVyiHJ1k>; “First Amendment Audit of the US Court of Appeals 9th Dist,” YouTube video, 23:46, posted by NewsNowSeattle, December 27, 2018, <https://www.youtube.com/watch?v=fjmd6oP3t1Y>.

¹²⁷ “(Fail) ‘Hospital Lobby’ ‘Stop Filming Now!!!’ 1st Amendment Audit.” (The auditor asserts [correctly] that hospital “[p]olicy is not law!”)

¹²⁸ “David Boren’s YouTube Stats (Summary Profile),” Social Blade, September 15, 2019, https://socialblade.com/youtube/channel/UCOjcyOuoygDkSVTVE2_B6Wg. (Boren’s channel was created December 2013, but he has recently adopted tactics he learned from James Freeman [aka as Springer]. Consequently, 41k of his overall 72k subscriptions appear to be the product of his change in tactics.)

Table 4. Issues Raised and Concerns Expressed by Police or Citizens

Expressed Concern	Count	% (of 59)
Harassment	3	5.1%
Regulatory Concerns	22	37.3%
Privacy	3	5.1%
Policy	14	23.7%
Law	5	8.5%
Perceived Threat	31	52.5%
Security	14	23.7%
Safety	13	22.0%
Terrorism	4	6.8%
None	3	5.1%

4. Target—Location Type Selected

Although some auditors also engaged in copwatching where they initiated contact and hassled officers conducting a traffic stop or other enforcement, the location types analyzed were limited to instances where the auditor sought to elicit a police-citizen contact. The initial 10 reviews included unique locations review target-specific similarities and differences in auditing methods. Diverse location types encompassed both government offices and private citizens: a public street, a federal fusion center, a police station, a fire station, a prison, an Federal Bureau of Investigation (FBI) building, a Jewish synagogue, a Department of Defense (DoD) building, a private business warehouse, and a children’s park. Initial coding for location types explored patterns for targeting government offices, government officials, private organizations, or a private individual. The location types analyzed covered only instances in which the auditor sought police contact, not police-initiated contacts. Further inquiry was required to determine whether the constitutional protections for “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space” applied to the recording of private

citizens and companies.¹²⁹ Many targeted locations had nothing to do with public officials until concerned citizens called the police.

Overwhelmingly, audits centered on government buildings. Data filtering and consolidation required grouping audit target locations in the three types: government buildings, critical infrastructure, and private facilities. Within each type were unique locations that present specific legal and policy challenges. Hospitals were assigned a different category because they have unique rules and can be private or state-owned. Legal due to location-specific legal differences in potential TPM restrictions, I assigned distinct categories to remaining locations. The video analysis involved one privately owned and one state-funded hospital. Auditors targeted 27 government locations, including the FBI, a fusion center, three post offices, three prisons, five courts, the Department of Motor Vehicles (DMV), and other facilities.¹³⁰ Fourteen targets were critical infrastructure and included airports, seven military bases, an arsenal, the Grand Concourse, and a Defense Logistics Agency.¹³¹

¹²⁹ Calvert, “The First Amendment Right to Record,” 156.

¹³⁰ “FBI—Austin TX—Civil Rights Investigation,” YouTube video, 14:52, posted by Pink Camera Magic, February 25, 2019, <https://www.youtube.com/watch?v=Cz63T5LvVyo>; “F.B.I/Fusion Center Downtown Anchorage Alaska 1st Amendment Audit! ☆Silent Treatment☆”; “Biloxi,MS.-Police Dept,” YouTube video, 21:53, posted by News Now Houston, January 20, 2019, https://www.youtube.com/watch?v=pBph_cS2d-Q; “Group Audit—New Jersey State Prison—Major Fail—Part 1,” YouTube video, 12:25, posted by Southeastern Pa. Community Watch, November 27, 2017, https://www.youtube.com/watch?v=XH6hxV0Cw_U; “1st Amendment Audit USPS Worth It (All for Us?)”; “1st Amendment Audit—DMV and NDOT in Carson City (2 Cops Show up)—Fail, Pass, Pass!” YouTube video, 20:26, posted by Sunrie, December 19, 2017, <https://www.youtube.com/watch?v=NvPLQpLm2r4>.

¹³¹ “F.B.I/Fusion Center Downtown Anchorage Alaska 1st Amendment Audit! ☆Silent Treatment☆”; “Denver International Airport—Operations and Denver Police—1st Amendment Audit—Fail”; “Joint Base Pearl Harbor-Hickam—Part 1—First Amendment Audit”; “First Amendment Audit-Fail US Naval Academy. Annapolis Maryland”; “Michigan Cops Lose It Over Silent Photography! 1st Amendment Audit Fail!”; “1st Amendment Audit Bronx, NY 558 Grand Concourse Huge Fail #1st Amendment Audit Bronx NY,” YouTube video, 4:02, posted by CMpolyglot, November 15, 2018, <https://www.youtube.com/watch?v=nnlzW07JEqE>; “Officer Makes up Laws to Enforce,” YouTube video, 16:25, posted by Audit the Audit, July 6, 2019, <https://www.youtube.com/watch?v=1EZDLYPj3IY>; “First Amendment Audit: Nashville TSA—Nashville, TN”; “Finally! My Arrest Video in Chesterfield VA|Failed Audit—Oap,” YouTube video, 30:01, posted by Oath Accountability Project, March 15, 2018, https://www.youtube.com/watch?v=Hp_wb30Wn0w; “Patrick AFB/Civil Rights Audit (Precious Rights).”

Some auditors appeared to select unconventional targets, like churches and synagogues where private citizens, not government officials, were the focus of their visit. For example, the Beverly Hills shooting involving Furry Potato occurred at a synagogue.¹³² In another audit, NastyNathaniel used auditing to harass the Church of Scientology of the Valley on behalf of the AngryGayPope (AGP), a self-professed member of the group Anonymous who has made harassing the church a personal hobby.¹³³ AGP (identified as Donald Myers) has harassed the church relentlessly; he created a fake website in the name of the church lawyer and harshly criticized the church on his AGP web page.¹³⁴ During the audit of the church, NastyNathaniel made a point to reveal the reason for his harassment to church members by mentioning the AGP and asking whether they knew him; on AGP's web page, the provision of links to NastyNathaniel's YouTube channel remove all doubt that AGP has weaponized the First Amendment auditor as a tool of harassment.¹³⁵ Table 5 depicts three categories (police, government buildings, and critical infrastructure) that comprise the 10 types of locations targeted by auditors.

¹³² "Mirrored Furry Potato Shot."

¹³³ "1st Amendment Audit, Scientology Valley Org W/Johnny Five O: Camback Warriors," YouTube video, 22:41, posted by NastyNathaniel, November 9, 2017, <https://www.youtube.com/watch?v=eKT7kiMX-Qo>.

¹³⁴ Donald Myers, "Angry Gay Pope—Hollywood Scientology Investigator," Angry Gay Pope, accessed July 13, 2019, <https://angrygaypope.com/>; Tony Ortega, "Angry Gay Pope Loses Ownership of 'KendrickMoxon.Com' to ... Kendrick Moxon," The Underground Bunker, September 5, 2014, <https://tonyortega.org/2014/09/05/angry-gay-pope-loses-ownership-of-kendrickmoxon-com-to-kendrick-moxon/>.

¹³⁵ Myers, "Angry Gay Pope."

Table 5. Target Locations in 59 Video Audits

Location Type	Count	% (of 59)
Police	15	25.4%
Government Building	27	45.8%
Prison	3	5.1%
Court	5	8.5%
Post Office	3	5.1%
Other Government Building	16	27.1%
Critical Infrastructure	13	22.0%
Hospital	2	3.4%
Military	7	11.9%
Transportation	4	6.8%
Private Facility (includes churches)	3	5.1%
Public Park	1	1.7%

As these examples and the video analysis suggest, auditors often target citizens to trigger a police response. Another observation is that auditors targeted police facilities in only 25.4 percent or 15 of the 59 audits. Instead, auditors targeted other government and private institutions, which led a citizen or official to summon police.

5. Response—Police Action

Despite extensive efforts by some auditors, police-citizen conflict occurred less than expected. While citizens called police 72 percent of the time, officers made contact only 49 percent of audits, and 28 percent resulted in no conflict. In 13 audits (22 percent), the citizen or government official did not call the police. As shown in Table 6, the audit led to an arrest or trespass in 8.5 percent of the audits (n=5).

Table 6. Police Responses to Auditor Activities in 59 YouTube Audits

Police Notified or Present	42	71.2%
Contacted but no police enforcement	13	22.0%
No police-citizen conflict	17	28.8%
Police not called	13	22.0%
No police contact	4	6.8%
Contact made with auditor or complainant	29	49.2%
Enforcement Taken	5	8.5%
Arrest made	2	3.4%
Issue trespass warning	3	5.1%

Some auditors were so eager to engage police that they became giddy discussing it. News Now Omaha (NNO) Copblock, for example, audited the DoD and was contacted on the sidewalk by staff, who pointed out the “No Trespassing” sign.¹³⁶ The auditor did not trespass, but he hassled the soldier and argued, “You can only trespass private property!” NNO told the audience, “they’re gonna get owned by OPD... I mean by me, well... I don’t know. They just gonna get owned.”¹³⁷ He continued excitedly, “Dude, they [the police] ain’t gonna wanna come out no more! I already know they called ’em. They [the DoD] may not know who I am, but they’ll find out. The OPD Officer should know exactly who the f--k I am,” NNO exclaimed. He added disappointedly, “That’s the part that sucks. No more concealing my identity.”¹³⁸ The officer approached in a police car, and NNO exclaimed, “How you doing?” When the officer continued driving past him, he said disappointedly, “Awe man! I know she’s gonna turn!”¹³⁹ NNO practically ran down the street to engage the officer, stating as he did, “you fucking called the cops! You’re supposed to be the military! Ha-ha-haaah!”¹⁴⁰ Much to the auditor’s dismay, the officer

¹³⁶ “US Department of Defense I Don’t Answer Questions Unlawful Search and Seizures First Amendment Audit,” YouTube video, 10:30, posted by News Now Omaha Copblock, March 26, 2019, https://www.youtube.com/watch?v=_TaNPQde_IA.

¹³⁷ “US Department of Defense I Don’t Answer Questions.”

¹³⁸ “US Department of Defense I Don’t Answer Questions.”

¹³⁹ “US Department of Defense I Don’t Answer Questions.”

¹⁴⁰ “US Department of Defense I Don’t Answer Questions.”

contacted the complainant but never engaged NNO. Frustrated, he yelled, “I’ll come back with the tripod bag,” then told the audience, “see if we can get some attention from that!”¹⁴¹ As NNO’s last statement suggests, auditors want the engagement and police-citizen conflict; when they no longer trigger that response, they escalate tactics.

As police and citizens learn about auditors and fail to provide their desired response, agencies should expect a shift in tactics. For instance, a shift can be observed in the recent activities of James Springer, who transitions from auditing to copwatch-style insertion of himself into ongoing police-citizen encounters, where he antagonizes, insults, and curses the officers.¹⁴²

D. CONCLUSION

Auditing is either a national problem or national response to a problem, depending on a person’s perspective. Regardless, trends in locations targeted, tactics employed, and police responses emphasize the need for clarity on legal requirements and options. Auditor targets often proclaim the very concerns that auditors challenge as invalid and superseded by absolute First Amendment freedoms. The only absolute, however, is that police and auditors disagree on the limits that can and should be placed on citizens recording public and private institutions. Police were involved in over 71 percent of the audits, even though auditors only directly targeted police 25.4 percent of the time. As police adapt to auditors to reduce conflict, auditor methods change, often escalating into direct attacks or targeted auditing to press the boundaries of First Amendment protections.

This research iteratively examined 59 auditing videos and then refined the data to three significance groups to facilitate legal analysis. Those groups, tactics, targets, and issues, consist of specific ploys, challenges, and legal issues to resolve. The first section discusses tactics. Department policy, state law, and federal law address many of the legal questions raised by auditor tactics. The 59-video analysis identified recurring auditor tactics and targets for 10 locations, and many individuals calling police objected to the

¹⁴¹ “US Department of Defense I Don’t Answer Questions.”

¹⁴² “Sioux Falls,” YouTube video, 36:00, posted by James Freeman, August 13, 2019, <https://www.youtube.com/watch?v=vjN2y--lB7I&feature=youtu.be>.

auditor filming their location on the grounds of safety, security, or policy. Auditors dismissed concerns on the two basic premises, (1) “policy is not law;” and (2) the Constitution permits citizen filming from any public place, without exception.¹⁴³

Auditor tactics and targets were consistent in the nationwide video review, as were the concerns expressed by their unhappy hosts. The strong preference toward government and private facilities suggests a broader need to train government, civilian employees, and responding police for third-party audit encounters. Concerns expressed during audits correlate directly with bait techniques that target safety, security, and policy. Auditors threatened perceived safety and security concerns so citizens and administrators would call the police. Auditors also challenged policies that they felt threatened constitutional liberties. The ensuing conflict revealed the need for agencies to educate the public about auditors and develop cooperative response plans that guarantee essential privacy protections for patients, victims, and witnesses, while also providing ample alternative opportunity for dissent and public expression of opinions. Consequently, the legalities of filming each common target location need further examination, and the various baiting methods assessed by legal experts in each field.

¹⁴³ “US Department of Defense I Don’t Answer Questions.”

III. LEGAL ANALYSIS OF TACTICS AND TARGETS

Civil rights audits occur in nearly every city and state in the nation, and they present challenges, notably First-Amendment-related challenges that call for solutions. Potential solutions require knowledge of the common target locations within a given jurisdiction and an evaluation of the legal issues and rulings specific to each location. This thesis uses the ten target locations identified in the auditor video analysis of Chapter II. In this chapter, I outline my discovery that the Supreme Court has, in fact, created a framework for First Amendment analysis that applies to the auditor.

Section A lays out the Public Forum Doctrine and explains its importance in the examination of rights and limits for civil auditors. Accordingly, many of the questions brought into the thesis or raised within it are addressed through forum analysis.

Section B applies forum analysis to the 10 locations identified in this study. For each location type, I research and examine existing and applicable case law to assign a forum and identify the standards governing applicable time, place, and manner (TPM) restrictions.

This study revealed specific tactics for baiting and trapping officers into conflict. Appendix A includes an examination of state and local law applicable to auditor traps and bait, and it highlights the conflicts and weak points enabled by poor training and inadequate policies. The reader is encouraged to view this document, because it showcases the worst of the auditor tactics and the potential abuse to which officers are subjected and must respond professionally. An understanding of these issues is critical to the development of adequate policy and relevant TPM restrictions.

Some bait and trap issues are addressed in the subsequent discussion of forum analysis, but existing laws define the parameters for most of them.¹⁴⁴ These laws are still subject to TPM restrictions, as the courts will apply (and have) public forum doctrine in

¹⁴⁴ Threats, harassment, stalking, and disorderly conduct statutes create restrictions upon First Amendment activities common in bait and trap tactics. If challenged, the court determines the constitutionality of the statute and subsequent restriction.

analyzing the constitutionality of the statutes. By choosing to enforce these laws, police incidentally impose restrictions on First Amendment activities. They will be challenged in court, usually in qualified immunity hearings where plaintiffs specifically challenge the restrictions officers imposed upon the plaintiff. Because TPM restrictions cannot intentionally restrict unfavorable content, efforts to restrict traps and bait should focus on the TPM of speech, not the content.

A. LEGAL FRAMEWORK FOR FORUM ANALYSIS

When police and auditors clash, the subsequent court decisions examine the constitutionality of the officer's decisions and any supporting state or local statutes. The most commonly observed challenge is that the officer enforced or imposed unconstitutional limits to the free speech or freedom of assembly guarantees of the First Amendment. The demand for lawful and accurate imposition of speech restrictions therefore necessitates comprehension of the legal framework courts apply when assessing the constitutionality of imposed TPM restrictions on government property. Understanding reasonable TPM restrictions requires clarity for three key concepts in First Amendment jurisprudence: forum analysis, standards of scrutiny, and content-based restrictions. The courts have developed two categories of fora, public and nonpublic.¹⁴⁵ The Supreme Court directs lower courts evaluating "a First Amendment claim for speech on government property" to "identify the nature of the forum," because permissible speech restrictions are contingent on forum classification as public and nonpublic fora.¹⁴⁶

1. Forum Analysis

The 6th Circuit Court of Appeals provided guidance recently for evaluating First Amendment violation claims on public property. The First Amendment gives citizens the right to record matters of public interests, including public officials performing their duties in public places. This right is not absolute, and it does not grant access they would not otherwise obtain. The government can restrict the right through reasonable TPM

¹⁴⁵ *Hopper v. City of Pasco*, 241 F. 3d 1067 (Court of Appeals, 9th Cir. 1985).

¹⁴⁶ *Hopper v. City of Pasco*, 1985, 1074.

restrictions. When the government limits First Amendment privileges, the courts determine the reasonableness of that imposition by applying the public forum doctrine, which considers the forum, standard of scrutiny, and neutrality of the restriction.¹⁴⁷

a. Public Forum

- Traditional public spaces, including streets, parks, and sidewalks that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁴⁸

b. Nonpublic Forums (*Designated Public, Limited Public, and Nonpublic*)

(1) Designated Public Forum

- *A designated public forum* includes places where the government intentionally opens *nontraditional* [i.e., nonpublic] *forums* for public discourse.¹⁴⁹
- When the government *intentionally* opens a nonpublic forum for activity traditionally limited to open forums, it is then treated as such in court analysis. The Supreme Court explains that the government “has power to preserve property under its control for the use to which it is lawfully dedicated.”¹⁵⁰ No requirement even exists to inform the public that the forum is not open for public assembly and debate; neither government inaction nor the permission of free access to property owned or control by

¹⁴⁷ A. A. Bhagwat, “The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence,” eScholarship, 790, April 25, 2017, <https://escholarship.org/uc/item/7pq0h8zj>.

¹⁴⁸ *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 US 672 S. Ct. (1992).

¹⁴⁹ *Hopper v. City of Pasco*, 1985, 1074.

¹⁵⁰ *International Soc. for Krishna Consciousness, Inc. v. Lee*, 680.

the government will convert it to a public forum; the conversion must be intentional.¹⁵¹

(2) Limited Public Forum

- *Limited public forum* comprises nonpublic forums that are “a sub-category of a designated public forum where the government” makes the location available only to “certain groups or to certain topics.”¹⁵²
- *Viewpoint neutral*—subject-based, rather than viewpoint-based—restrictions are permissible.

(3) Nonpublic Forum

- Everything else

Figure 1 depicts the types of forums within the public space. Many of these locations would be considered a public place for criminal statutes, but not for the purposes of the First Amendment. For example, the police lobby is a public place public intoxication charges can be filed, but the Supreme Court does not consider it to be a public forum. The term public forum, therefore, is not synonymous with access.

¹⁵¹ *International Soc. for Krishna Consciousness, Inc. v. Lee*, 680.

¹⁵² *Hopper v. City of Pasco*, 1985, 1074. (The Court notes that some courts incorrectly use the terms designated public forum and limited public forum interchangeably, but the forums, and their respective standards are different, “at least in this circuit,” writes the Court. The distinction is important, because without it, the standard of scrutiny is based on public forum [strict scrutiny], which makes no sense in light of other Supreme Court decisions [applying to legislation and the provision of grant funding], or as a nonpublic forum, which provides almost no constitutional protection for citizens. Limited public forum provides the means for operational continuity of nonpublic forums, with the constitutional coverage of the public forum, by examining the subject for potential viewpoint discrimination. As it offers the best balance of each in the contest between civil rights and government interests, I argue that limited public forum should and will become a standard tool of the courts. This thesis will refer to it, as if it has.)



Figure 1. Types of Forums for Government Property

In Figure 1, the large blue oval encompasses all forums for public property, divided into public (green oval) and nonpublic forums (white oval). Nonpublic forums also include designated public forums (treated as public forums) and limited public forums (where content-specific speech can be restricted unless created to target a specific viewpoint).

2. Level of Scrutiny

Once the forum is determined, the court applies the appropriate level of scrutiny. That decision is contingent upon another assessment, however, of whether the restriction targets specific speech or is content-neutral.

a. *Strict Scrutiny*

Any speech restriction targeting specific content will have to pass the STRICT SCRUTINY test. To survive scrutiny, the statute or policy must be specially crafted to accomplish a specific goal, which the court deems “a compelling state interest,” without broadly restricting other forms of speech; it must also be the least restrictive option for achieving the state’s purpose.¹⁵³

b. *Intermediate Scrutiny*

Content-neutral copwatch activity typically falls into this standard for analysis, which requires content-neutral, public forum speech restrictions address a “significant governmental interest,” “leave open ample [methods] of communication,” and are “narrowly tailored,” which means not overbroad, but does not require the least restrictive option.¹⁵⁴

c. *Reasonableness (Rational Basis) Test*

(1) Reasonable considering forum purpose served

- The pattern of normal activities or intended purpose of the property determines the reasonableness of restrictions
- Must not be an attempt to silence dissent or disagreeable speech

¹⁵³ *International Soc. for Krishna Consciousness, Inc. v. Lee*, 684.

¹⁵⁴ Bhagwat, “The Test That Ate Everything,” 789.

(2) Viewpoint neutrality

- *Content-based restrictions* are viewpoint neutral when they intentionally (and constitutionally) restrict First Amendment activity based on subject compatibility, without regard for point of view.¹⁵⁵

Viewpoint-neutral restrictions are technically content-based, because they restrict First Amendment activity based on the subject, but they do not consider viewpoint. For example, the Event Center could deny the motorcycle association permission to present about Harley safety features during a pet convention, unless the presentation aligned with a convention theme on safe pet transportation or the dangers of motorcycles to unleashed pets. In other words, the government can prevent off-topic speech, but viewpoint cannot justify speech suppression.

Once the court establishes the proper forum classification, it will apply a standard of scrutiny ranging from the most stringent (“strict scrutiny”) to the least (“the reasonableness test”).¹⁵⁶ *Content-based restrictions and restrictions affecting public forums and designated public forums* must pass the court’s strict scrutiny standard, which requires that reasonable TPM restrictions serve a “compelling state interest” and are “narrowly drawn to achieve that end.”¹⁵⁷

Content-neutral TPM restrictions in public forums and designated public forums face “intermediate” scrutiny, and only have to demonstrate that the restriction is “narrowly tailored to serve a significant government interest, and [affords] ample alternative channels of communication.”¹⁵⁸ For the *nonpublic forum and limited public forum*, the court applies the reasonableness standard.¹⁵⁹ The reasonableness test assesses whether the restriction

¹⁵⁵ *Hopper v. City of Pasco*, 241 F. 3d 1067 (Court of Appeals, 9th Cir. 2001).

¹⁵⁶ *Hopper v. City of Pasco*, 2001, 1081.

¹⁵⁷ *Hopper v. City of Pasco*, 2001, 1081.

¹⁵⁸ *Flint v. Dennison*, 488 F. 3d 816 (Court of Appeals, 9th Cir. 2007); Ruane, *Freedom of Speech and Press*, 9, Ruane uses the term “intermediate” scrutiny, while Flint only describes the requirements.

¹⁵⁹ *Hopper v. City of Pasco*, 1985, 1074–75.

serves to preserve the property for its created purpose.¹⁶⁰ For the reasonableness test, the government does not have to demonstrate the restriction is narrowly tailored to serve a *compelling* government interest; the government needs only to demonstrate that the reasonable need for the restriction is within the scope of its application.¹⁶¹ The distinction between public and nonpublic forum is critical because much of the government-owned property that an auditor believes to be *public* is actually deemed *nonpublic* in forum analysis. Consequently, much of the observed police-citizen conflict in audits appears to be the result of auditors conflating the terms *public place* and *public forum*, which have very different meanings and constitutional significance.

When imposing speech restrictions in a *nonpublic forum*, officials are not required to demonstrate a compelling or significant government interest. However, the regulation must be narrowly designed for a specific “rational basis” or justification, which can include continuity of business functions or real security needs.¹⁶² The kind of speech is also relevant, because some forms of speech are not afforded constitutional protection or court scrutiny. Speech can be political, commercial, private, public, obscene, religious, compelled, or symbolic; each has unique First Amendment nuances.¹⁶³ Table 7 depicts the complexity of forum analysis, which shows how different forums and factors affect standards of review.

¹⁶⁰ *Flint v. Dennison*, 834.

¹⁶¹ *Flint v. Dennison*, 835.

¹⁶² *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 US 788 S. Ct. (1985).

¹⁶³ William Van Alstyne, “A Graphic Review of the Free Speech Clause,” *California Law Review* 70, no. 1 (1982): 112, <https://doi.org/10.2307/3480183>; Ruane, *Freedom of Speech and Press*, 3.

Table 7. Forum Analysis Complexity

		Forum Analysis				
		Forum	Content-Based Restrictions	Content-Neutral Restrictions	Protected Speech (Y/N)	
Private Speech	Private speech about matters of public interest	P&DPF	Strict Scrutiny	Intermediate Scrutiny	Yes	
		LPF	Reasonable & Viewpoint Neutral	Reasonable		
		NF	N/A	Reasonable		
	Symbolic Speech	P&DPF	Strict Scrutiny	Intermediate Scrutiny	Yes	
		LPF	Reasonable & Viewpoint Neutral	Reasonable		
		NF	N/A	Reasonable		
	Fighting Words & Real Threats*				No	
	Obscenity				No	
	Child Pornography				No	
	Government Speech	Monuments	P&DPF	The Court have deemed these to be government speech, rather than public speech, and therefore not bound by First Amendment strictures.		No
		Legislation	P&DPF			
		Funding	P&DPF			
Standards of Review		Forum Types				
Strict Scrutiny		Public Forum & Designated Public Forum (PF&DPF)				
Intermediate Scrutiny		Limited Public Forum (LPF)				
Reasonableness test		Nonpublic Forum (NF)				
*While fighting words are not protected, the court is quite strict on what constitutes fighting words, and that standard is even stricter for words directed at police.						

B. LOCATION-BASED FORUM AND COURT SCRUTINY ANALYSIS

For each location identified in this research as an auditor target location, this thesis applies legal analysis, forum analysis, and case law consider potential TPM restrictions. As auditing activity raises security concerns without regard to content, reasonable restrictions may be established to regulate the activity to free speech zones or establish prohibitions on recording inside the buildings. While this security requirement is not

intended to restrict speech, non-content-specific speech may incur “incidental restrictions” that the court holds to a lower level of First Amendment scrutiny.¹⁶⁴

1. Military Bases

Although less common in this study, auditors targeted military bases, and this activity highlighted a lack of legal clarity about constitutional boundaries among auditors and soldiers alike; responding police were no more informed. The law may have more teeth in this scenario than either group understands. Representing 11.9 percent of audits in this study, military base personnel responded with commendable professionalism and tolerance, a response that some case law implies may not be required. The Supreme Court has consistently found military bases to be a nonpublic forum, for which TPM restrictions need only be reasonable and in support of the intended function of the location; it unambiguously found and ruled that the business of the base is “to train soldiers, not to provide a public forum.”

The Supreme Court has explicitly ruled that base commanders can regulate the roads outside the secure area when the roads are under their jurisdiction.¹⁶⁵ In *U.S. v. Apel*, the base commander issued a no-trespass notice to a person and later arrested him for returning and appearing in the free speech zone outside the base. The Supreme Court ruled that the road outside a base is under the commander’s control and that he has the authority to restrict activity and arrest a trespasser even if engaged in protected speech activity.¹⁶⁶ Many auditors are under the impression that they have a right to record any place they can legally access, like the public roadway.¹⁶⁷ Others mistake fences, sidewalks, or painted lines as jurisdictional limits where the military authority to restrict recording ends.¹⁶⁸ The Court rejects both arguments in *Apel*, writing:

¹⁶⁴ Ruane, *Freedom of Speech and Press*, 11–12.

¹⁶⁵ *US v. Apel*, 134 S. Ct. 1144 (2014).

¹⁶⁶ *US v. Apel*, 1151.

¹⁶⁷ “Joint Base Pearl Harbor-Hickam—Part 1—First Amendment Audit.” The auditor informs his audience that what he is doing is legal, and then criticizes the police and military who inquire about his activity.

¹⁶⁸ “Officer Makes up Laws to Enforce.”

Nothing in § 1382 or our history suggests that the [Criminal Trespass] statute does not apply to a military base under the command of the Air Force, merely because the Government has conveyed a limited right to travel through a portion of the base or to assemble in a particular area.¹⁶⁹

Federal law makes the commander responsible “for the protection or security of” “property subject to the jurisdiction, administration, or in the custody of the Department of Defense.” 50 U.S.C. §§ 797(a) (2), (4); see also 32 CFR § 809a.2 (a) (“Air Force installation commanders are responsible for protecting personnel and property under their jurisdiction”). And pursuant to that authority, the Base commander has issued an order closing the entire base to the public. Buck Memorandum Re: Closed Base, App. 51; see also 32 CFR § 809a.3 (“any directive issued by the commander of a military installation or facility, which includes the parameters for authorized entry to or exit from a military installation, is legally enforceable against all persons”). The fact that the Air Force chooses to secure a portion of the Base more closely—be it with a fence, a checkpoint, or a painted green line—does not alter the boundaries of the Base or diminish the jurisdiction of the military commander.¹⁷⁰

Some statutes expressly authorize government prohibition against the making of “any photograph, sketch, picture, drawing, map, or such vital military installations or equipment without first obtaining permission of the command concerned....”¹⁷¹ Auditors, believing that any public roadway or easement is a *de facto* safe zone for photography, challenge soldiers who respond and inquire about their actions and intentions.¹⁷² Auditors commonly assume that freedom of access to government property grants *ipso facto* First Amendment liberties; the Supreme Court disagrees, writing that:

[It is a mistake to think] that whenever members of the public are permitted to visit a place owned or operated by the Government, then that place becomes a “public forum” for the purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant “that people who want to propagandize protests or views have a constitutional right to do so

¹⁶⁹ *US v. Apel*, 1151.

¹⁷⁰ *US v. Apel*, 1153.

¹⁷¹ “18 U.S. Code § 795—Photographing and Sketching Defense Installations,” Cornell Law School Legal Information Institute, accessed August 3, 2019, <https://www.law.cornell.edu/uscode/text/18/795>.

¹⁷² “US Department of Defense I Don’t Answer Questions Unlawful Search and Seizures First Amendment Audit.” The auditor challenges the soldiers who politely inquire about his actions, and asks if all the cars driving by are also on military property. According to the Court, they very well might be.

whenever and however and wherever they please. The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.¹⁷³

The Court opinion highlights the influence of forum in setting First Amendment boundaries.

2. Government Buildings, including Courts, Post Offices, Prisons, and Transportation

Collectively, government buildings, courts, post offices, prisons, and transportation represent over 50 percent of the audited location types. A common thread among these predominantly county, state, and federal facilities is that they are likely to have security measures and concerns that auditors can trigger. Many targeted government buildings are designed to serve a specific function and purpose, which does not include providing for public expression of speech; worded differently, they are generally nonpublic forums. As nonpublic forums, content-neutral restrictions need only satisfy the reasonableness standard to meet constitutional muster.¹⁷⁴ Ruane observes that the courts have classified post offices, military bases, and prisons as nonpublic forums.¹⁷⁵ The Supreme Court also ruled that “the sidewalk leading to the entry of the post office is not the traditional public forum sidewalk,” distinguishing sidewalks parallel to the street from those between the parking lot and the building, and further instructing, “the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.”¹⁷⁶

Government buildings alone ranked as the highest and most preferred target for auditors (37 percent of sites), quite possibly because these employees consistently provided the desired conflict even though relatively few called the police. Government building audits included FBI offices, fusion centers, the Department of Transportation (DOT), and

¹⁷³ *Greer v. Spock*, 424 US 828 S. Ct. (1976).

¹⁷⁴ Ruane, *Freedom of Speech and Press*, 8–9.

¹⁷⁵ Ruane, 9.

¹⁷⁶ *United States v. Kokinda*, 497 US 720 S. Ct. (1990).

the DMV, and the employees and administrators at these locations consistently perceived the auditor as a security threat. Each location had rules or conduct regulations supporting limitations on auditor conduct, but many appeared unsure of the boundaries, and these unclear boundaries allowed auditors far more freedom than constitutionally required.

Auditors recording government buildings frequently referenced one of three legal documents to support their actions and create doubt for untrained employees. These documents are 41 CFR 420, a 2010 Department of Homeland Security (DHS) Memorandum, and Poster 7. Employees often refused to look at these documents and missed the opportunity to resolve the auditor dilemma. Refusing to discuss the statute or document created an auditor-promoted impression that the employee was uninformed or indifferent to the law. For example, NewsNowSeattle argued that 41 CFR 420 (Title 41, Section 102–74.420 of the Code of Federal Regulations) guaranteed his freedom to record; *U.S. v. Gileno* applied that very statute to impose reasonable restrictions on recording inside the building and offers insight into higher court development of a reasonable TPM restriction framework.¹⁷⁷

The post office is a government building, and the officials post Conduct Regulations, but auditors mistakenly believe these documents grant them unfettered access to the post office. The opposite is true. In a Florida Post Office, the auditor *rogue nation* argued with staff that a “2010 DHS Memo” expressly permitted photographs in entrances, lobbies, and foyers. The memo-in-question is a declassified, partially redacted internal memorandum (report # HQ-IB-012-2010) distributed as guidance to the Federal Protective Service. The document summarizes 41 CFR 420 and articulates reasonable First Amendment restrictions on assembly and speech.¹⁷⁸ The memo informs readers of limited citizen rights to record the exterior of “federally owned or leased facilities from publicly

¹⁷⁷ “First Amendment Audit of the US Court of Appeals 9th Dist.” NewsNowSeattle tries to quote 41 CFR 420 to officers, but it is the statute actually giving them the authority to impose reasonable restrictions on recording; *US v. Gileno*, 350 F. Supp. 3d 910 (Dist. Ct. 2018). A citizen journalist (not an auditor) was charged with recording in violation of courthouse rules and regulations.

¹⁷⁸ “Unlawfully Detained and Trespassed, 1st Amendment Audit, Leesburg FL.” Auditor claims that the DHS memo allows him to record; Department of Homeland Security, *Photographing the Exterior of Federal Facilities*, FPS Information Bulletin (Washington, DC: Department of Homeland Security, 2010), 1–3. A DHS memorandum that references 41 CFR 420 and reiterates key points.

accessible spaces such as streets, sidewalks, parks, and plazas.”¹⁷⁹ Quoting the statute, the memorandum advises readers that persons may photograph spaces occupied by a tenant agency...only with permission of an authorized official for that agency, but it also states that “building entrances, lobbies, foyers, corridors, or auditoriums” may be photographed “for news purposes.”¹⁸⁰ Auditors zero in on the last section, and completely overlook the conditional introduction: “Except where security regulations, rules, orders, or directives apply or a Federal court order or rule prohibits it, persons...may take photographs of.”¹⁸¹ The statute allows for reasonable exceptions to photography through “security regulations, rules, orders, directives, or court order.” The memorandum then clarifies that “there are currently no general security regulations prohibiting *exterior* photographing of any federally owned or leased building.”¹⁸² The emphasis of the document and statute is unquestionably on recording the building exterior, but even that action could be restricted by “a written local rule or regulation established by a Court Security Committee or Facility Security Committee.”¹⁸³

Federal policies and statutes did not change in 2010. The purpose of the memo, however, was to clarify a mistaken understanding of that statute, which led to the arrest of 29-year-old Antonio Musumeci, who was recording the exterior of the Daniel Patrick Moynihan United States Courthouse.¹⁸⁴ The confusion, in this case, was a misunderstanding of 41 C.F.R. Section 102–74.420. The protective guards understood the provisions for recording inside the location as a narrow list of acceptable places, assuming the exterior—by exclusion—to be prohibited.¹⁸⁵ The purpose of the memo was to clarify that recording outside of the federal building was permissible without specific exclusions.

¹⁷⁹ Department of Homeland Security, 1.

¹⁸⁰ Department of Homeland Security, 1.

¹⁸¹ Department of Homeland Security, 1.

¹⁸² Department of Homeland Security, 3.

¹⁸³ Department of Homeland Security, 3.

¹⁸⁴ David W. Dunlap, “You Can Photograph that Federal Building,” *Lens Blog* (blog), October 18, 2010, <https://lens.blogs.nytimes.com/2010/10/18/you-can-photograph-that-federal-building/>.

¹⁸⁵ Dunlap.

The court, as a condition of dismissing the lawsuit against the DHS, required the Federal Protective Service to provide written notice to enforcement officers that “there are currently no general security regulations prohibiting exterior photography by individuals from publicly accessible spaces, absent a written local rule, regulation, or order” (emphasis added).¹⁸⁶ The memo further clarified that currently no such exclusionary regulations existed for recording the exterior of federal property.¹⁸⁷ Auditors, having obtained declassified copies of the 2010 DHS Memo, are unaware of the third clause in this relatively unbinding district court rule. That section clarifies that nothing prohibits the government or police from:

Taking any legally permissible law-enforcement actions, including but not limited to approaching any individual taking photographs and asking for the voluntary provision of information such as the purpose of taking the photographs or the identity of the individual, or taking lawful steps to ascertain whether unlawful activity, or reconnaissance for the purpose of a terrorist or unlawful act, is being undertaken.

The attorneys for the New York Civil Liberties Union and the DHS each offered statements to *The New York Times* about the court ruling and case dismissal. The former declared, “[t]his settlement secures the public’s First Amendment right to use cameras in public spaces without being harassed.”¹⁸⁸ The Federal Protective Service attorney saw it as clarification that the exterior recording of federal facilities was “fully compatible with the need to grant public access to federal facilities.”¹⁸⁹ Evidence that clarity did not occur, however, is found in the article’s conclusion, where *New York Times* quotes Christopher T. Dunn, associate legal director of the civil liberties union, saying:

[T]he settlement could be interpreted to apply to any federal building anywhere in the country under the aegis of the protective service. Because the regulation speaks broadly of federal property—not the only courthouse—Dr. Dunn said the settlement was ‘tantamount to a recognition

¹⁸⁶ *Musumec v. US Department of Homeland Security*, No. 10-Civ. 3370 (United States District Ct., Southern District of New York, 2010).

¹⁸⁷ *Musumec v. US Department of Homeland Security* 2.

¹⁸⁸ Dunlap, “You Can Photograph that Federal Building.”

¹⁸⁹ Dunlap.

that there is no restriction on the photography of federal buildings from public places.’¹⁹⁰

First, not only does a district court lack jurisdictional control “anywhere [else] in the country,” but the Supreme Court and appellate courts have consistently found this right to be subject to reasonable restrictions.¹⁹¹ Second, Mr. Dunn makes the mistake of many who examine this subject by conflating the legal terms and implications for *public spaces* and *public places*; public accessibility, while a component of public *places*, is neither the determinant for public *spaces* nor of the government authority to restrict First Amendment activities in those spaces.¹⁹² Finally, if currently no restriction exists to proscribe photographing federal buildings, the audit videos suggest that the message did not have the impact Mr. Dunn anticipated.

In 2018, DHS released a document titled, “Operational Readiness Order,” that acknowledges the increased public interest in recording government facilities, attempts to clarify some of the rules, and adds discussion regarding the “photographing the interior of federal facilities.”¹⁹³ The order specifies that it applies to “FPS protected federal facilities” and adds the “geographic areas of consideration,” which it describes as “nationwide.”¹⁹⁴ The document then breaks down the Federal Code 102–74.420 and offers examples for each clause.¹⁹⁵ This addition implies the policy of permitting citizens to record within FPS protected facilities, distinguishing news and citizens from commercial photography and further muddying the waters on permissible restrictions by redacting key clauses from

¹⁹⁰ Dunlap.

¹⁹¹ *Martin v. Hunter’s Lessee*, 14 US 304 S. Ct. (1816); *Zabriskie v. Cleveland, C. & CR Co.*, 64 US 381 S. Ct. (1860); *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); *Cox Broadcasting Corp. v. Cohn*, 420 US 469 S. Ct. (1975); *Smith v. City of Cumming*, 212 F. 3d 1332 (Court of Appeals, 11th Cir. 2000).

¹⁹² *Jacobson v. US Dept. of Homeland Sec.*, 882 F. 3d 878 (Court of Appeals, 9th Cir. 2018). The lower court decision for summary judgment was vacated and case remanded on the decision that the public place was not a public forum within the context of the case in question.

¹⁹³ Department of Homeland Security, *Photographing and Videotaping Federal Facilities*, Operational Readiness Order (Washington, DC: Department of Homeland Security, 2018), 1–6, <https://www.dhs.gov/sites/default/files/publications/Operational%20Readiness%20Order%20HQ-ORO-002-2018%20Photography%20and%20Videotaping%20....pdf>.

¹⁹⁴ Department of Homeland Security, 2, 6.

¹⁹⁵ Department of Homeland Security, 2–3.

relevant phrases.¹⁹⁶ What it retains without clarification or advice is the provision for restrictions, writing “Photography and videotaping the interior of federal facilities is allowed under the conditions set forth in (a)–(c) of the regulation unless there are regulations, rules, orders, directives, or a court order that prohibit it.”¹⁹⁷ Auditors will continue to key in on examples and overlook this reference (and the law it quotes), and government employees will continue to be confused about the limits they can reasonably impose.

Auditors also misconstrued a third document: Poster 7, the “Rules and Regulations Governing Conduct on Postal Service Property.”¹⁹⁸ Auditors rushed to point out Poster 7 on the post office wall, when it actually establishes the post office interior as a *limited public forum*, stating “[p]ublic assembly and public address, except when conducted or sponsored by the Postal Service, are prohibited in lobbies and other interior areas open to the public.”¹⁹⁹ With this clause, the post office is clarified to be a *limited public forum* where TPM restrictions need only meet a standard of reasonableness, which can include the prevention of service disruption or meeting security needs. Auditors pointed to a different section of the poster, which allows the taking of photographs for news purposes in certain places, but stop reading where it itemizes the exceptions: “where prohibited by official signs or Security Force personnel or other authorized personnel or a federal court order or rule.”²⁰⁰ Worded differently, they can record unless an official sign or an authorized person restricts that activity.

The U.S. v. *Gileno* case offers remarkable parallels to auditor activities for a case having nothing to do with the civil rights auditor YouTube movement.²⁰¹ Court security

¹⁹⁶ Department of Homeland Security, 2–3.

¹⁹⁷ Department of Homeland Security, 2, (Emphasis added).

¹⁹⁸ “Tyrant Vs Uneducated Cop 1st Amendment Audit Hampton Falls NH Post Office (You Can Be Arrested),” YouTube video, 13:53, posted by Reality News, March 14, 2019, <https://www.youtube.com/watch?v=4fZfi9OGVRM>.

¹⁹⁹ United States Postal Service, *Rules and Regulations Governing Conduct on Postal Service Property* (Washington, DC: Government Publishing Office, 2016), 1.

²⁰⁰ United States Postal Service, 1.

²⁰¹ *US v. Gileno*.

officers (CSOs) arrested Gary Gileno, representing the *We the People Rising* group, for violating the court rules and regulations on August 24, 2017.²⁰² A self-declared citizen journalist, Gileno records public hearings and posts them on YouTube for public discussion. Like many auditors, it is not the First Amendment protection for Gileno’s activity in question, but rather the statutory limitations the government could reasonably enforce.²⁰³ Gileno’s appeal argued that the CSO orders to take his camera out of the courthouse “abridged his constitutional rights,” that California’s “Brown Act” (open meetings law) preempted courthouse rules, and that the convicting “judge failed to consider mitigating factors.”²⁰⁴ In the court’s *de novo* review of the decision, the court deconstructed each complaint and then affirmed the conviction and sentence.²⁰⁵ The court determined lawful the courthouse directive removing the appellant’s camera from the facility after examining the courthouse directive’s constitutional breadth, clarity, and impact.²⁰⁶

The first court analysis examined whether the officers’ directive for Gileno to remove his camera from the location was unconstitutionally overbroad.²⁰⁷ The court instructed that for the court to void a statute, its overbreadth must be both *real* and *substantial*, relevant “to the statute’s plainly legitimate sweep.”²⁰⁸ “Substantial overbreadth,” the court explained, is a metric established by the United States Supreme Court to eschew striking statutes simply because they might be unconstitutionally applied when they otherwise cover “a whole range of easily identifiable and constitutionally proscribable conduct.”²⁰⁹ When such constitutionally proscribable conduct is absent, the statute is deemed constitutionally overbroad, but the burden is upon the litigant to establish

²⁰² *US v. Gileno*, 913.

²⁰³ *US v. Gileno*, 917.

²⁰⁴ *US v. Gileno*, 912–13.

²⁰⁵ *US v. Gileno*, 915–16.

²⁰⁶ *US v. Gileno*, 917.

²⁰⁷ *US v. Gileno*, 915.

²⁰⁸ *US v. Gileno*, 915.

²⁰⁹ *US v. Gileno*, 915.

“that the statute ‘as applied’ to him is unconstitutional.”²¹⁰ Regulations that do not “grant unfettered discretion” to the officer may constitutionally govern “core conduct...on federal property in order to preserve the normal functioning of the federal facilities.”²¹¹ The court concluded that the regulatory courthouse directive did not violate Gileno’s constitutional rights by being overbroad, and then moved to the next issue, was the directive too vague?²¹²

In examining the question of clarity, the court applies the “void-for-vagueness doctrine” and will void statutes on two grounds. First, the court will void statutes lacking “sufficient definiteness that ordinary people can understand what conduct is prohibited.” Second, it will void statutes that “encourage arbitrary and discriminatory enforcement.”²¹³ In *Gileno*, the court concluded that the sign “PHOTOGRAPHS PROHIBITED” was sufficiently definite, that it narrowly limited enforcement discretion, and that the statute was not “void for vagueness.”²¹⁴ The court factored other warnings and notifications into the total assessment of statute clarity and limited discretion. When NewsNowSeattle audited the 9th Circuit Court of Appeals, he took great issue with the fact that the sign read “PHOTOGRAPHS PROHIBITED,” and objected, saying “There’s no statute. That’s a bogus sign!”²¹⁵ The Court disagreed in *Gileno*, and found that the sign was sufficiently specific when coupled with verbal instructions of the CSOs and designed to limit the officers’ discretionary authority.²¹⁶ Ironically, while unrelated incidents, Gileno and NewsNowSeattle both objected to signs in the 9th Circuit Court of Appeals Courthouse. In

²¹⁰ *US v. Gileno*, 916.

²¹¹ *US v. Gileno*, 916.

²¹² *US v. Gileno*, 916.

²¹³ *US v. Gileno*, 916.

²¹⁴ *US v. Gileno*, 916.

²¹⁵ “First Amendment Audit of the US Court of Appeals 9th Dist.”

²¹⁶ *US v. Gileno*, 916.

Gileno, the court concluded the issue, writing that Gileno “could not have thought he was permitted to photograph” the officer.²¹⁷

The final issue that the court answers in *Gileno* is whether Gileno’s First and Fourteenth Amendment rights were violated by preventing him from filming the hearing.²¹⁸ The appellant argued that under the Brown Act, the courthouse “was transformed into a limited public forum for the purposes for the Hearing,” and the court responded that even if that were accurate, “the rules against photography and filming were reasonable time, place, and manner restrictions that were applied in a content-neutral manner.”²¹⁹ One statement the court made in *Gileno* would make a good sign for the courthouse walls: “The government can restrict free speech on its property.”²²⁰ The court clarified that “Judicial and municipal complexes are not public fora.”²²¹ In a nonpublic forum, viewpoint-neutral restrictions are constitutional when evidence demonstrates they serve a legitimate need; in this case, the court found banning cameras “was reasonable because [it] served a legitimate security need” and “was also viewpoint neutral.”²²² The courthouse prohibited the camera—not Gileno—from entering and viewing the hearing, and thus, no constitutional violation occurred.²²³

After determining that the courthouse rules and regulations were not overbroad, too vague, or a constitutional violation, the court supported the courthouse directive and related statute (41 C.F.S. 102–74.385), which requires persons to “comply at all times with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals.”²²⁴ The court noted the fact that

²¹⁷ *US v. Gileno*, 917. Based on the objections posed by auditors, this author concludes that Gileno and NewNowSeattle thought the law was on their side regarding the sign. Some conflict might be avoided by adding a reference to the statute on the sign.

²¹⁸ *US v. Gileno*, 917.

²¹⁹ *US v. Gileno*, 917.

²²⁰ *US v. Gileno*, 917.

²²¹ *US v. Gileno*, 917.

²²² *US v. Gileno*, 917–18.

²²³ *US v. Gileno*, 918.

²²⁴ *US v. Gileno*, 918.

the courthouse permitted cameras with prior approval as an alternative means of expression that Gileno admittedly chose not to use.²²⁵

The courts have also ruled that airport terminals are nonpublic forums, which permits restrictions on First Amendment expressions, providing they are reasonable and not an effort to silence a specific perspective.²²⁶

3. Police Facilities

Recording police facilities may have been the initial auditing approach, but it now ranks second to audits of government facilities. As the previous section indicates, reasonable, content-neutral TPM restrictions may shield government buildings more than officials realize or enforce. The same is true for police facilities. The legal foundation and latitude for reasonable restrictions upon First Amendment activity hinge upon identifying the location as either a public forum or a nonpublic forum. Municipal buildings are nonpublic forums.²²⁷ The Supreme Court has ruled that a “Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.”²²⁸ The Supreme Court also rejected the Court of Appeals’ assertion that the “restriction be narrowly tailored so that the Government’s interest be compelling,” writing, “[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because the use of that forum may be the most efficient means of delivering the speaker’s message.”²²⁹ The Appeals Court may have erred by confusing the standards for a *designated public forum* with the *limited public forum*; the first faces strict or intermediate scrutiny, while the latter need only be

²²⁵ *US v. Gileno*, 918.

²²⁶ Lee Rudy, “Note: A Procedural Approach to Limited Public Forum Cases,” *Fordham Urban Law Journal* 22, no. 4 (1995): 1260; *McDonnell v. City and County of Denver*, 878 F. 3d 1247 (Court of Appeals, 10th Cir. 2018).

²²⁷ *US v. Gileno*, 917.

²²⁸ *Turner v. Driver*, 52; *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 808.

²²⁹ *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 808–9.

reasonable.²³⁰ In explaining the ruling, the Supreme Court identified several nonpublic forums, including school mail, city bus advertising space, military installations, and “the federal workplace, [which] like any place of employment, exists to accomplish the business of the employer.”²³¹ The court concluded that due to the need for “wide discretion and control over the management of its personnel...the government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees.”²³² While this case seemingly impacts federal government restrictions on speech-related activities, it also provides the applicable standards for limiting First Amendment activities in nonpublic forums. That standard, as explained, is simply the reasonableness and scope of the restriction, when “assessed in the light of the purpose of the forum [e.g., the police station] and all the surrounding circumstances.”²³³

Unfortunately, police cannot limit contact with auditors to nonpublic forums, nor is that their wish. Police-citizen contact occurs in nonpublic forums and the “quintessential public forums” traditionally dedicated to the expression of opinion, communication, or public discourse, namely “parks, streets, and sidewalks.”²³⁴ In public forums, strict scrutiny defines reasonable TPM content-based restrictions on citizen expression of speech.²³⁵ Strict scrutiny does not preclude restrictions to First Amendment activity; it merely ensures that content-based restrictions narrowly satisfy a compelling governmental

²³⁰ *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 803, Based on the volume of First Amendment cases related to public forum and expression, the 9th Circuit appears to have significantly advanced clarity on TPM restrictions. The fact that it was overruled exemplifies its willingness to tackle the tough issues and solve constitutional challenges.

²³¹ *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 803.

²³² *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 805.

²³³ *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 809.

²³⁴ *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 817.

²³⁵ *Hopper v. City of Pasco*, 1985, 1074, “In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”; *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 802, the court explains that when a government uses its nonpublic forum for speech-related activities, it becomes public forum; however, it “is not required to indefinitely retain the open character of the facility;” it can change back to a nonpublic forum.

interest through the least restrictive means.²³⁶ Street encounters and interactions with copwatchers happen in the public forum and face strict or intermediate scrutiny, depending on whether the restrictions are content-based or content-neutral.²³⁷ Auditors filming inside police buildings, however, most likely face the standard of reasonableness applied to TPM restrictions for recording inside a nonpublic government building. Even reasonable restrictions must be narrowly tailored to curtail activity incompatible with the purpose and function of the building; the constitution permits the TPM of speech expression, and not viewpoint restrictions of private speech.²³⁸

In *Turner v. Driver*, the 5th Circuit Court addressed the issue of filming police, and concluded that “for the future... a First Amendment right to record police does exist, subject only to reasonable time, place, and manner restriction.”²³⁹ Even with police buildings representing 25.4 percent of audit sites in the 59 videos assessed, none of the agencies imposed reasonable TPM restrictions, and few officers appeared prepared for the audit. In *Turner*, the court did not define the forum for the sidewalk outside the police station, but it did state the requirements for reasonable TPM restrictions.²⁴⁰ Describing intermediate scrutiny, the court required restrictions to be “narrowly tailored to serve a significant government interest” and added that the “restriction need not be the least restrictive or least intrusive means of serving the government’s interests.”²⁴¹ Consequently, it appears that the 5th Circuit deemed the sidewalk outside the police station to be a public forum while recognizing that content-neutral restrictions passing intermediate scrutiny are permissible.

²³⁶ Ruane, *Freedom of Speech and Press*, 5.

²³⁷ Rebecca A. Taylor, “The First Amendment,” *American Bar*, August 15, 2017, https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/july_2014/the_first_amendment/.

²³⁸ *Greer v. Spock*, 843, “The Court is to inquire “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” (Citing *Grayned v. City of Rockford*); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).) “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information” (citing *Ward v. US*).

²³⁹ *Turner v. Driver*, 688.

²⁴⁰ *Turner v. Driver*, 690.

²⁴¹ *Turner v. Driver*, 690.

The burden will be upon the government to justify the significance of restrictions under intermediate scrutiny or the reasonableness standard and demonstrate that the activity is incompatible with the purpose and function of the property.

As the video analysis for this thesis indicates, administrators and officers seldom contact auditors to silence a specific viewpoint; they instead expressed several concerns for public safety that might offer the basis for reasonable TPM restrictions. The Supreme Court has “identif [ied] ‘congestion,’ ‘interference with ingress or egress,’ ‘and the need to protect...security’ as content-neutral concerns.”²⁴² Justification citing security as a concern may require testimony supporting the danger presented by the auditor’s action. Arguments that recording inside disrupts the intended business purpose can easily show that recording exposes citizens’ personal information and disrupts the work of the employees, which makes it incompatible with the design and purpose of the facility. Arguably, most government buildings and even hospitals share the commonality that citizens seldom visit the location of their own volition, but instead are forced through life circumstances to seek aid, comply with regulatory statutes, and report the occurrence—or answer for—an alleged crime. Consequently, the invasive nature of a stranger video recording their conversation is likely to have a chilling effect on a citizen’s willingness to report a crime or provide personal information; the camera, therefore, is incompatible with the intended function of the facility. Banning all interior photos and video, except those preauthorized (to allow reasonable accommodations for citizen privacy), is consistent with First Amendment jurisprudence for reasonable TPM restrictions upon expressions of free speech.

4. Public Parks and Venues

The less frequent auditing of parks is fortunate, given that parks fall among those public forums traditionally afforded the highest protections and for which restrictions meet the highest level of judicial scrutiny.²⁴³ In the study of 59 audits for this thesis, only one

²⁴² *McCullen v. Coakley*, 2531, Citing *Boos v. US.*, the court also warned that restrictions concerned about the effect of unwanted speech on the audience is not content-neutral.

²⁴³ *International Soc. for Krishna Consciousness, Inc. v. Lee*, 679.

included a park.²⁴⁴ Cases and authors discussing the subject often refer to the words of Justice Roberts, who described streets and parks as those public forums that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²⁴⁵ Law reviews offer similar conclusions:

The quintessential city park boasts fields, benches, sidewalks, and playgrounds. It also reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” The city government owns and manages the land and the physical structures built upon it. But within this space, anyone can say almost anything. Skaters, vagabonds, hipsters, Klansmen, lesbians, Christians, and cowboys—the city park accommodates them all. The city park thus symbolizes a core feature of a democratic polity: the freedom of all citizens to express their views in public spaces free from the constraints of government-imposed orthodoxy.²⁴⁶

In parks, “anyone can say almost anything” or nothing at all, as in the case of the HATETHESTATE recording children in a park.²⁴⁷ While HATETHESTATE’s manner and filming alarmed parents, the confrontation was his objective.²⁴⁸ Recording and taking pictures in a park, especially of children, is one of those ubiquitous activities of parents and friends. Restricting the auditor, without preventing everyone else from taking photographs, requires the government to satisfy the standard of strict scrutiny because exclusively restricting auditor actions, however creepy, violates “a core feature of democratic policy.”²⁴⁹ Many states have statutes that enact TPM restrictions on this activity. For example, Texas Penal Code Section 21.15 prohibits photographs or videos that invade a reasonable expectation of privacy by recording the “naked or clothed genitals, pubic area,

²⁴⁴ “Dont FIIm (Sic) My Kids in Public! 911 Called! Public Park 1st Amendment Audit.”

²⁴⁵ *International Soc. for Krishna Consciousness, Inc. v. Lee*, 679.

²⁴⁶ John D. Inazu, “The First Amendment’s Public Forum,” *William & Mary Law Review* 56, no. 4 (2015): 1158, <https://scholarship.law.wm.edu/wmlr/vol56/iss4/5>.

²⁴⁷ “Dont FIIm (Sic) My Kids in Public! 911 Called! Public Park 1st Amendment Audit.”

²⁴⁸ “Dont FIIm (Sic) My Kids in Public! 911 Called! Public Park 1st Amendment Audit.”

²⁴⁹ Inazu, “The First Amendment’s Public Forum,” 1158.

buttocks, or female breast of a person.”²⁵⁰ While viewing the video might require a warrant, the citizen complaint of the activity may provide the reasonable, articulable suspicion of a specific crime, which permits investigative detention for the felony offense and—at least for stop-and-identify states—grounds for requiring identification.

5. Private Targets

Audits of private locations are less frequent but disproportionately result in a higher escalation and violence. Of 59 videos examined, only three audits targeted private locations, and one resulted in a shooting; worded differently, of the 59 audits, only one resulted in violence, and that one targeted a private location.²⁵¹ Auditors may find less sympathy in the court and public eye when targeting churches, homes, and private individuals. In the case of the Furry Potato shooting, the prosecutor refused to charge the shooter, and stated in a memorandum that the guard had put the school on lockdown because of Perez’s actions, and that—due to a “recent surge in anti-Semitic hate crimes and the mass shooting at the Tree of Life synagogue”—it was reasonable for the guard “to perceive Perez’s actions as dangerous.”²⁵² The memorandum continues, “Perez went to a Jewish school, and place of worship, dressed in all black and with a backpack secured to her body by a harness ... Perez’s backpack could have contained a bomb, and her attire could have concealed a firearm or other deadly weapon.”²⁵³ As these events suggest, targeting private citizens may undermine auditor support in the community, and auditors should not expect the post-conflict judicial support afforded the activity of recording police and public officials.

The sidewalk dividing the synagogue property and street is generally a public forum, and the Supreme Court has consistently declared sidewalks among the traditional

²⁵⁰ “Texas Penal Code § 21.15,” Findlaw, accessed October 1, 2019, <https://codes.findlaw.com/tx/penal-code/penal-sect-21-15.html>.

²⁵¹ “Mirrored Furry Potato Shot.”

²⁵² Queally, “Guard Won’t Be Charged in Shooting of Youtube Activist ‘Furry Potato.’”

²⁵³ Queally.

avenues of public forum for expressive speech.²⁵⁴ Although primarily within the private property of the synagogue (and outside First Amendment strictures), some expression of speech and ideas occur in the form of worship, education, and discussion. For many churches, taking a picture or using a camera may be common occurrences, especially around holidays, weddings, and special events. Excusing this common practice on the adjacent sidewalk, while restricting the auditor, requires content-based assessment and exclusion of speech. As the regulation of the auditor's expressive conduct requires the government to focus on content, it is subject to strict scrutiny. Content-specific restrictions for a public forum will not withstand strict scrutiny unless they are the least-restrictive alternative and are narrowly tailored to serve a "compelling state interest," like the prevention of targeted auditing or harassment.²⁵⁵

Cities have created ordinances imposing restrictions that plaintiffs challenged in subsequent court cases. In some cases, the court upholds the ordinance.²⁵⁶ In *Frisby*, the court supported a ban against picketing a specific residence, writing, "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants."²⁵⁷ A similar ordinance prohibiting auditors from targeting churches could make the same arguments to qualify as a reasonable TPM restriction. The court determined that the picketers "[did] not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."

Further explaining, the court added that "the offensive and disturbing nature of the form of communication banned [in the ordinance] can scarcely be questioned and found the statute a Constitutionally appropriate balance between the advocate's right to convey a

²⁵⁴ *United States v. Kokinda*, 729. Even sidewalks are assessed in light of the manner and purpose of their use and design. When a sidewalk was between the parking lot and building, the court deemed it a nonpublic place, which required only reasonableness to impose restrictions.

²⁵⁵ Taylor, "The First Amendment."

²⁵⁶ *Chaplinsky v. New Hampshire*, 573. (The court upheld an ordinance against cursing and name calling other citizens in public, and found that the statute was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace," *Cf. Cantwell v. Connecticut*, 296, 311.)

²⁵⁷ *Frisby v. Schultz*, 487 US 474 S. Ct. 487–89 (1988).

message and the recipient’s interest in the quality of his environment.”²⁵⁸ The Supreme Court ultimately supported the ordinance and wrote, “the State has a substantial and justifiable interest in banning” speech directly targeting the “presumptively unwilling” audience.²⁵⁹ The goal of the ordinance and the court in *Frisby* was to protect the unwilling listeners from becoming a “captive audience” to targeted offensive speech within the sanctity of their home.²⁶⁰ In applying standards of scrutiny, the court distinguished restrictions upon “offensive and disturbing” communications to targets from restrictions upon the expression of ideas to the general public.²⁶¹ Finally, the court contrasted the home with other locations, which suggests that the law banning targeted picketing of the home was probably impermissible for a place of business.²⁶²

As with churches, when an auditor targets a specific person, society is less forgiving, and criminal statutes offer relief. HATETHESTATE learned this lesson in Florida, after following, filming, and harassing a vendor who did not appreciate his actions.²⁶³ Punta Gorda Florida closed streets to hold an outdoor event where vendors set up shop and sold products.²⁶⁴ Carrying his “Fuck the County” sign, HATETHESTATE walked the grounds and stopped in front of a vendor. The woman asked him to stand elsewhere and expressed concern that he would deter customers and interfere with her sales. HATETHESTATE took offense and turned the camera on the woman, and followed and harassed her as she hid and eventually left the area to escape his abuse. The victim called the police, who warned HATETHESTATE of Florida’s stalking statute. When the

²⁵⁸ *Frisby v. Schultz*, 474.

²⁵⁹ *Frisby v. Schultz*, 488.

²⁶⁰ *Frisby v. Schultz*, 487–88.

²⁶¹ *Frisby v. Schultz*, 488.

²⁶² *Frisby v. Schultz*, 488.

²⁶³ “I’m Accused of a Crime, 1st Amendment Activity Made Illegal by Punta Gorda Police Department,” YouTube video, 20:55, posted by HATETHESTATE, June 14, 2019, <https://www.youtube.com/watch?v=8ALrj008NTI>.

²⁶⁴ “I’m Accused of a Crime.”

woman returned, HATETHESTATE resumed his harassment, and the police ultimately charged him with stalking.²⁶⁵

Reasonable TPM restrictions for churches, homes, and individuals are rather limited because they often occur in a public forum afforded the highest level of scrutiny. When speech invokes a compelling state interest, existing laws usually apply that regulate the activity and classify it as harassment, stalking, or disorderly conduct. The difficulty in curbing this behavior and the likely summoning of police suggest a need to train police and community members to respond correctly.

6. Hospitals

Whether private or publicly owned, hospitals may have higher protections than other private and public locations. Neither is a public forum, traditionally used as a place for free and open expression of thought and exchange of opinion in a “marketplace of ideas” context proffered by Justice Oliver Wendell Holmes.²⁶⁶ Only two of the 59 audits analyzed occurred at a hospital, yet each raised the expected concerns of privacy and security.²⁶⁷ The courts have found medical centers to be nonpublic forums for First Amendment purposes, which means that speech-related restrictions are permissible, “as long as they “are reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²⁶⁸ In the thesis research, objections to auditor actions were based on policy and privacy, rather than concern about the specific views of the auditor.²⁶⁹ The courts have endorsed similar concerns by upholding an 8-foot buffer at medical centers in support of the “right to be let alone” and the provision of unobstructed and “free passage in going to and from work,” which the court suggested as even more

²⁶⁵ “I’m Accused of a Crime.”

²⁶⁶ Blasi, “Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment,” 19; *Hill v. Colorado*, 530 US 703 S. Ct. 487–89 (2000).

²⁶⁷ “(Fail) ‘Hospital Lobby’ ‘Stop Filming Now!!!’ 1st Amendment Audit.”

²⁶⁸ *Preminger v. Secretary of Veterans Affairs*, 517 F. 3d 1299 (Court of Appeals, Federal Cir. 2008).

²⁶⁹ “(Fail) ‘Hospital Lobby’ ‘Stop Filming Now!!!’ 1st Amendment Audit”; “1st Amendment Audit, Chicago Rush Hospital.”

critical at a medical facility.²⁷⁰ Many of the buffer-zone statutes already refer to the locations as medical facilities, which suggests that the court may favorably view similar restrictions at other medical facilities.

²⁷⁰ *Hill v. Colorado*, 717.

IV. RESEARCH IMPLICATIONS AND RECOMMENDATIONS

My examination of First Amendment law revealed three things. First, more auditor-applicable First Amendment case law resulted than expected. The court has outlined a very specific and widely applied framework for that analysis, the public forum doctrine. Second, scholarly work, as premised, has focused solely on copwatchers and missed the auditor distinctions, including the impact of public forum doctrine. Finally, police agencies are not prepared for audits, and may instead be preparing for the wrong encounter.

Unfortunately, given the breadth of First Amendment jurisprudence with stochastic findings among the lower and appellate courts, a single one-size-fits-all policy is not feasible, particularly when assessing federal and local response options. Instead, agencies need a template that outlines policy options and prepares them for the audits. The IACP Recording Police Activity Model Policy offers a starting point; however, because the policy only addresses protesters and copwatchers, agencies should add guidance for auditors.²⁷¹

A. DEVELOPING SPECIFIC TPM RESTRICTIONS AND POLICY

Agency policy should address time, place, and manner (TPM) restrictions from two perspectives, which are generally defined by the relevant forum. Forum analysis, however, is not an ideal tool for the officer's field kit. Officers need simple guidance that clarifies officer authority while limiting discretion and narrowing possible options. Narrowing the range of options satisfies the court tests for limiting arbitrary discretion, but it also expedites decision making and enhances officer safety. The policy narrows discretion without hamstringing police by dividing guidance into two areas for TPM restrictions, restrictions *imposed* by police and restrictions *enforced* by police.

²⁷¹ International Association of Chiefs of Police, *Recording Police Activity*, 1–7.

1. Imposed TPM Restrictions

Apart from restrictions put into place at the police facility, most restrictions *imposed* by police will apply to copwatching and protests. In circumstances where police impose restrictions (whether spontaneously or in executing an incident action plan), the location will likely be a public forum, and the restrictions will be content-neutral. When this is the case, intermediate scrutiny applies, and the restrictions must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”²⁷² Courts have applied intermediate scrutiny where demonstrators contested a demonstration zone established for security purposes and supported the policy decision.²⁷³ The questions of “narrowly tailored” and “significant government interest” were examined, and the court was quick to state, “security is not a talisman that the government may invoke to justify any burden on speech (no matter how oppressive the speech).”

The First Circuit Court of Appeals required Boston to provide a historical or experiential basis to substantiate security needs.²⁷⁴ In examining the scope of the restriction, courts consider regulations “narrowly tailored” when they are “not substantially broader than necessary to achieve the government’s interest.”²⁷⁵ The restriction does not have to be the least restrictive or even the most effective option when examined through hindsight.²⁷⁶

How does this apply to policy? An officer at the scene of a crime or collision could create a perimeter that restricted citizen access. That barrier would naturally preclude recording from a distance closer than the barrier, which might be reasonable, providing a significant government interest (securing a homicide scene for evidence collection) exists, the barrier is narrowly tailored (securing only places where evidence is susceptible to

²⁷² Ruane, *Freedom of Speech and Press*, 8.

²⁷³ *Bl (a) ck Tea Society v. City of Boston*, 378 F. 3d 8 (Court of Appeals, 1st Cir. 2004).

²⁷⁴ *Bl (a) ck Tea Society v. City of Boston*, 13.

²⁷⁵ *Bl (a) ck Tea Society v. City of Boston*, 12; referring to Supreme Court rulings (Id. 798–99, 109 S.Ct. 2746, Id. 800, 109 S.Ct. 2746).

²⁷⁶ *Bl (a) ck Tea Society v. City of Boston*, 12.

intentional or inadvertent disruption before collection) and leaves ample communication channels (the recording can continue from outside the perimeter).

Recent court decisions have found that the requirements of narrowly tailored restrictions and ample alternate channels correlate into a mandate for instructions to be “state [d] clearly and unambiguously and ‘allow a person of ordinary intelligence’ to understand what acts are prohibited.”²⁷⁷ On a traffic stop, the reasonable distance may only be to the curb or out of the street. This need for specificity is missing from the Baltimore and IACP policies. The officer should give specific instructions for where the photographer (and all other members of the public) can stand. Instructions should be specific and not the ambiguous statements “stand back” or “stand over there,” which the courts have rejected as too nonspecific to enforce.²⁷⁸ Instead, “step to the curb” or “move back behind that post” are more likely to satisfy the court, providing they are content-neutral, narrowly tailored for a specific and significant government need, leave open other means of communication, and provide clear and unambiguous direction on what is permitted and what is not.²⁷⁹

When auditors target a government building, military base, or private business, rules, regulations, or policies may proscribe the auditor’s activity. Those rules may even be the motivation for the audit. Regardless, the creation of such rules is the responsibility

²⁷⁷ *State v. Russo*, 407 P. 3d 137 S. Ct. (2017), quoting in part *State v. Guyton*, 135 Hawai`i (2015) and *LeMay v. Leander*, 92 Hawai`i (2000).

²⁷⁸ *State v. Russo*, 149. (In response to the command to “stand back,” the auditor can simply move back six inches and his video will support later claims that he “complied.” The intended command should make boundaries clear to the auditor and anyone watching the video.)

²⁷⁹ *State v. Russo*, 150. “[T]he order or direction must be sufficiently clear and specific so that ordinary individuals exercising their constitutional rights to free speech can readily identify the conduct that the order prohibits. See *id.* (observing that requirements of particularity and specificity are based in part on the concepts of ‘fairness and due process,’ which ‘dictate that a court order must be sufficiently particular and definite so as to clearly identify the conduct that it prohibits.’) Clarity and specificity are all the more important in the context of the offense charged in this case, as under HRS § 291C-23, mere lack of compliance with a police officer’s verbal ‘order or direction’ renders conduct ‘unlawful’ that otherwise may be lawful and constitutionally protected.” Also, the court explained its expectations, writing, “Officers Lawson and Fairchild were entitled to issue directives to regulate the time, place, and manner of Russo’s video recording so long as the officers possessed an objectively reasonable belief that Russo was interfering or about to interfere with the ongoing traffic stop. Assuming the officers so concluded, any orders or commands they delivered were required to be clear, specific, and narrowly tailored to mitigate the actual danger or risk posed by the recording, and the directives were required to leave open ample alternative channels to observe the officers’ activities.”

of the property owner or manager, which might be a private or government entity. Whomever the owner, the restrictions they impose must withstand court scrutiny. The forum designation for the property determines the proper level of scrutiny applied to restrictions. If government-owned and not traditionally open or intentionally opened for public discussion, debate, and exchange of ideas, the property is a nonpublic forum. Private property is neither a public forum nor subject to First Amendment challenges.²⁸⁰ Owners and managers of these locations will not be familiar with First Amendment law, forum analysis, or court expectation, but they will want to limit auditing activity, and often beyond the scope of their lawful ability. Property lines and building entries often divide forum types and the levels of proscribable behavior. While officers should not need a law degree to determine where the action is required or forbidden, the policy or training should explain the importance of boundaries in the First Amendment audits.

2. Developing TPM Restrictions

Efforts specifically to restrict First Amendment auditors (1A), whether collectively or only for the most caustic offenders are, by definition, content-specific efforts to suppress speech based on the message or the messenger; as such, this approach, labeled viewpoint discrimination, is considered one of the most egregious violations of the First Amendment.²⁸¹ The Supreme Court has, however, recognized the need for government agencies and employees to function without unreasonable interference, and that may incidentally include restrictions on the auditor-favored manner or place for expression. Any government restrictions designed to limit activity should concentrate on preventing incompatible activity that interferes with the given location's function and design. Focusing restrictions on location-based functional needs and limiting incompatible activity "implicates the Court's 'forum based' approach for assessing restrictions that the government seeks to place on the use of its property."²⁸²

²⁸⁰ *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

²⁸¹ *Hartman v. Thompson*, No. 18-5220 (Court of Appeals, 6th Cir. 2019).

²⁸² *Minnesota Voters Alliance v. Mansky*, 1879.

Developing restrictions that incidentally impact auditors is permissible when they affect everyone equally, regardless of viewpoint, and they meet the court’s standard of review.²⁸³ Even in a public forum, content-neutral restrictions can limit the place and manner of speech expression when narrowly tailored and allowing alternate communication channels.²⁸⁴ The applicable standard is contingent upon the forum where the government seeks to apply the restrictions.²⁸⁵ It follows then that an entity imposing restrictions that incidentally upset First Amendment protections should follow the court’s example and conduct a forum analysis, then assess the restriction through the relevant standard of scrutiny. This approach requires the agency to answer four questions: (1) what forum applies, (2) how will courts assess reasonableness, (3) is this policy or law, and (4) what are the alternatives?

a. Which Forum Applies to the Property in Question?

The question of the proper forum—or rather the answer—can vary for even a single property. Even the most unaffected property, private property, must evaluate each area considering the function of the property and the historical use purpose. Generally, privately owned and operated property is not subject to First Amendment constraints and can screen content as desired; forum analysis, therefore, is primarily a tool for assessing government restrictions for First Amendment conduct on government property. In that sense, a Catholic church is not constitutionally required to open Mass to permit the Jehovah’s Witness or the Baptist pastor to advance their worldviews before the congregation. Outside the church, forums change—or rather, begin—at the property line, most commonly demarked by the government-owned public sidewalk. From that vantage point, the auditor can record and proclaim their perspectives within reason. Having the authority to regulate access to persons on private property means the owner is free to require auditors to leave the premises at risk of arrest, but owners have no such control over sidewalk activity.

²⁸³ *Lavite v. Dunstan*, No. 18–3465 (Court of Appeals, 7th Cir. 2019).

²⁸⁴ *Bl (a) ck Tea Society v. City of Boston*, 12.

²⁸⁵ *Ridley v. Massachusetts Bay Transp. Authority*, 390 F. 3d 65 (Court of Appeals, 1st Cir. 2004); *Hartman v. Thompson*.

In this thesis analysis, auditors targeted mostly government buildings or property. Consequently, administrators for these locations benefit most from this thesis and an understanding of forum analysis, which informs the range of permissible TPM restrictions. As with private entities, the government is constitutionally permitted to control owned or leased property in a manner that precludes disruption in furtherance of the property's intended function.²⁸⁶ Like the church, the sidewalk adjacent to the public street is generally a public forum, even though the sidewalk adjacent to the building is a nonpublic forum.²⁸⁷ The critical determinant is the intended purpose and use of the property by the owners. If the property has not traditionally been a place of open discussion and debate, and the government has not intentionally opened it to such, then it is a nonpublic forum.²⁸⁸ This method of examination also applies to “the common areas of public [property],” including such *nonpublic forums* as building lobbies, foyers, and hallways), which the DOJ letter and IACP Model Policy treat as *public forums*.²⁸⁹ When these locations are correctly examined as a *nonpublic forums*, then reasonable TPM restrictions may be applied. Appendix D contains the DOJ letter and Appendix E contains the IACP Model Policy.

b. How Will the Court Determine Reasonableness?

Once the court identifies the forum applicable to the restriction, the appropriate level of scrutiny is applied. The courts apply intermediate scrutiny to content-neutral TPM restrictions in public forums. If the agency has intentionally designated a location for open public expression, it becomes a designated public forum, and the courts treat it as a public

²⁸⁶ *Greer v. Spock*, 836, “The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

²⁸⁷ *United States v. Kokinda*, 728, “The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.” and “In *United States v. Grace*, 461 U.S. 171 (1983), we did not merely identify the area of land covered by the regulation as a sidewalk open to the public and therefore conclude that it was a public forum.”

²⁸⁸ *Hopper v. City of Pasco*, 2001, 1074.

²⁸⁹ Jonathan Smith, *US DOJ Letter to Baltimore Police Department Re: Christopher Sharp v. Baltimore City Police Department* (Washington, DC: Department of Justice, 2012), 6, https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf; International Association of Chiefs of Police, *Recording Police Activity*, 1.

forum.²⁹⁰ As *Russo* outlines, reasonable restrictions examined under intermediate scrutiny must be “clear, specific, and narrowly tailored to mitigate the [disruption] posed by the [expressive activity],” and the directives were required to “leave open ample alternative channels [for similar expression].”²⁹¹ For the organization establishing restrictions, the *Russo* decision means the organization should publish clear directions on what is permitted and what is prohibited. If a statute or local ordinance is created to support the restriction, that statute should contain clear, unambiguous instructions so that “ordinary individuals ... can readily identify what conduct is prohibited.”²⁹² For those nonpublic forums, the court will evaluate the reasonableness of the restriction for the business function it seeks to sustain.

Restrictions may constitutionally limit activity incompatible with the purpose of the facility. For example, this study has shown that auditors commonly target the DMV.²⁹³ The government has not traditionally opened the DMV as a forum for open discussion and debate, but instead, the government has restricted this property for processing vehicle registrations. Employees express concern about video recording because it compromises personal identifying information and disrupts the registration process.²⁹⁴ Customers bring

²⁹⁰ *Olsen v. Rafn*, No. Case No. 18-C-1366 (Dist. Ct. 2019), (“The public-forum doctrine recognizes ‘three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.’ Quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 87 L. Ed. 2d 567 [1985].); *Lavite v. Dunstan*, (“The government can also designate spaces not traditionally open to public assembly and debate as public fora, but it must do so intentionally, not “by inaction or by permitting limited discourse.” Also citing and *Cornelius* [citation omitted]. “A space the government intentionally characterizes as open to expressive activity is known as a ‘designated’ public forum. Citing *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 [1992]”); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 802; *Hopper v. City of Pasco*, 2001, 1074.

²⁹¹ *State v. Russo*, 150.

²⁹² *State v. Russo*, 150.

²⁹³ “1st Amendment Audit Gladstone DMV (We Get The Boot),” YouTube video, 12:48, posted by Oregon Cop Watcher, October 1, 2018, <https://www.youtube.com/watch?v=ipUXzkGFIBM>; “1st Amendment Audit—DMV and NDOT in Carson City (2 Cops Show up)—Fail, Pass, Pass!”

²⁹⁴ “1st Amendment Audit Gladstone DMV (We Get The Boot).” (Staff expressed privacy concerns to auditors who continue to record for some period before finally leaving. Customers are observed trying to work their way around the auditors during the discussion and show concern about the cameras); “1st Amendment Audit—DMV and NDOT in Carson City (2 Cops Show up)—Fail, Pass, Pass!” (The auditor did not enter the location because he was openly carrying a firearm on his audit and also had his child with him [in a stroller], verbally challenging the weapon restriction on a “public building,” but deciding that he was “not gonna bother” with it. Anyone who has visited the DMV would understand why the government would not want armed customers.)

personal documents and verbally provide personal information at the windows. This business function is incompatible with video recording or live streaming business activity. The consequence is the business disruption within the facility, which is created by the need to alter or pause transactions. The administrator does not care what viewpoint the auditor holds or publishes; the act of recording is the only concern. Given this specific scenario, the court would likely deem it reasonable to ban all recording within the property.²⁹⁵ As a nonpublic forum, the regulation imposed does not have to be the least restrictive option; it needs only be reasonable. Allowing the same auditor to record outside the facility, even if a specific distance from the doors (to prevent the blocking of ingress and egress) meets the definition for reasonableness and would likely withstand court scrutiny.²⁹⁶

c. Is this Policy or Law?

When developing restrictions that may incidentally restrict expressive activities, the administrator, employees, and responding officers should know the legal foundation for the creation and the enforcement of that policy or regulation. The video analysis for this thesis revealed that auditors frequently demand to know the law authorizing the administrator's request to stop recording. The administrator's lack of knowledge serves only to embolden the auditor. Auditors often follow up by stating that "policy is not law."²⁹⁷ In the previous example, 41 CFR §102-74.420 is the law that permits photographs in "entrances, lobbies, foyers, corridors, or auditoriums for news purposes" unless prohibited by "security regulations, rules, orders or directives."²⁹⁸ A regulation prohibits

²⁹⁵ *US v. Gileno*, 917, "Free speech restrictions in a nonpublic forum are constitutional if they are viewpoint neutral and reasonable in light of the purpose served by the forum. Id. at 966 (citing *Cornelius*, 473 U.S. at 806, 105 S. Ct. 3439); *Hopper*, 1075. A speech restriction in a nonpublic forum is reasonable if there is evidence that the restriction reasonably fulfills a legitimate need. Id. 967."

²⁹⁶ *United States v. Kokinda*, 729–30.

²⁹⁷ "(Must See)Tyrant Alert: Walk of Shame!!! 1st Amendment Audit Fail (Detained)," YouTube video, 29:29, posted by Auditing America, January 26, 2019, <https://www.youtube.com/watch?v=MQeOr8Nd3TA>; "1st Amendment Audit Gladstone DMV (We Get the Boot)"; "(Fail) 'Hospital Lobby' 'Stop Filming Now!!!' 1st Amendment Audit."

²⁹⁸ Government Publishing Office, *41 CFR § 102–74.420 What Is the Policy Concerning Photographs for News, Advertising or Commercial Purposes?* (Washington, DC: Government Publishing Office, 2010), 214.

conduct when a posted sign unambiguously proscribes the behavior. The enforcement statute—and the one enforced in *Gileno*—is 41 CFR §102-74.385, which reads that:

Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals.²⁹⁹

For federal buildings, the answer to “What law is that” is: § CFR §102-74.385.

For a municipal or state facilities, new regulations may require passing a local ordinance or state statute. Agencies implementing restrictions should post clear signage that informs the ordinary citizen what conduct is prohibited, and—given the frequency of statutory focus in audits—the sign should cite the supporting statute.³⁰⁰ Whether verbal or written, instructions should explicitly articulate what is permitted and prohibited. The court will void a statute that is too vague, and the same logic applies to proscriptive signs.³⁰¹ An agency should post clear, unambiguous signs stating the prohibited conduct in a manner that the subjected and enforcing parties can understand. Additionally, agencies can reduce citizen-employee friction by also listing the supporting legal statute. As police enforce laws, not policies, creating appropriate statutes remove many of the auditor challenges, including policy challenges, refusal to identify, and questions of detention.

d. Alternatives

In public forums, the court will expect officials to design restrictions to narrowly serve a significant government purpose and provide ample alternative means of expression when imposing restrictions. In non-public forums, the standard of reasonableness will

²⁹⁹ “Electronic Code of Federal Regulations,” Electronic Code of Federal Regulation, October 15, 2019, <https://gov.ecfr.io/>.

³⁰⁰ *US v. Gileno*, 916–17. (The court found that the language “Photographs Prohibited” was not too vague, when accompanied by further directions from the officers. The court also noted the objection, but took no issue with the fact that the statute was not shown on the sign. It is this author’s perspective that including the statute, even if not mandated, can alleviate conflict and avoid future [less favorable] court decisions.)

³⁰¹ *US v. Gileno*, 916, “Under the void-for-vagueness doctrine, a penal statute must `define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’ *Id.* 615 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 [1983]).”

likely suffice. Agencies that apply the standard of intermediate scrutiny, even where mere reasonableness is required, will fare better in courts and create more favorable case law.

B. FINDING TPM RESTRICTIONS IN MODEL POLICIES

In a review of policies for potential TPM restrictions, I found the existing models devoid of auditor-related guidance. The Baltimore Police policy and the DOJ letter (which heavily influenced that policy) provide a discussion point for legal and tactical responses to the challenges posed by protestors *en masse* and copwatchers.³⁰² Specific guidance for responding to hostile and antagonistic citizen activists directly correlates to the auditor challenges, but these policies are incomplete. Although both the IACP model policy and DOJ-imposed Baltimore police department (PD) model exclude auditor response, this omission reflects more on the national blindness to this growing movement than the quality of the policies. Regardless, a policy gap emerged that consequentially fails to consider issues this thesis has revealed. One such gap is in the broad-brush painting of public spaces to be synonymous with public places for First Amendment expression. To be sure, these documents correctly assert that a right to record (or conduct any First Amendment expression) is constitutionally protected in public spaces. The error occurs when the policies fail to observe the level of protection—or rather, the hurdles placed on government—as different in copwatching and auditing, based upon the forum categorization of the property in question. That distinction, however, is less relevant when considering only the public protestor or the copwatcher—both of which occur in public forums. The emergence of the auditor demands that policies evolve to equip officers to respond safely and constitutionally. New policies should retain the sections for *imposing* TPM restrictions—similar to those covered in Baltimore’s *current* policy and the IACP Model—while adding a policy that outlines the officer response options when *enforcing* TPM restrictions. The latter section will likely include applicable local and state statutes, like trespassing or harassment, but it should also equip the officers to engage and educate

³⁰² Baltimore Police Department, *1016 Citizen Observation/Recording of Police Officers* (Baltimore: Baltimore Police Department, 2016), 1–6, <https://www.baltimorepolice.org/1016-citizen-observationrecording-police-officers>; Smith, *US DOJ Letter to Baltimore Police Department*, 1–11; International Association of Chiefs of Police, *Recording Police Activity*, 1–2.

the complainant without providing auditors the desired police-citizen conflict. Depending on state and local law, as well as the presiding Court of Appeals, the range of options and resulting policy will differ. Recognizing the policy deficiencies and knowing the issues to include can better equip agencies and officers to prepare for and respond to civil rights audits. For a complete review of the Baltimore and IACP policies, see Appendix B: First Amendment Policy Review.

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V. CONCLUSION

What are reasonable time, place, and manner (TPM) restrictions to civil liberties with regard to recording police, government facilities, and critical infrastructure? How should agencies reflect these restrictions in policy and training to balance civil rights properly against the preservation of site security and functionality, particularly in response to civil rights audits?

A. THESIS FINDINGS

This thesis began with an investigation of the emerging issues of police-citizen conflict, created by self-ascribed civil rights auditors, which focused primarily on those who call themselves 1A auditors. The literature review revealed relevant case law and scholarly articles addressed First Amendment discourse from the perspective of copwatchers and displayed little knowledge of auditors, even when some of their recommendations crossed into the auditor domain. Missing from legal and scholarly work were the understanding and awareness of auditors and discussion that considered the implications of applying copwatch rules to audit scenarios.

In the analysis of 59 audit videos, I learned that auditors nationwide use similar tactics and choose similar targets. The legal analysis in this thesis found that the remaining two prominent categories for auditor tactics, bait and traps, required different approaches. Existing laws, ordinances, and policies best answer questions raised by traps, while case law and First Amendment jurisprudence offered insight for location-based responses and potential TPM restrictions. Also evident from the legal analysis is that the government cannot restrict auditor speech or expressions (including crude signs) simply because it is offensive; but, restrictions can be enforced. The forum defines the limits of that enforcement. Public forum doctrine, which the Supreme Court has developed over the years in other areas of First Amendment law, directly applies to all government-owned property and determines the level of court scrutiny on TPM restriction efforts. For nonpublic property, the government may impose reasonable restrictions on First Amendment expression, but the reason must be defensible.

Any effort to limit auditor tactics must focus on actions, not the content of or dislike for the person’s speech or expression. Agencies should also provide ample alternative means for public expression of dissent. Auditors will loudly proclaim that they are filming from public property when an agency establishes restrictions, and—for that reason—many officials hesitate to restrict auditing activity, even when they could lawfully impose reasonable TPM restrictions. As Ruane explains, the court holds that “[p]ublic property, which is not by tradition or designation a forum for public communication, is governed by different standards.” In other words, the court treats nonpublic forums differently.

Consequently, the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, as long as the regulation on speech is reasonable and not an effort to suppress” an opposing view.³⁰³ Nonpublic forum includes military bases, prisons, and municipal buildings.³⁰⁴ Agency administrators are encouraged to task their legal counsel with exploring reasonable auditor restrictions that respect constitutional rights while protecting employees from auditor harassment. Even when an officer acts professionally and does everything correctly from a legal and policy perspective, the auditor is likely to frame the encounter adversely in a YouTube post and comments.³⁰⁵

This thesis has discussed reasonable TPM restrictions for auditing activity. Current policy and guidance suggest a general unawareness of the auditors or the potential for police-citizen conflict that develops when the policies and legislation fail to consider and address the growing YouTube auditing issues. Even when restrictions are constitutionally permissible, state and local administrators may decide not to impose them. A state can afford higher protections for civil liberties than constitutionally required; for example, a state can choose not to create a Stop and Identify statute. Likewise, the federal, state,

³⁰³ *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 US 37 S. Ct. (1983); *Postal Service v. Council of Greenburgh Civic Assns.*, 453 US 114 S. Ct. (1981).

³⁰⁴ Ruane, *Freedom of Speech and Press*, 12, (Ruane lists military bases, prisons, and school mail systems as nonpublic forums.); *US v. Gileno*, 917, (States that municipal buildings are nonpublic fora.)

³⁰⁵ “Biloxi,MS.-Police Dept.” (Zero conflict with audit, but video caption, “You need to go yonder!” implies the auditor was run off by uneducated, backwoods police.)

and local agencies can enact policies that explicitly permits behavior the government could constitutionally proscribe. Many officials may choose this option to foster a strong community relationship; others may choose more restrictive policies in favor of public safety. The problem occurs when these policies are confused with or based upon an incorrect understanding of the law and reasonable TMP restrictions they could lawfully impose.

B. IMPLICATIONS

The findings in this thesis should raise concerns at every level of government. At the federal level, where consent decrees drive local police policy, an affirmative responsibility exists to ensure that the policies imposed position the agency for success rather than failure. Legislators should be aware of the impact of federal and state laws on First Amendment rights and public safety. On the one hand, the local officers will face lawsuits when they enforce an overly broad statute; on the other hand, the officers' protective responsibilities are undermined when statutes do not support investigative efforts. The state and county administrators err in failing to enact clear and unambiguous rules and regulations, supported by specific statutes that local officers can enforce when summoned. In either event, the local officers face the consequences of ill-informed legislators and poorly crafted statutes.

Consequently, public education is critical for all levels of government, but the greatest need lies locally, for it is at this level that training and policy guidance will have the most immediate impact upon the quality of response. Few administrators will argue that the failure to prepare for known risks will increase the agency's liability; auditors, as this study has shown, are a significant risk. With diminishing wiggle room in qualified immunity protections and the continuous assault on police legitimacy, the magnitude and frequency of that risk are growing exponentially.

1. Revisiting Court Guidance

Perhaps the Supreme Court has been silent on auditors because it has already addressed many of the questions raised in this research and provided a framework for assessing the constitutionality of First Amendment restrictions, forum analysis doctrine.

Regardless, appellate courts are not silent, at least not on the issue of recording the police in public, and many are joining the support for copwatching. As the Third Circuit wrote in affirming the First Amendment protection for recording police officers conducting their official duties in public, “Today, we join this growing consensus.”³⁰⁶ The Third Circuit was the second appellate court to deny officers and agencies qualified immunity on issues of recording police. When that consensus becomes unanimous, with or without Supreme Court decisions, all courts will deem the right to record to be clear, and agencies will suffer financial penalties. Agencies must train officers to respond to auditors and copwatchers appropriately before that situation occurs, but they must also examine the specific issues created in audits and help their community prepare for these encounters.

2. The Impact on Police Legitimacy

Thematic analysis of auditor videos has revealed tactics and bait methods frequently employed and highlighted training deficiencies for public officials and police in the areas of law, policy, and First Amendment activities. Evident from the study is that police, government officials, and the public generally respond poorly, providing conflict where desired, affirming preconceived notions about police, and undermining law enforcement legitimacy in the eyes of the public. This battle for legitimacy is critical for officer and public safety because authors and ranking police officials indicate that the adverse effects of media scrutiny have led to the “Ferguson Effect” or “YouTube effect,” where officers disengage or “de-police,” further impacting community relations and potentially allowing crime to rise.³⁰⁷ De-policing and its impact are both unsettled debates in research and criminal justice.³⁰⁸ Command-level police officials argue, “there is currently a ‘war on cops’—whereby citizens are emboldened by protests and negative media coverage of the police and are lashing out by assaulting police officers more

³⁰⁶ *Fields v. City of Philadelphia*, 862 F. 3d 353 (Court of Appeals, 3rd Cir. 2017).

³⁰⁷ Nix and Pickett, “Third-Person Perceptions, Hostile Media Effects, and Policing,” 29–30; Aaron C. Davis, “‘YouTube Effect’ Has Left Police Officers under Siege, Law Enforcement Leaders Say,” *Washington Post*, August 10, 2015, <https://www.washingtonpost.com/news/post-nation/wp/2015/10/08/youtube-effect-has-left-police-officers-under-siege-law-enforcement-leaders-say/>.

³⁰⁸ Nix, Wolfe, and Campbell, “Command-Level Police Officers’ Perceptions of the ‘War on Cops’ and De-Policing,” 33–35.

frequently.”³⁰⁹ In addition to de-policing—withdrawing from proactive enforcement measures—officials fear that police will fail “to use coercive force” when required.³¹⁰ A recent series of assaults on New York Police Department (NYPD) officers have given substance to concerns about de-policing increasing officer risk.

On July 20, 2019, two NYPD officers responded to a disturbance call, only to be “openly mocked and splashed with water by a crowd of 15 to 20 local youths,” one of whom also struck an officer in the back of the head with the empty bucket after drenching him.³¹¹ The officers walked away, taking no enforcement action and never even reporting the incident to supervisors. A similar incident occurred three days earlier, while officers were attempting an arrest.³¹² Both events went viral, which sparked an outcry. According to the *New York Post*, one police source blamed Mayor de Blasio for the officers’ “hands-off approach.”³¹³ The source asks, “Who does that in their right frame of mind?” and then answers the question with “People who believe there’s no consequences.”³¹⁴ While some officials praised the officers for restraint, NYPD Chief Monahan stated, “any cop who thinks that’s all right, that they can walk away from something like that, maybe they should reconsider whether or not this is the profession for them.”³¹⁵ Blatant citizen disrespect and officer inaction are not isolated to the bucket brigades assaulting NYPD officers. The following month, a First Amendment auditor berated, cursed, and threatened to assault an officer sexually in the police lobby, without immediate repercussions, which prompted the mayor to ban recordings inside precincts and order officers to issue criminal trespass

³⁰⁹ Nix, Wolfe, and Campbell, 33.

³¹⁰ Nix, Wolfe, and Campbell, 34.

³¹¹ Thomas Tracy et al., “See It: Another Video of Cops Getting Drenched by Mob Emerges as Brooklyn Man Surrenders for Dousing Two Cops with Water in Humiliating Attack and a Fourth Suspect Is Busted in Similar Harlem Splashing,” *nydailynews*, July 24, 2019, <https://www.nydailynews.com/new-york/nyc-crime/ny-water-bucket-arrest-nypd-20190724-rjizvaborfcdnfhyxm7w73zmcu-story.html>.

³¹² Tina Moore et al., “NYPD Cops Get Drenched by Buckets of Water,” *New York Post*, July 22, 2019, <https://nypost.com/2019/07/22/total-anarchy-nypd-cops-get-drenched-by-buckets-of-water/>.

³¹³ Moore et al.

³¹⁴ Moore et al.

³¹⁵ Tracy et al., “See It.”

warnings to future offenders.³¹⁶ Police and auditors have yet to test the constitutionality of that order, but the Supreme Court has acknowledged the government’s right to trespass persons from nonpublic government property.³¹⁷ Each of these events supports claims that de-policing occurs and creates risk for officers and the public.

Nix and Pickett emphasize the importance “for police departments to take steps to counter the negative publicity in the media, and ensure a more accurate depiction of policing.”³¹⁸ Those steps should include public education, as well as specific training and clear policies to guide officers dealing with citizen-created conflict. Police policy should clarify legal options for TPM restrictions to typical auditing behavior, and training should prepare officers for common tactics, including personal, offensive criticism and provocation efforts. Agencies should leverage the city website and media channels to inform the public about their First Amendment policy, and the city should support officers who follow that policy, even after that leads to citizen-police conflict. Failure to do so adds fuel to the auditor narrative, undermines agency legitimacy, and fosters an environment for de-policing. Researchers, politicians, and police hardly agree upon the frequency and prevalence of de-policing, but its consequences can put officers and the community at risk and embolden auditors, some of whom conceive of no legitimate boundaries in their behavior. This risk increases as auditors become increasingly more brazen and aggressive in their verbal and physical assault on police, self-justified by the narrative that police deserve such treatment.

³¹⁶ Tina Moore and Ben Feuerherd, “Man Berates, Threatens to Sexually Assault Cops in NYPD Precinct,” *New York Post*, August 15, 2018, <https://nypost.com/2018/08/15/man-caught-berating-threatening-to-sexually-assault-cops-in-nypd-precinct/>; Tina Moore and Amanda Woods, “NYPD Bans Civilians from Recording Video inside Precincts,” *New York Post* (blog), August 18, 2018, <https://nypost.com/2018/08/18/nypd-bans-civilians-from-recording-video-inside-precincts/>.

³¹⁷ *Lavite v. Dunstan*, 1881. (The Court wrote, “The building is a five-story office space, housing over twenty County departments. No evidence suggests that this was a space in which advocacy or interest groups met, let alone distributed leaflets or literature.” *Minnesota Voters Alliance v. Mansky*, 1888. (“Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.”))

³¹⁸ Nix and Pickett, “Third-Person Perceptions, Hostile Media Effects, and Policing,” 30.

3. Legitimacy Related Impact and Consequences

Aside from increased liability and the occurrence and impact of diminishing legitimacy, police face another risk related to auditors, missing the real threat. Just because the auditors present themselves as champions of the First Amendment who care about American democracy does not mean they do. Even if every auditor did, that would not ensure that the person with the camera intended only “good.” History proves otherwise. On May 3, 2015, before two Islamic State of Iraq and Syria (ISIS)-inspired subjects opened fire on a Garland, Texas, event center, they communicated with Elton Jamal Hendricks of Charlotte, North Carolina. At the same time, Hendricks communicated with another man, who sent photographs of the location and information about the security to Hendricks. Less than a minute before the shooting, the subject took one photo of the Garland officer and the security officer, which was later shown in a 60-Minutes episode. The timing suggests that the shooters had to pass this subject to carry out the shooting. Auditors take photos to create a citizen-police conflict; shooters take them to plan or document the attack. Two overseas Mosque shootings underscore this point, where both killers streamed video of their massacres, one on Facebook, the other on Twitch.

Bad guys use social media, take pictures of police, and photograph locations before and during attacks. While auditors capitalize on this fact to generate concern, create citizen-police conflict, and attack police legitimacy, police are left to respond professionally without missing the real threats. Complete disengagement ensures this risk becomes a reality. Agency policy must allow for contact, even if voluntary, to determine intent. While the terrorist could attempt to capitalize on the exploitability of the First Amendment, the police could also videotape interactions and share the information. Police and targets would quickly dismiss auditing activity as harmless but recognize genuine threats. Most likely, the attackers would initiate their attacks on first contact with the police, as the Garland attackers did when held up by the outer event perimeter. Like that event, the shooting would alert others to the threats before the shooting could target and kill innocent victims.

Furthermore, the intervention would save lives while providing essential safeguards for First Amendment expression. While the Supreme Court suggests that training prepares police for cruel, provocative, or crude verbal abuse, I suggest that officers learn to engage

auditors on their level and use the auditors' platform to shift perceptions in the auditors' audience. Most importantly, training should prepare officers to engage when necessary, assess, and recognize the real threats, and respect the First Amendment in all their encounters. Officers should learn auditor tactics and prepare for them. Agencies should develop specific, applicable policies and training. First Amendment training should become agency priority, and officers should know applicable enforcement statutes and receive agency support when forced to apply those laws. Agency intelligence units and local fusion centers should be aware of the auditors and their activities, and quickly alert them when a visitor is of no concern. Tracking auditors may be time-consuming, but it is relatively simple, given their quest for viewers. Auditors want an audience, subscriptions, and the related revenue, so they rarely restrict video. Agencies should share auditor information through regional meetings that include county, state, and federal partners. Officer safety and public threat briefings should provide information on auditors radicalizing toward homegrown violent extremist ideologies. In addition to networking, and perhaps more critical, agencies should train their officers and partner agencies to respond professionally and safely to auditor bait and trap tactics, and then share lessons learned after audit encounters.

4. Closing Thoughts

Researchers seeking to expand the understanding of auditors and the social factors driving this activity have several options. First, they can explore the auditor issue from a social identity perspective. One method is to review the implications of social media messaging and video tagging, overlays, and thumbnail selections for themes in the narrative. Another option is to explore better methods of documenting volatile social media videos. For example, they might examine the quality of auditor narrated posts from an interview perspective, and then treat the posts as open interviews and collect qualitative social data through a case study or specifically chosen videos. Regardless of the method, auditors are a growing issue for law enforcement, public safety, and criminal justice. Each area of the criminal justice community will increasingly encounter these individuals, as they continue to escalate tactics to invoke a public and police response. Arguably, every civil rights audit is a community education opportunity. While the auditor is not likely to

be receptive, thousands of viewers will view the video; agencies should turn the tables and use that platform for good.

Policy, training, and research offer the best solutions for ensuring police respond appropriately, which entails respecting constitutionally protected rights while identifying and eliminating dangers accurately. The task is not an easy one, and as is often the case, police are at the forefront. They explore the threat vector. They test the waters. They make good and sometimes bad choices; they suffer the consequences when poorly prepared for those decisions. Agencies have the responsibility to develop sound policies that prepare officers for auditor encounters while identifying and enacting reasonable restrictions on activity that disrupts their ability to provide services to the rest of the community.

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APPENDIX A. LEGAL EXAMINATION OF AUDITOR TACTICS

This appendix examines the auditor tactics, which have been observed to challenge state law and local policy beyond the scope of the First Amendment question. Tactics primarily involve speech, expression, or challenges to existing laws. As no TPM restrictions can ever withstand court scrutiny on the premise that the suppressed speech is disagreeable or unwanted, this section explores existing policies, laws, and ordinances that incidentally impact auditing traps.

Civil rights audits occur in nearly every city and state in the nation, and while auditors are using the same playbooks, government officials and police do not appear to have one. What police most lack is a clear understanding of the reasonable TPM restrictions they may impose during the routine auditor encounters they likely will face in their jurisdictions. Such an understanding requires knowledge of the types of locations (from the 10 most common by the video analysis detailed in Chapter II) within their jurisdiction, and then an evaluation of the legal issues and rulings specific to each location.

Not all auditors assume an immediate aggressive position; some are pleasant and respectful to officers until they are asked to provide identification and state the purpose of their activity.³¹⁹ Other auditors are intentionally abrasive, hostile, provocative, or harassing in their efforts to provoke an officer into a confrontation.³²⁰ Most auditors know the law related to their actions and consider their activity a test of officer knowledge to hold

officers accountable.³²¹ When officers “fail” this test (meaning they request or demand identification when not supported by law), the scene falls apart. Depending on the type of auditor encountered and the officer’s subsequent actions, the scene-gone-wrong can result

³¹⁹ “Commerce City Hall—GLS,” YouTube video, 34:45, posted by Furry Potato, April 26, 2019, <https://www.youtube.com/watch?v=75GI8cZiVQo>.

³²⁰ “Leon Valley Chief Salvaggio (Torture Me) 1st Amendment Audit Fail,” YouTube video, 20:58, posted by Mexican Padilla, May 2, 2018, <https://www.youtube.com/watch?v=d4SD5ibuiS4>.

³²¹ “‘Im Gonna Need Your ID’ 1st Amendment Audit!!!,” YouTube video, 17:13, posted by Auditing America, July 14, 2019, <https://www.youtube.com/watch?v=Ji8uatJJzqE>.

in minor embarrassment, complete humiliation, or a constitutional violation and lawsuit. Citizens are not always correct about the boundaries on the exercise of First Amendment rights, so their pass or fail determination is less critical than a determination by a court. To avoid litigation, clear lines are needed on issues related to legal, policy, and personal response options for officers. Even when an officer acts professionally and does everything correctly from a legal and policy perspective, the auditor is likely to frame the encounter adversely in a YouTube post and comments.³²²

Legal issues commonly raised by auditors include the refusal to identify, the refusal to answer questions, asking if or why they are detained, and requesting or quoting the specific law that prohibits auditor’s activity or authorizes the officer’s order. This section examines the auditor’s tactics, which have been observed to challenge state law and local policy beyond the scope of the First Amendment question. Legal statutes already control many of these, but auditors capitalize on inconsistent statutes and unprepared officers or officials to create conflict.

A. REFUSAL TO IDENTIFY OR ANSWER QUESTIONS. WHY ASK? WHY DENY?

Why did 54 percent of targets attempt to identify the auditor? Why did 31 of 59 auditors refuse to identify? The first answer is evident in the concerns expressed during the audits. Safety, security, and terrorism were concerns collectively expressed in 31 of the 59 videos. The DHS has repeatedly advised the public to report suspicious activity, which it describes as “unusual attention to facilities or buildings beyond a casual or professional interest...[including]...extended loitering *without explanation* ... unusual, repeated, and/or prolonged observation of a building (e.g., with binoculars or video camera)” (emphasis added).³²³ The DHS site indicates that the activity might be innocent, but that law enforcement should make that determination. In 2018, the DHS tweeted “Know the Signs of Terrorism-Related Suspicious Activity” with an image of a camera and text listing

³²² “Biloxi,MS.-Police Dept.” (Zero conflict with audit, but video caption, “You need to go yonder!” implies the auditor was run off by police.)

³²³ “What Is Suspicious Activity?,” Department of Homeland Security, December 19, 2014, <https://www.dhs.gov/see-something-say-something/what-suspicious-activity>.

the signs as “[t]aking pictures or videos, or a prolonged interest in personnel, facilities, security features, or infrastructure in an unusual or covert manner.”³²⁴ The DHS See-Something-Say-Something website instructs, “Public safety and security is everyone’s responsibility. If you see suspicious activity, report it to local law enforcement,” and the downloadable infographic again warns against photography, without the reference to lawful behavior or First Amendment protections.³²⁵ In short, people challenge auditors by demanding identification or explanation, because the public has been trained to perceive the activity of recording as a threat to safety and security, and has been instructed that it is their responsibility to do something about it. Figure 2 depicts a consolidation of the notifications from the entire DHS infographic to present only the messages relevant to auditing.



Figure 2. DHS Infographic Tweeted July 2018 (Modified).³²⁶

³²⁴ Michael Zhang, “Homeland Security Says Photography Could Be a Sign of Terrorism,” PetaPixel, July 13, 2018, <https://petapixel.com/2018/07/13/homeland-security-says-photography-could-be-a-sign-of-terrorism/>.

³²⁵ “If You See Something, Say Something®,” Department of Homeland Security, December 10, 2012, <https://www.dhs.gov/see-something-say-something>.

³²⁶ Adapted from Zhang, “Homeland Security Says Photography Could Be a Sign of Terrorism.”

Why do auditors refuse to provide identification (54 percent) or explain their purpose (41 percent)? The short answer is that it ensures conflict. When people learn the auditors' purpose, their identity becomes less relevant, and the conflict often ends.³²⁷ Some auditors refuse to identify on principle, because the law does not require it, and they want to educate the public and the police.

Legal mandates to provide identification to law enforcement vary, depending on whether the person is in a “stop and identify” state or not.³²⁸ The Sixth Judicial District Court of Nevada ruled in *Hiibel* (2004) that police can stop and identify someone (require the person to provide identifying information) upon reasonable articulable suspicion that a person committed a crime.³²⁹ The requirement for identification is only constitutional in Nevada because it is a stop-and-identify state; non-stop-and-identify states require a probable cause arrest before refusal to identify is deemed an offense.³³⁰ California and Texas are examples of states without a stop-and-identify statute. In these states, police can only require identification after developing probable cause that the person committed or is about to commit a specific crime.³³¹ Such a requirement complicates the role of police when identity is relevant to that conclusion. Knowing when identification is required, auditors often cite state laws to the officer or mock them for not knowing it; the caliber of the auditor or degree of officer aggression can also dictate how politely or crudely the auditor quotes the law to officers and, perhaps, whether the officers follow it.³³² Agencies'

³²⁷ “Cockrell Hill, Tx.-‘It’s Simple I.D. or Jail Buddy!’-Police Department.” (As soon as the Sergeant arrived, Roth told him he was a journalist with no ill intentions and was allowed to photograph.); “Deleware Ohio Police Dept 1st Amendment Audit,” YouTube video, 20:23, posted by BLW TV, July 17, 2018, <https://www.youtube.com/watch?v=ZJcXSJFBIFY>. (After the auditor told the bailiff that he had no ill intentions, he was allowed to photograph without incident.); “US Department of Defense I Don’t Answer Questions Unlawful Search and Seizures First Amendment Audit.” (The auditor complains that police all know who he is, so he can no longer hide his identity.)

³²⁸ Immigrant Legal Resource Center, *Stop-and-Identify State Statutes in the United States*, 1.

³²⁹ Immigrant Legal Resource Center, 1.

³³⁰ Immigrant Legal Resource Center, 1.

³³¹ Immigrant Legal Resource Center, 20.

³³² “News Now Jumped by Dallas Thugs,” YouTube video, 8:13, posted by SAEXTAZYPREZ, January 22, 2018, <https://www.youtube.com/watch?v=oDj5rDBMRa0>. (Patrick Roth reminds officers that under Texas Penal Code 38.02, he is not required to identify himself unless he is under arrest.)

policies and training should address both investigative detentions and their state-specific requirements for citizens to provide identification.

The court protects the right to record government officials, including police in the public performance of their duties, but the Constitution also allows reasonable restrictions. Any effort to limit auditor tactics must focus on actions, not the content of or dislike for the person’s speech or expression. Agencies should also provide ample alternative means for public expression of dissent. Auditors will loudly proclaim that they are filming from public property when an agency establishes restrictions, and—for that reason—many officials hesitate to restrict auditing activity, even when they could lawfully impose reasonable TPM restrictions. As Ruane explains, the court holds that “[p]ublic property, which is not by tradition or designation a forum for public communication, is governed by different standards.” In other words, the court treats nonpublic forums differently.

Consequently, the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to TPM regulations, the State may reserve the forum for its intended purposes, as long as the regulation on speech is reasonable and not an effort to suppress” an opposing view.³³³ Ruane specifically places “military bases, prisons, and school mail systems” in the category of nonpublic forums for which restrictions do not require “strict scrutiny.”³³⁴ Agency administrators are encouraged to task their legal counsel with exploring reasonable auditor restrictions that respect constitutional rights while protecting employees from auditor harassment.

B. REFUSAL TO ANSWER QUESTIONS

Auditors responded to inquiries about their intentions with the silent treatment or verbal refusal to answer in 24 of the 59 videos analyzed. Seventy-nine percent (19 of 24)

³³³ *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 46; *Postal Service v. Council of Greenburgh Civic Assns.*, 129–130.

³³⁴ Ruane, *Freedom of Speech and Press*, 12.

of the auditors who refused to explain actions also refused to identify, and those who did not refuse were simply not asked.³³⁵

Each video exemplifies the concerns of officials and employees raised by the auditor's presence and bring into question the degree to which auditing contributes to the "marketplace of ideas."³³⁶ Furthermore, the videos spark questions as to whether reasonable restrictions should be imposed upon persons recording security components or the interior design of a government building or critical infrastructure. An example of a state-imposed restriction might be the requirement for a person to identify and state their purpose when recording a critical infrastructure, or the creation of a stop and identify statute. Any such statute, when challenged, would be examined under public forum doctrine.

The eight locations involved include a fusion center, a police station, an Air Force base, a school bus parking area, a sheriff office, and an arsenal. As this auditing activity raises security concerns without regard to content, reasonable restrictions may be established to regulate the activity to free speech zones or establish prohibitions on recording inside the buildings. This security requirement is not intended to restrict speech,

³³⁵ "1st Amendment Test FBI Building (Birmingham, Alabama)." Agents told the auditor, "You're allowed to take pictures, but we're also allowed to protect our office and figure out who you are," mentioning the "Terror Threat we have in this country"; "F.B.I/Fusion Center Downtown Anchorage Alaska 1st Amendment Audit! ☆Silent Treatment☆." Fusion center employees' inquiry about the auditor's intentions and are given the silent treatment; "1st & 4th Amendment Violation Middletown, CT." When an auditors refuse to explain their presence or produce identification, the officer mentions a recent shooting that caused them to be concerned for their safety; "They Tried to Intimidate, They Failed!". Sheriff officers ask, "What are you filming for?" He refuses to identify or answer questions"; "1st Amendment Audit South Bend Indiana Department of Transportation." Transportation employees ask the auditor, "What are you doing?" They also tell him, "These are our buses, our children, we want to keep them safe." He refuses to identify or answer questions; "Michigan Cops Lose It Over Silent Photography! 1st Amendment Audit Fail!!". Michigan officers ask a person filming an arsenal, "Why are you doing this?" He gives them the silent treatment; "First Amendment Audit Winder Police Department. ('I Need to Identify Who You Are')." Officers expressed concern over citizens being filmed at a police station. The auditor would not identify or explain actions; "Patrick AFB/Civil Rights Audit (Precious Rights)." Soldiers said that they needed identification because of the "higher threat level" and the auditor taking pictures of the gate. The auditor did not explain his actions or identify.

³³⁶ Blasi, "Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment," 19–22. (The "marketplace of ideas" is a concept attributed to Justice Oliver Wendell Holmes Jr, when he wrote, "that the ultimate good desired is better reached by Free trade in ideas—that the best test of truth is in the power of the thought to get itself accepted in the competition of the market.")

even though non-content-specific speech may incur “incidental restrictions” for which the court holds to a lower level of First Amendment scrutiny.³³⁷

C. DETENTION

Tests of the Fourth Amendment include refusal to stop walking, walking away from an officer asking questions, and demanding to know why or if they are detained. This activity results for two reasons. First, auditors want to know when the law requires them to identify and probably know the difference between states with and without “stop and id” laws. Second, auditors are attempting to pin the officer to a decision regarding the detention for a Terry stop and Fourth Amendment challenges.

The Supreme Court ruled in *U.S. v. Swindle* that police cannot “order someone to stop unless the officer reasonably suspects the person of being engaged in illegal activity.”³³⁸ The legal standard required is reasonable suspicion, “supported by articulable facts that criminal activity ‘may be afoot.’”³³⁹ In Texas, officers can develop suspicion through observed information, as well as credible information from a reliable witness, but the officers’ determination of reasonable suspicion requires consideration of the “totality of the circumstances” before them.³⁴⁰ With auditors, reasonable suspicion will seldom develop through witness complaints alone, and the officers must always determine that for themselves.

Questions of detention require the officer to be familiar with *Terry v. Ohio* and know the required elements for lawful detentions.³⁴¹ *Terry v. Ohio* articulates the necessary components not only to stop individuals but also to disarm them when reasonable

³³⁷ Ruane, *Freedom of Speech and Press*, 11–12.

³³⁸ *US v. Swindle*, 407 F. 3d 562 (Court of Appeals, 2nd Cir. 2005).

³³⁹ Immigrant Legal Resource Center, *Stop-and-Identify State Statutes in the United States*, 2, 22. (“Certain police unions have claimed that *Hiibel* combined with the general obstruction statute creates a duty to identify. There is no support for this in California statutes or case law.”)

³⁴⁰ *Carmouche v. State*, 10 SW 3d 323 (Court of Criminal Appeals 2000).

³⁴¹ *Terry v. Ohio*, 392 US 1 S. Ct. (1968).

suspicion of a specific crime exists. Arguably, if the weapon is visible, no further justification is required.

In affirming, Justice Harlan wrote:

Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. **McFadden asked Terry his name, to which Terry “mumbled something.” Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him** (emphasis added).³⁴²

He adds:

I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in affirmance on the present facts. Officer McFadden’s right to interrupt Terry’s freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer’s right to take suitable measures for his safety followed automatically.³⁴³

As the court implies and the Ohio ACLU confirms, Ohio is a stop-and-identify state; this court decision might have been different if it were not.³⁴⁴

D. POLICY ISSUES

Policy issues arise when auditors either question the legality of a policy or attempt to bait the officers into an action that would violate their policy and result in discipline.

³⁴² *Terry v. Ohio*, 33.

³⁴³ *Terry v. Ohio*, 33–34. The court emphasized that in this case, the suspected offense was a violent crime. Suspicion of a minor offense not deemed violence might have yielded a different finding.

³⁴⁴ “What to Do If You’re Stopped by the Police,” ACLU of Ohio, 2019, <https://www.acluohio.org/stopped-by-police>.

Demanding the officers' name and badge number, requesting a supervisor, or requesting a complaint form are ways that auditors test policies. The more caustic the auditors, the less likely the officers will want to comply, and the more likely they will make the wrong decision. Sometimes officers simply make decisions that play into the auditors' hands. In auditing the Austin Police, Philip Turner "The Battousai" chose a copwatch tactic of monitoring a traffic stop, and the concerned officers confronted him.³⁴⁵ When officers began shining lights at the camera to inhibit recording, Turner quoted the Austin policy prohibiting their actions, but they ignored him. After a complaint and a media story, the officers received extensive disciplinary time off work.³⁴⁶

E. PERSONAL AUTHORITY CHALLENGE

Personal challenges are statements, questions, and actions that insult or attack the legitimacy of the officer, the position, or the agency. The mildest scenarios could be the person displaying an offensive sign or making offensive gestures. Courts have rejected creative officer justifications for contacting persons showing them "the bird;" in *Swartz v. Insogna*, the court ruled that the act alone was not disorderly conduct, could not reasonably be deemed a distress signal, and did not offer "reasonable suspicion of a traffic violation or impending criminal activity."³⁴⁷ The Supreme Court also ruled that offensive signs and clothing do not constitute fighting words, ironically choosing not to repeat the offensive word, Justice John Paul Harlan wrote:

For while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that

³⁴⁵ "Two Austin Cops Suspended without Pay for Violating 1st Amendment Right of Citizen Journalist," YouTube video, 2:06, posted by The Battousai, March 31, 2017, <https://www.youtube.com/watch?v=b63ODIBkI8w>. Turner typically presents himself as a watchdog auditor, although he is capable of switching to the adversarial auditor if provoked.

³⁴⁶ "Police Harassment: Austin Police Department (FOX News Aired)," YouTube video, 2:50, posted by The Battousai, November 14, 2016, <https://www.youtube.com/watch?v=AZTLs2UQejM>.

³⁴⁷ *Swartz v. Insogna*, 704 F. 3d 105 (Court of Appeals, 2nd Cir. 2013).

the Constitution leaves manners of taste and style so largely to the individual.³⁴⁸

Auditors with affinity to anarchist ideologies bear similarities and often support each other's worldviews through comments or statements, and each other's subscription referrals. They also begin to mimic each other by using the same tactics and terminology. Insults, name-calling, cursing, and dismissing are shared methods for James Freeman, Eric Brandt, and David Boren. In a recent audit, Boren appeared on the scene of a reported shooting, and the officers were attempting to secure the area.³⁴⁹ An officer approached and asked him to step back out of the crime scene, and Boren became immediately hostile, stating, "Motherfucker put your hands on me bitch and see what happens!"³⁵⁰ The officer repeated the order to move back to the last squad car. Two officers walked Boren back to the perimeter amidst a barrage of profanity and borderline threats like, "you're lucky I didn't knock your ass out."³⁵¹ James Springer commented on this live video from his Freeman Family Random Crap channel and wrote that if Boren had cursed less, he might have gotten a "healthy settlement" for this video.³⁵² Springer added, "I don't understand why cops get blasted in the back of the head while pumping gas? Oh, wait! This video is why!"³⁵³

Springer also curses officers and insults them to incite a response and apparently enjoys the confrontation. In an August 13, 2019 video, Springer approached an officer on a traffic stop. When an involved civilian took offense to being recorded, Springer cursed him and forced the officer to intercede. With his own daughter present, Freeman then

³⁴⁸ "Cohen v. California, 403 U.S. 15 (1971)," Justia Law, 25, 2019, <https://supreme.justia.com/cases/federal/us/403/15/>. The court would not permit the prosecution of a man who wore a jacket into the courthouse that bore the text, "Fuck the Draft."

³⁴⁹ "Evil Hates Light !," YouTube video, 38:35, posted by David Boren, August 3, 2019, <https://www.youtube.com/watch?v=TNV-PFTYt-E>.

³⁵⁰ "Evil Hates Light !," at 03:11.

³⁵¹ "Evil Hates Light !," at 5:04.

³⁵² "Evil Hates Light !," Video comment by James Springer. (After posting comments, Springer changed his channel name to "Home is Where You Park It.")

³⁵³ "Evil Hates Light !," (After posting comments, Springer changed his channel name to "Home is Where You Park It.")

directed his aggression toward the officer and called the officer a “piece of trash,” while threatening to make the citizen his “bitch.”³⁵⁴ The officer moved Springer back to a reasonable distance while Springer yelled at the officer, calling him a “fucking piece of shit” and stating, “you wonder why cops get blasted... you wonder why they put bullets in the back of cops heads while they’re pumping gas?”³⁵⁵ Springer’s obsession with officers being shot is evident. Whether his suggestion to the 500 people watching his live stream is yet another attempt to bait officers to arrest him, or a ploy to motivate someone to perform the act, remains to be seen.³⁵⁶ The officer was utterly professional, and his request for Springer to move back 30 feet back was arguably reasonable considering Springer’s earlier confrontation and disruption of his investigation. The following day, a Lakewood officer, acting calmly and professionally, was verbally abused by Eric Brandt, who declared, “you’re a fat fucking blues bag pig, and you earn every fucking minute of hate, and I’m very sorry that you weren’t shot in Philadelphia today, because that’s the kind of brain you have that should be blown out the side of your face!”³⁵⁷ The berating went on and on, as other auditors joined in to curse the silent officer.

Springer (Freeman), Boren, and Brandt are worst-case examples of individuals using the Constitution to bolster their YouTube channels and give them license to treat police despicably. Nevertheless, the Supreme Court has ruled that the First Amendment protects this activity. A New Mexico court explains:

Both the United States Supreme Court and New Mexico courts have recognized that police officers are not ordinary citizens. [Citation omitted] The United States Supreme Court recognized that “even the ‘fighting words’ exception recognized in *Chaplinsky*.. might require a narrower application in cases involving words addressed to a police officer, because ‘a properly trained officer’ may reasonably be expected to ‘exercise a higher

³⁵⁴ “Sioux Falls.”

³⁵⁵ “Sioux Falls.”

³⁵⁶ “Sioux Falls.”

³⁵⁷ “Lakewood.”

degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"³⁵⁸

Even with the higher degree of restraint, officers are human and likely to respond when cornered and subjected to a constant barrage of insults and profanity. Training should prepare officers not only to check their own emotions but also to also look out for fellow officers and keep them from stepping into the traps. In one of his many caustic and offensive audits, Eric Brandt singles out Officer Chavez and showers him with insults and profanity until he enraged Chavez to the point that it appears fellow officers had to hold Chavez back from assaulting Brandt.³⁵⁹

³⁵⁸ *Benavidez v. Shutiva*, 1248. (The Court decision and subsequent citations become problematic when lower courts fail to recognize and distinguish the relatively benign and narrow use of profanity in the controlling decisions from the direct and personal verbal assaults auditors feel licensed to direct at police and others who oppose their approach.); *Houston v. Hill*, 462.

³⁵⁹ "Cop Goes Berzerk—Attacks Eric Brandt—Let Me at Him, Sarg!—P95044—Chavez Jr," YouTube video, 4:53, posted by The Real Mr Brandt, November 4, 2018, <https://www.youtube.com/watch?v=qCvLxhjAZmI>.

APPENDIX B. FIRST AMENDMENT POLICY REVIEW

In this appendix, I examine two policies for responding to First Amendment challenges: the Baltimore Police policy and the IACP PROP model policy. The review concludes that both policies address the First Amendment issues of copwatching and protestors, but fail to provide specific guidance for auditor encounters.

A. EXAMINING BALTIMORE POLICY AND DOJ INPUT

In August 2016, the Baltimore Police Department (BPD) entered into an agreement with the DOJ following the issuance of a findings report that found the BPD violated First Amendment rights.³⁶⁰ This review examines the Baltimore Police policy, the DOJ opinion, as found in a letter to the BPD, and the IACP PROP model policy and compares their guidance to the legal findings of this thesis.

This study has shown that police are called and placed in the middle of a concerned citizen or government official and the auditor. As intended by the auditor, the conversation and the conflict is transferred to the local police upon arrival. Reviewing local policies on First Amendment activities, this research finds little direction for dealing with audits. The BPD Policy #804 is available in two versions: the *current* version (published July 1, 2016) and the *draft* version (published September 13, 2018). Both versions appear designed for protests and the occasional copwatcher, but neither offers any guidance for responding to an audit. The *current* version started correctly. Section 1 describes the traditional public forums in which a person has the right to gather.³⁶¹ Section 2 explains that reasonable restrictions may be enforced “in accordance with the law.”³⁶² Section 4 informs that police “may place additional reasonable restrictions...only as necessary to maintain public safety

³⁶⁰ Baltimore Police Department, *Consent Decree Primer* (Baltimore: Baltimore Police Department, 2019), 1, https://www.baltimorepolice.org/sites/default/files/General%20Website%20PDFs/Consent_Decree_Primer_Packet.pdf.

³⁶¹ Baltimore Police Department, *804 First Amendment Protected Activity* (Baltimore: Baltimore Police Department, 2016), 1, <https://www.baltimorepolice.org/804-first-amendment-protected-activity>.

³⁶² Baltimore Police Department, 1.

and order and to facilitate uninhibited commerce and freedom of movement.”³⁶³ Section 3 defines “rioting and looting” and empowers officers to prevent such activity, while section 5 discusses crowd management and the need to respect First Amendment rights.³⁶⁴ The policy then proceeds to describe various crowd scenarios and outline appropriate responses.³⁶⁵

The *draft* version of the policy increases the length from four to nine pages without providing direction for audits. Conversely, it makes factually incorrect statements about the law, which Baltimore presumably founded on the guidance received from the DOJ as part of the consent decree.³⁶⁶ The *draft* removes all mention of reasonable restrictions to First Amendment activity, except the restrictions defined in an incident action plan.³⁶⁷ Even a casual observer will notice the revised policy does not prepare officers for the auditor encounter. Both the *draft* and the DOJ letter effectively expand the public forum to include “all other areas in which persons have a legal right to be present (including a person’s home or business and common areas of public and private facilities and buildings.)”³⁶⁸ This list of public spaces—described as places where “BPD members shall respect, and shall not infringe, the right of all persons to observe and record the actions of law enforcement officers in the public discharge of their duties,”—practically binds the responding BPD officer from conducting enforcement in auditor scenarios.³⁶⁹ When officers respond to these complaints, the cameras focus on them, and that engages the policy prohibitions against taking police action. Baltimore policy 1016 specifically

³⁶³ Baltimore Police Department, 1.

³⁶⁴ Baltimore Police Department, 1.

³⁶⁵ Baltimore Police Department, 1.

³⁶⁶ Smith, *US DOJ Letter to Baltimore Police Department*, 4. (“BPD should clarify that the right to record public officials is not limited to streets and sidewalks—it includes areas where individuals have a legal right to be present, including an individual’s home or business, and common areas of public and private facilities and buildings.”)

³⁶⁷ Baltimore Police Department, *804 DRAFT First Amendment Protected Activity* (Baltimore: Baltimore Police Department, 2018), 2, <https://www.baltimorepolice.org/804-draft-first-amendment-protected-activity>.

³⁶⁸ Baltimore Police Department, 1.

³⁶⁹ Baltimore Police Department, 8.

addresses the recording of police, but is also crafted for the protestor and copwatcher, because it deals only with “recording of police” and crafts rules that play into the auditor’s tactics.³⁷⁰

DOJ guidance to Baltimore was equally problematic. Amidst divided courts, the letter states that an affirmative right exists to record police and offers *Glik v. Cunniffe* as a supporting case and then adds in the footnote “there is no binding precedent to the contrary,” while listing several courts with opposing views on the issue.³⁷¹ The letter then explains why police should respect First Amendment privileges, before walking through the then-current BPD policy (referred to as “General Order J-16”) and listing required changes. The DOJ criticized the policy’s use of “public domain” without further definition, and then defined “public domain” to include [traditional public forums] and “areas where individuals have a legal right to be present, including an individual’s home or business, and common areas of public and private facilities and buildings.”³⁷² Having already set up opposing views to *Glik* as strawman cases to be easily dismissed, the letter provided dubious support for including “common areas of public and private facilities and buildings” in the public domain definition. To build that case, the DOJ offered three case examples and praised the video presented in the Rodney King trial.³⁷³ The cases presented, however, fail on the same premise for which the letter dismissed cases proscribing the recording of police—they were not controlling, but more importantly—the facts were too dissimilar to be relevant or support the DOJ conclusion.³⁷⁴

³⁷⁰ Baltimore Police Department, *Baltimore Police Department Policy 1016: Citizen Observation/Recording of Police Officers* (Baltimore: Baltimore Police Department, 2016), 1–5, <https://www.baltimorepolice.org/1016-citizen-observationrecording-police-officers>. (Section 2.1 of the current policy provides guidance that would mitigate some of the auditor tactics, including when the officer should tell a person not to record, demand identification, ask why the person is recording, detain the person, block the camera, or demand the video. Unfortunately, it omits the auditor issue and creates rules that confuse the issue regarding authorized actions and TPM restrictions.)

³⁷¹ Smith, *US DOJ Letter to Baltimore Police Department*, 2.

³⁷² Smith, 4.

³⁷³ Smith, 4. Baltimore falls within the 4th Circuit for appeals. The footnotes list two 4th Circuit decisions and describes them as unbinding because they either were not published or lacked “substantial discussion,” that then relied solely on *Glick* to dictate Baltimore policy on a matter not settled by the Supreme Court and divided in the Circuits.

³⁷⁴ Smith, 4.

The first case listed as evidence for the DOJ definition of public spaces was *Jean v. Massachusetts State Police*. This 1st Circuit case involved a man recording police from within his home and then providing the video to another who published it online; the issues at hand were the constitutionality of the state wiretapping laws and the right of media to publish unlawfully obtained information. The case did not define public forums or domain, but it did support the right to record police from within someone’s residence, however off-topic.³⁷⁵ The second case offered by the DOJ letter was *Pomykacz v. Borough of West Wildwood*, a non-controlling, New Jersey District Court finding that Maureen Pomykacz could take a picture of police from her vantage point outside the police station.³⁷⁶ The final shred of support was in the *Robinson v. Fetterman* case, in which a truck driver recorded police from private property as they investigated an accident.³⁷⁷ Unfortunately, none of these cases support the definition mandated by the DOJ letter. Worse, they are mostly inapplicable to the observed audit challenges, in which the auditors are not in their own homes or posting third-party videos, not limiting photos to public vantage points outside facilities, and not obtaining permission to record from the private property that they target.

Furthermore, having failed to discuss forum analysis and lack controlling authority, the cases offer no discussion or definition of “common areas of public and private facilities and buildings,” and are therefore devoid of any persuasive value.³⁷⁸ The DOJ reasoning fails on a third point, direct conflict with Supreme Court findings. In *Greer v. Spock*, the Supreme Court wrote:

[It is a mistake to think] that whenever members of the public are permitted to visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for the purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant “that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. The state, no less than a

³⁷⁵ *Jean v. Massachusetts State Police*, 492 F. 3d 24 (Court of Appeals, 1st Cir. 2007).

³⁷⁶ *Pomykacz v. Borough of West Wildwood*, 438 F. Supp. 2d 504 (Dist. Ct. 2006).

³⁷⁷ *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (Dist. Ct. 2005).

³⁷⁸ Smith, *US DOJ Letter to Baltimore Police Department*, 4. This thesis is not suggesting that the right to record police does not exist, or that persons cannot record in public forums, only that—as demonstrated in law—that right is subject to restrictions mostly ignored in the DOJ letter.

private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.³⁷⁹

Public access and public forum are not synonymous when referenced in First Amendment jurisprudence.

When written, the DOJ letter and the Baltimore policy deficiencies are likely products of several factors beyond the respective agency's control. First, neither the letter nor the policy focused on the response to the auditor issues discussed in this thesis. The primary apparent policy focus was officer response to protests and demonstrations, with a secondary concern for copwatch activity. Second, the letter correctly notes, "courts have only recently begun to refine the contours of the right to record police," but this thesis demonstrates that the contours for TPM restrictions are well-defined and need only be applied to the auditor issues.³⁸⁰ Future courts will be forced to examine the right to record at times, in places (targeting government and private buildings with no nexus to police), and in a manner (more hostile, aggressive, and harassing in nature) that will undoubtedly generate new frameworks for analyzing First Amendment law. Meanwhile, police are thrown into this First Amendment battleground and asked to serve as proxies for each side of the battle, while miraculously preserving peace and protecting liberties without becoming the target (or turning a blind eye when attacked). A better solution provides officers with the policies and training to serve as neutral negotiators of security and liberties, with an understanding and respect for the value of First Amendment discourse, coupled with lawful authority to respond and reasonably restrict those liberties for the stability of the community and democratic society.

When considering the auditor challenges, the restrictive, impractical, and binding Baltimore and DOJ policies are inadequate for preparing officers and protecting communities. Guidance can be gleaned from the documents, however, to develop a starting point for examining agency policy. Particularly beneficial is the general guidance phrase starting each commentary. Agencies can build from these statements to tailor specific

³⁷⁹ *Greer v. Spock*, 424 US 828 S. Ct. (1976).

³⁸⁰ Smith, *US DOJ Letter to Baltimore Police Department*, 3.

guidelines (rather than the DOJ's) that align with respective state and local regulations. A review of that guidance will comprise the remainder of this section.

The DOJ letter writes:

Policies should affirmatively set forth the First Amendment right to record police activity.³⁸¹

Commentary:

Given that only 25.4 percent of audits targeted police, this affirmation should include the same exception that every court has found essential to include, that the right is subject to reasonable TPM restrictions.³⁸²

Section B reads:

Policies should describe the range of prohibited responses to individuals observing or recording the police.³⁸³

This general guidance can be applied to auditors and offers policymakers an area for considering applicable policy. The DOJ's specific guidance that officers should not "threaten, intimidate...discourage...block or obstruct...recording devices" is sound and applicable to protestors, copwatchers, and auditors.³⁸⁴ Further advice against unlawful

³⁸¹ Smith, 2.

³⁸² *American Civil Liberties Union of Ill. v. Alvarez*, 679 F. 3d 583 (Court of Appeals, 7th Cir. 2011). "Under the Court's speech-forum doctrine, a regulatory measure may be permissible as a "time, place, or manner" restriction if it is "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, . . . and . . . leave[s] open ample alternative channels for communication of the information.""; *Glik v. Cunniffe*, 655 F. 3d 78 (Court of Appeals, 1st Cir. 2011). The court acknowledged that the right to film may be subject to TPM restrictions; *Gericke v. Begin*, 753 F. 3d 1 (Court of Appeals, 1st Cir. 2014); *Fields v. City of Philadelphia*, 862 F. 3d 353 (Court of Appeals, 3rd Cir. 2017), "We do not say that all recording is protected or desirable. The right to record police is not absolute. "[I]t is subject to reasonable time, place, and manner restrictions"; *Turner v. Driver*, 848 F.3d 678 (Court of Appeals, 5th Cir. 2017), "As the First Circuit explained, '[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [basic First Amendment] principles.' This right, however, 'is not without limitations.' Like all speech, filming the police 'may be subject to reasonable time, place, and manner restrictions'"; *Smith v. City of Cumming*, 212 F. 3d 1332 (Court of Appeals, 11th Cir. 2000), "As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."

³⁸³ Smith, *US DOJ Letter to Baltimore Police Department*, 5.

³⁸⁴ Smith, 5.

Fourth Amendment seizures of equipment, although beyond the scope of this thesis, is also instructive.³⁸⁵

The Baltimore policy under DOJ review (referred to as “General Order J-16”) contained references to TPM restrictions that Baltimore seemingly removed after somewhat subjective DOJ criticism discussed in section C:

Policies should clearly describe when an individual’s actions amount to interference with police duties.³⁸⁶

Again, the general advice is sound, and in fact, most of the general advice in this document can be applied to auditor policies, if policymakers factor audits into the policy design. In this case, the DOJ did not recognize auditors for the growing challenges they would place upon policing or manner they would exploit the First Amendment to stage police-citizen conflict for their YouTube channels. The DOJ guidance for this section, which applies to auditors, suggests the Baltimore Police policy define interference, stating:

The right to record police activity is limited only by “reasonable time, place, and manner restrictions.” Glik, 655 F.3d at 8; Smith, 212 F.3d at 1333. If a general order permits individuals to record the police unless their actions interfere with police activity, the order should define what it means for an individual to interfere with police activity and, when possible, provide specific examples in order to effectively guide officer conduct and prevent infringement on activities protected by the First Amendment.³⁸⁷

Mentioning TPM restrictions without defining them offers insufficient guidance for policy creation. Agencies need further clarification and examples of when they might apply. The DOJ letter is correct that Baltimore needs to define interference. The definition and criteria for this offense vary among states and require agencies to customize their policy according to state laws and court decisions. If the state cannot prosecute a person for the offense, then it does not rise to a level justifying the suppression of the First Amendment right to record.

³⁸⁵ Smith, 5.

³⁸⁶ Smith, 5.

³⁸⁷ Smith, 5.

The policy should include examples of instances where TPM restrictions may be imposed and describe examples for each. The DOJ letter suggests the Baltimore construction of restrictions is an effort to find ways to restrict liberties and writes that Baltimore’s policy “encourages officers to use their discretion in inappropriate, and possibly unlawful, ways [like over-relying on enforcement tools in response to First Amendment challenges],” when the policy should instead, the DOJ writes, “encourage officers to provide ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties.”³⁸⁸ This flawed DOJ conclusion reflects a negative and subjective view of police motives and ignores court guidance on policy creation. In each case where the court has upheld policies imposing reasonable TPM restrictions, it was because the policy made clear to the citizen what was prohibited and expressly limited officer discretion. The policy should not avoid the topic of restrictions, but instead explain when the officer may impose or enforce content-neutral and constitutional regulations, which the court defines as those regulations that limit the “unbridled discretion” of government officials, while “setting forth specific, objective standards to guide the ... exercise of discretion.”³⁸⁹ Like criminal statutes, the Baltimore policy, which is publicly available, should define restrictions “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”³⁹⁰ By describing exactly when a person crosses the line and when officers should enforce related statutes, the policy limits officer discretion in a manner consistent with court decisions. Anything less will either

³⁸⁸ Smith, 7.

³⁸⁹ *Preminger v. Secretary of Veterans Affairs*, 1303, “we think that the regulation sets forth specific, objective standards to guide the VA’s exercise of discretion. We thus see little risk that the VA will be able to use the regulation to engage in undetectable viewpoint discrimination. Accordingly, we decline to hold section 1.218(a)(14) facially invalid as a regulation granting ‘unbridled discretion’ to restrict speech”; *Houston v. Hill*, 482, While stating that “a municipality may constitutionally punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer,” it struck down the Houston ordinance as an “attempt to punish such conduct by broadly criminalizing speech directed to an officer”; *US v. Gileno*, 916, the court writes, “Under the void-for-vagueness doctrine, a penal statute must ‘define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’ Id. 615 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 [1983]).”

³⁹⁰ *US v. Gileno*, 916, quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

provide officers with overbroad discretion or no discretion at all; the latter of which is likely evidenced by Baltimore and other city leaders describing their police forces as “fetal,” where “the ability to interdict” has been stripped away.³⁹¹

The next section of DOJ’s letter comments on the policy, which states that supervisors can “recommend a less-intrusive location ... from which [the citizen] may continue to ... record the police activity.”³⁹² The DOJ suggests this authority be imparted upon the officer as well. Given the prevalence of auditors, agencies should incorporate this advice into their policies, coupled with appropriate parameters. Unlike the many protests where action plans and lengthy preparations provide an abundance of supervision, audits occur spontaneously in unexpected places and times when a supervisor may not be immediately available. This fact makes empowering officers more critical and the details of the next section less applicable to auditor scenarios:

Policies should provide clear guidance on supervisory review.³⁹³

The letter then states that offices should request a supervisor before performing searches or arrests of someone recording. Requiring the supervisor presence before addressing interference in police work permits tensions to simmer and escalate. It is correct to require the policy to delineate supervisory roles and responsibilities in audits.

Given that the auditor’s demand for a supervisor is a common trap, policies should encourage officers to contact a supervisor upon request. However, if the agency properly trains, the audit may never escalate to that level. Requesting a supervisor simply because a citizen is recording wastes resources for three reasons. First, the supervisor is unnecessary when no conflict exists. Second, the delay while awaiting a supervisor response permits the auditor to escalate conflict on a call that would have otherwise had none. This escalation is more likely when policy requires a supervisor notification and response before arrest decisions because that requirement forces the officers to remain on scene, which further

³⁹¹ Davis, “‘Youtube Effect’ Has Left Police Officers under Siege, Law Enforcement Leaders Say.”

³⁹² Smith, *US DOJ Letter to Baltimore Police Department*, 7.

³⁹³ Smith, 7.

risks conflict while awaiting a supervisory response.³⁹⁴ Finally, given the ubiquity of cell phones, this policy allows any citizens to halt enforcement efforts by merely producing their phones and transforming the transaction into a First Amendment encounter.³⁹⁵

The next section describes when officers should seize devices and is relevant to the auditor policy, but outside the scope of this thesis. Section E reads:

Policies should describe when it is permissible to seize recordings and recording devices.³⁹⁶

Policies should describe when to request consent or obtain a search warrant. They should also inform the officers that unlawful seizures of cameras could be a form of “prior restraint” and explain the implications on constitutional rights.³⁹⁷

The final section covers the balance between citizen rights to record with access afforded to the press.³⁹⁸

Section F reads:

Police departments should not place a higher burden on individuals to exercise their right to record police activity than they place on members of the press.³⁹⁹

The DOJ letter found that this requirement was satisfied by Baltimore’s policy, which read:

³⁹⁴ Smith, 8. The letter criticizes the General Order, stating, “At a minimum, supervisors must be present to approve such arrests before an individual is transported to a holding facility. BPD’s general order does not include mandatory language requiring supervisors to be present during these occurrences, but rather advises supervisors to be present ‘if possible.’” The DOJ suggested change is neither required by statute nor sound tactical advice. The original wording is more reflective of real-world police experience and the realization that things do not always occur as planned.

³⁹⁵ Pew Research, “Demographics of Mobile Device Ownership and Adoption in the United States,” *Pew Research Center: Internet, Science & Tech* (blog), June 12, 2019, <https://www.pewinternet.org/fact-sheet/mobile/>. (According to a recent Pew survey, 96% of Americans own a cell phone and 81% own a smartphone.)

³⁹⁶ Smith, *US DOJ Letter to Baltimore Police Department*, 8.

³⁹⁷ Smith, 9. Prior restraint is a violation of First Amendment rights by preventing people from gathering the information they would otherwise disseminate.

³⁹⁸ Smith, 10.

³⁹⁹ Smith, 10.

Members of the press and members of the general public enjoy the same rights in any area accessible to the general public.” Id. 4.

No individual is required to display ‘press credentials’ in order to exercise his/her right to observe, photograph, or video record police activity taking place in an area accessible to, or within view of, the general public.⁴⁰⁰

The issues discussed in this policy review highlight the legitimate need for agency policy to clarify citizen rights to record police, as well as applicable limits and restrictions. Neither the Baltimore policy (current or draft) nor the DOJ letter provides officers or agencies direction for responding to audits. The policy solely addresses instances in which then police are the object of recording, even though that is the case in only 23 percent of audits. It does not discuss officer response when another agency or a private citizen is the target of the audit. The document’s guidance for responding to unfavorable speech, criticism, or foul language is pertinent and could be used to prepare officers for that aspect of audits.

Missing from the policy and DOJ letter are the explanations of TPM restrictions that organizations may impose; guidance for officers who respond to audits; and instructions for evaluating and enforcing reasonable restrictions. The DOJ letter offers no guidance for agencies seeking to impose reasonable restrictions, and nothing in the letter reflects an evident appreciation for forum analysis and the distinction between public space and public forum. The DOJ approach to First Amendment issues undoubtedly made its way into the next document of discussion, the IACP model policy on the PROP, which was sponsored by the DOJ.⁴⁰¹

⁴⁰⁰ Smith, 10.

⁴⁰¹ Community Oriented Policing Services (COPS), *Public Recording of Police* (Washington, DC: Department of Justice, 2016), 1–2, https://www.valorforblue.org/Documents/Clearinghouse/IACP-Recording_of_Police_Trifold.pdf; International Association of Chiefs of Police, *Recording Police Activity*, 2.

B. A REVIEW OF IACP'S MODEL POLICY

In February 2014, the IACP conducted the PROP project under a grant awarded by the COPS of the DOJ.⁴⁰² The final product included student and instructor PowerPoint slides, a paper on the subject, a tri-fold handout, and a model policy.⁴⁰³ While this author reviewed all these documents, this thesis focuses on the model policy, how that aligns with the auditing issues, and court decisions identified in the research for this thesis. Two observations are worth noting before discussing this policy. First, the stated purpose of the document is to provide officers with guidance for when citizens record them; the model serves that purpose well. Second, the document stipulates that it is a model, not a national policy, and agencies use their respective policies based upon local statutes, case law, and political environment.

The policy begins by stating its purpose—to guide officer response to being recorded, and then states the policy—that the public has “an unambiguous right to record officer in public places, as long as their actions do not interfere with [the officer’s duty or another’s safety].”⁴⁰⁴ After defining *recording* and *media*, the policy jumps into procedures. Section IV (A) states that persons “lawfully in public *spaces*” or “where they have a legal right to be” [including] “the common areas of public and private facilities and buildings—have a First Amendment right to record things in plain sight or hearing, to include police activity.”⁴⁰⁵ When considering auditor issues and related case law, the statement fails immediately under forum analysis, where the courts have consistently held that public access does not equate to public forum or the liberties afforded that classification. A private business has full authority to restrict photography without impacting or invoking the First Amendment, and in fact, even when a private property has permitted such discourse, it is not automatically converted to a public forum, and it remains

⁴⁰² International Association of Chiefs of Police, *Recording Police Activity*, 2.

⁴⁰³ Community Oriented Policing Services (COPS), *Public Recording of Police*, 1–2.

⁴⁰⁴ International Association of Chiefs of Police, *Recording Police Activity*, 2.

⁴⁰⁵ International Association of Chiefs of Police, 1.

“not subject to First Amendment constraints.”⁴⁰⁶ Removing all doubt, the Supreme Court adds, “the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum.”⁴⁰⁷ While someone can counter that the government triggers protections when it imposes restrictions on privately owned property, the point is that the policy is incorrect in lumping such *places* into the “public spaces” category. Doing so muddies the waters for officers responding to audits when private businesses wish to restrict recording on their property.

Section IV (A) 1 covers copwatch activities and “legitimate and reasonable legal restrictions,” by stating that “a reasonable distance must be maintained from the officer(s) engaged in enforcement or related duties.”⁴⁰⁸ Unfortunately, it does not answer the question, “What is a reasonable distance?” The answer, of course, depends on the forum, the restriction, and the circumstances. It is also a copwatcher question, not an auditor question, but preparing officers for the auditor encounter would also equip them for this one. Part 2 of this section is also copwatch-focused, which advises that persons cannot “obstruct police actions” through “direct physical intervention, tampering with a witness, or by persistently engaging an officer.”⁴⁰⁹ Local agencies should clarify the elements for each of these examples and assess local applicability. The same applies to part 3, which discusses the impeding of vehicle and pedestrian traffic.⁴¹⁰ Like the Baltimore policy, albeit at a higher level, the IACP crafted this model policy for protestors and copwatchers, and its silence on auditor encounters highlights a gap in the knowledge of and guidance for auditors and their activities.

⁴⁰⁶ *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

⁴⁰⁷ *Manhattan Community Access Corp. v. Halleck*, 14.

⁴⁰⁸ International Association of Chiefs of Police, *Recording Police Activity*, 1.

⁴⁰⁹ International Association of Chiefs of Police, 1.

⁴¹⁰ International Association of Chiefs of Police, 1.

This section is covered well in the IACP and Baltimore policies, although this author would argue that the *current* Baltimore policy better serves this purpose than its *draft* replacement.

The aspect of auditing most absent from the Baltimore and IACP policies is the guidance that accounts for the targeting of third parties to elicit a police-citizen encounter. The growing occurrence of this problem, evidenced by the nationwide assortment of videos examined in this thesis, requires policies that prepare officers for these encounters.

C. FINDING MODEL POLICIES

The policies of the Baltimore Police and the DOJ letter (which heavily influenced the policy) provide a discussion point for legal and tactical responses to the challenges posed by protestors *en masse* and copwatchers.⁴¹¹ Specific guidance for responding to hostile and antagonistic citizen activists directly correlates to the auditor challenges, but these policies are incomplete. Both the IACP model policy and DOJ-imposed Baltimore PD model exclude auditor response, which reflects more on the national unawareness of this growing movement than the thoroughness of specific policymakers. Regardless, a policy gap exists that consequentially fails to consider issues this thesis has revealed. One such gap is in the broad-brush painting of public spaces to be synonymous with public places for First Amendment expression. To be sure, these documents are not wrong to write that a right to record (or conduct any First Amendment expression) is constitutionally protected. The error occurs when they fail to distinguish the level of protection—or rather, the hurdles placed on government—as different, based upon the forum categorization of the property in question. In fairness, that distinction is less relevant when considering the public protestor or the copwatcher; both of which occur in public forums, but the emergence of the auditor demands that policies evolve to equip officers to respond safely and constitutionally. Doing so requires that policies retain the sections for *imposing* TPM restrictions—similar to those covered in Baltimore’s *current* policy and the IACP model—

⁴¹¹ Baltimore Police Department, *1016 Citizen Observation/Recording of Police Officers*, 1–5; Smith, *US DOJ Letter to Baltimore Police Department*, 1–11; International Association of Chiefs of Police, *Recording Police Activity*, 1–2.

while adding a policy that outlines the guidelines for *enforcing* TPM restrictions. The latter section will likely include applicable local and state statutes, like trespassing or harassment, but it should also equip the officers to engage and educate the complainant without providing auditors the desired police-citizen conflict. Depending on state and local law, as well as the presiding Court of Appeals, the range of options and resulting policy will differ. Recognizing the policy deficiencies and knowing the issues to include can better equip agencies and officers to respond to civil rights audits in a manner that safeguards civil rights and reduces police-citizen conflict.

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APPENDIX C. THESIS RESEARCH DOCUMENTATION

This appendix contains all the research documentation of this thesis to include a list of the 59 YouTube videos researched for this thesis, as well as what documentation on auditor tactics (bait and traps) and targets (types of locations targeted).

Video Number	State	YouTuber	Date	Duration	Location Type
1	1st Amendment Test FBI Building (Birmingham, Alabama) : FAIL				
	https://www.youtube.com/watch?v=6KvfRQD1fv0				
	Alabama - AL	Bama Camera	08/25/15	13:20	FBI
2	F.B.I / Fusion Center Downtown Anchorage Alaska 1st Amendment audit! ☆Silent Treatment☆				
	https://www.youtube.com/watch?v=YRplmo1UxLY				
	Alaska - AK	News Now Alaska	03/06/18	14:44	Fusion Center
3	ARIZONA POLICE (DISMISSED) Intimidation FAIL! 1st Amendment Audit with Surprise Ending				
	https://www.youtube.com/watch?v=vafh1tfJzqw				
	Arizona - AZ	Freedom New Now	02/13/19	13:21	Peoria Police
4	Little Rock,Ar-Federal Courthouse 1st Amendment Audit				
	https://www.youtube.com/watch?v=kBwOVyiHJ1k				
	Arkansas - AR	News Now Houston	04/15/17	6:05	Federal Courthouse
5	CHEVRON REFINERY El Segundo CA (BEAUTIFUL UNINFORMED GUARD) 1st Amendment Audit				
	https://www.youtube.com/watch?v=4Sp_VuPJCys				
	California - CA	highdesert community watch news network	05/27/19	13:24	Chevron Refinery

Video Number	State	YouTuber	Date	Duration	Location Type
6	1st Amendment Audit, Chicago Rush Hospital				
	https://www.youtube.com/watch?v=sRTZI5S8eS0				
	Chicago, IL	NathyNathaniel	11/12/19	7:38	Hospital
7	Denver International Airport - Operations and Denver Police - 1st Amendment Audit - FAIL				
	https://www.youtube.com/watch?v=oTN_XlfNSLE				
	Colorado - CO	First Amendment Strike Team	10/08/18	22:40	International Airport
8	1st & 4th Amendment Violation Middletown, CT				
	https://www.youtube.com/watch?v=0LP8onMH9N4				
	Connecticut - CT	Justice Watch	04/17/16	5:53	Police Station
9	Patrick AFB/Civil Rights Audit (Precious Rights)				
	https://www.youtube.com/watch?v=qv27T4WN2z0&t=97s				
	Florida - FL	HonorYourOath Civil Rights Investigations	05/25/15	14:41	Patrick Air Force Base
10	Unlawfully detained and trespassed, 1st amendment audit, Lessburg Fl				
	https://www.youtube.com/watch?v=WRxoNEWsapI				
	Florida - FL	rogue nation	07/07/18	41:58	Post Office
11	First Amendment Audit Winder Police Department. ("I Need To Identify Who You Are")				
	https://www.youtube.com/watch?v=8WqSn_GyTPQ				
	Georgia - GA	Georgia Guardian	01/01/19	24:16	Police Station
12	Joint Base Pearl Harbor-Hickam - Part 1 - First Amendment Audit				
	https://www.youtube.com/watch?v=rBvKgo77udg				
	Hawaii - HI	Honolulu City News	03/22/17	31:25	Navy Base
13	1st Amendment audit of the Kootenai County Courthouse, Idaho (pt. 1)				
	https://www.youtube.com/watch?v=PoeG0X6A968				
	Idaho - ID	Rockman AL	06/22/18	14:39	US District Court

Video Number	State	YouTuber	Date	Duration	Location Type
14	1st amendment audit USPS Worth IL (All for us?)				
	https://www.youtube.com/watch?v=8pCOWI3RDds				
	Illinois - IL	ChiTown Sue	07/19/18	19:31	Post Office
15	1st amendment audit South Bend Indiana department of transportation				
	https://www.youtube.com/watch?v=G-bm0Azhrhg				
	Indiana - IN	Freedom 2 Film	11/15/18	34:32	DOT
16	U.S. Federal Courthouse, Iowa (pictures not allowed inside) w/ Iowa Comm. Watch , 1st Amend Audit				
	https://www.youtube.com/watch?v=jJQ4GnfRBLy				
	Iowa - IA	highdesert community watch news network	11/24/17	4:13	US Federal Courthouse
17	Leavenworth,Ks.-"It's State Law No Recording!"-First Amendment Audit				
	https://www.youtube.com/watch?v=B4RxMGB2r8				
	Kansas - KS	Patrick Roth	10/31/18	11:42	Leavenworth Justice Center
18	First Amendment Audit - Stanton,KY Courthouse				
	https://www.youtube.com/watch?v=74CP4aOfgBo				
	Kentucky - KY	Eastern Kentucky Accountability	11/22/18	21:19	Court House
19	They tried to intimidate, they failed!				
	https://www.youtube.com/watch?v=C0C8vO81ZqI				
	Louisiana - LA	Constitutional Corner	12/08/16	4:13	Sheriff Dept
20	First Amendment Audit You Need Permission To Film in Here Augusta Maine Bureau of Motor Vehicles				
	https://www.youtube.com/watch?v=J2oYr3Zn5aQ				
	Maine - ME	TRG4YouTV	11/30/18	9:46	Bureau of Motor Vehicles

Video Number	State	YouTuber	Date	Duration	Location Type
21	First Amendment Audit-Fail U.S. Naval Academy. Annapolis Maryland				
	https://www.youtube.com/watch?v=ZSN-OZT_CdA				
	Maryland - MD	Chef Justice	08/25/17	22:32	US Naval Academy
22	WORCESTER,MA-Police w/GST "You cannot film in here!"				
	https://www.youtube.com/watch?v=vh6QL6C0vJA				
	Massachusetts - MA	Josh Russell	05/16/19	Removed by YouTube	Worcester Police
23	Michigan Cops Lose It Over Silent Photography! 1st Amendment Audit FAIL!!				
	https://www.youtube.com/watch?v=dAa4iushVg				
	Michigan - MI	Freedom New Now	05/02/17	8:21	Detroit Arsenal
24	1st amendment audit St Paul police station aftermath Turner vs Driver?				
	https://www.youtube.com/watch?v=4SAiyG4pYSM				
	Minnesota - MN	Open Dialogue Initiative	06/21/17	6:29	St Paul Police Station
25	Biloxi,Ms.-Police Dept				
	https://www.youtube.com/watch?v=pBph_cS2d-Q				
	Mississippi - MS	News Now Houston	01/21/19	21:53	Biloxi,Ms.-Police Dept
26	Northmoor,Mo.-"He's armed and filming!"-Police Department Audit				
	https://www.youtube.com/watch?v=iM0UFyC1mFM				
	Missouri - MO	Patrick Roth	12/02/18	6:17	Police Station
27	1st Amendment Audit - Bozeman Police office - Bozeman, MT				
	https://www.youtube.com/watch?v=0ZRfAIAnShA				
	Montana - MT	Questionable Authority	08/03/18	21:36	County Law and Justice Center

Video Number	State	YouTuber	Date	Duration	Location Type
28	ID REFUSAL NEBRASKA STATE TROOPER HQ FIRST AMENDMENT AUDIT				
	https://www.youtube.com/watch?v=MoSyj3vg2uQ				
	Nebraska - NE	News Now Omaha Copblock	05/22/16	5:10	State Trooper HQ
29	1st Amendment Audit - DMV and NDOT in Carson City (2 cops show up) - Fail, Pass, Pass!				
	https://www.youtube.com/watch?v=NvPLQpLm2r4				
	Nevada - NV	Sunrie	12/19/17	20:26	DMV and NDOT
30	Tyrant Vs Uneducated Cop 1st Amendment Audit Hampton Falls Nh Post Office (You Can Be Arrested)				
	https://www.youtube.com/watch?v=4fZfi9OGVRM				
	New Hampshire - NH	Reality News	03/14/19	13:53	Post Office
31	Group Audit - New Jersey State Prison - Major fail - Part 1				
	https://www.youtube.com/watch?v=XH6hxV0Cw_U				
	New Jersey - NJ	Southeastern PA. Community Watch	11/27/17	12:25	State Prison
32	LIVE ALBUQUERQUE POLICE DEPARTMENT - NEW. MEXICO - FIRST AMENDMENT AUDIT				
	https://www.youtube.com/watch?v=m2DtsVZUoUk				
	New Mexico - NM	johnny five o	06/27/19	2:15:30	Police Department
33	1st amendment audit Bronx, NY 558 Grand Concourse Huge Fail #1st amendment audit Bronx NY				
	https://www.youtube.com/watch?v=nnlzW07JEqE				
	New York - NY	Cmpolyglot	11/15/18	4:02	Grand Concourse
34	1st amendment audit U.S. post office Fayetteville North Carolina				
	https://www.youtube.com/watch?v=u5qPCFFcHG8				
	North Carolina - NC	Jeff is here audits	04/24/19	22:35	Post Office

Video Number	State	YouTuber	Date	Duration	Location Type
35	2-21-2017 Sioux County, ND Judge violates “Right to Film Public Officials” in Court				
	https://www.youtube.com/watch?v=ikQHAakEicY				
	North Dakota - ND	Alexandra Wilson	04/22/17	0:53	Court
36	DELEWARE OHIO POLICE DEPT 1ST AMENDMENT AUDIT				
	https://www.youtube.com/watch?v=ZJcXSJFBIFY				
	Ohio - OH	BLW TV	07/17/18	20:23	Police Station
37	Oklahoma City, Ok.-Bureau of narcotics-”I want your ID”				
	https://www.youtube.com/watch?v=HnOPfz5W92I				
	Oklahoma - OK	Patrick Roth	09/25/18	10:52	Bureau of Narcotics
38	1st Amendment Audit Gladstone DMV (We Get The Boot)				
	https://www.youtube.com/watch?v=ipUXzkGFIBM				
	Oregon - OR	Oregon Cop Watcher	10/01/18	12:48	DMV
39	OFFICER MAKES UP LAWS TO ENFORCE				
	https://www.youtube.com/watch?v=1EZDLYPj31Y				
	Pennsylvania - PA	Audit the Audit	07/06/19	16:25	Fort Myer
40	(FAIL) “HOSPITAL LOBBY” “Stop Filming Now!!!” 1st amendment audit				
	https://www.youtube.com/watch?v=aRmFFTvDFBE				
	Rhode Island - RI	Auditing America	06/10/19	31:29	Hospital
41	1st amendment audit Greer police department South Carolina...				
	https://www.youtube.com/watch?v=utMO_NnQR7c				
	South Carolina - SC	Trey Citizen	01/18/16	8:44	Greer, SC
42	First Amendment Audit: Nashville TSA - Nashville, TN				
	https://www.youtube.com/watch?v=R4IgzH6gu5o				

Video Number	State	YouTuber	Date	Duration	Location Type
	Tennessee - TN	Civil Unrest News	02/11/19	14:24	Nashville International Airport
43	FBI - Austin TX - civil rights investigation				
	https://www.youtube.com/watch?v=Cz63T5LvVyo				
	Texas - TX	Pink Camera Magic	02/25/19	14:52	FBI Building
44	Re-up - City Manager Demands Answers West Jordan Utah				
	https://www.youtube.com/watch?v=oYXLn3qeXKI				
	Utah - UT	James Freeman	04/15/19	20:43	City Hall
45	1st Amendment Audit - Vermont - No Love!				
	https://www.youtube.com/watch?v=Wwn_k_-fi-4&t=3s				
	Vermont - VT	New England Truth	11/21/18	8:46	State Police Station
46	Finally! My arrest video in Chesterfield Va Failed Audit - OAP				
	https://www.youtube.com/watch?v=Hp_wb30Wn0w				
	Virginia - VA	Oath Accountability Project	03/15/18	30:01	Defense Logistics Agency
47	1st Amendment Audit Elma, WA				
	https://www.youtube.com/watch?v=LmWptA_oDb0				
	Washington - WA	Blind Justice	02/15/19	37:06	Municipal Buildings
48	First amendment audit of the U.S. Court of Appeals 9th Dist				
	https://www.youtube.com/watch?v=fjmd6oP3tlY				
	Washington - WA	NewsNowSeattle	12/27/18	23:46	9th Cir. Court of Appeals
49	First Amendment audit OakCreek post office OakCreek Wisconsin				
	https://www.youtube.com/watch?v=pu1Vop9ZWaU				
	Wisconsin - WI	News Now Wisconsin	07/29/17	21:39	Post Office

Video Number	State	YouTuber	Date	Duration	Location Type
50	Assaulted by Wyoming State Patrol 1st amendment audit at Wyoming Department of Transportation				
	https://www.youtube.com/watch?v=9INnzw2xylQ				
	Wyoming - WY	watching wyco	01/15/19	34:12	Department of Transportation
51	Cockrell Hill, Tx.-"It's simple I.D. or Jail Buddy!"- Police Department				
	https://www.youtube.com/watch?v=bPkIJ5WSTcc				
	Cockrell Hill, TX	Patrick Roth	5/10/2019	10:31	Cockrell Hill Texas PD
52	Hey You Stop! Give Me ID (Copwatch)				
	https://www.youtube.com/watch?v=r5weko_Cx0o				
	Hagerstown, MD	BLACKLAB3L	5/12/2019	4:53	Hagerstown MD Streets
53	East LA Sheriffs show up in FORCE with HELO @ Fire Station #22 City of Commerce				
	https://www.youtube.com/watch?v=Xp0MzP8mKG4				
	Commerce, CA	The California Citizens Watch	4/27/2019	48:15	Commerce CA Fire Station
54	Security Guard Leaves His Work Boundary				
	https://www.youtube.com/watch?v=tRmxO_vmIv8				
	California - CA	News Now California	5/24/2019	29:55	Warehouse
55	Dont Film My Kids in Public! 911 Called! Public Park 1st Amendment Audit				
	https://www.youtube.com/watch?v=uh20OKSZN5k				
	Port Charlotte, FL	HATETHESTATE	5/26/2019	26:36	Children's Park
56	Masked				
	https://www.youtube.com/watch?v=1QQjpcunkPM				
	Iowa - IA	The Eric Brandt Show	12/9/2018	39:20	Prison - Camp St George

Video Number	State	YouTuber	Date	Duration	Location Type
57	FBI calls Houston Police on Cameraman				
	https://www.youtube.com/watch?v=jOS08Ld-vr8				
	Texas - TX	News Now Houston	3/4/2016	7:29	FBI
58	Mirrored Furry Potato Shot				
	https://www.youtube.com/watch?v=a-e83D9z3rE				
	California - CA	News Now Wisconsin	2/15/2019	38:52	Beverly Hills Jewish Synagogue
59	US Department Of Defense I Don't Answer Questions Unlawful Search And Seizures First Amendment Audit				
	https://www.youtube.com/watch?v=TaNPQde_IA				
	Omaha	News Now Omaha CopBlock	5/26/2019	10:30	US Department of Defense
	175	59	59	59	59
First Cycle Videos		First Cycle Videos			

Video	State	YouTuber	Location Type	Target
1	Alabama - AL	Bama Camera	FBI	Government Building
2	Alaska - AK	News Now Alaska	Fusion Center	Government Building
3	Arizona - AZ	Freedom New Now	Peoria Police	Police
4	Arkansas - AR	News Now Houston	Federal Courthouse	Court
5	California - CA	highdesert community watch news network	Chevron Refinery	Private Facility
6	Chicago, IL	NathyNathaniel	1st Amendment Audit, Chicago Rush Hospital	Hospital
7	Colorado - CO	First Amendment Strike Team	International Airport	Transportation
8	Connecticut - CT	Justice Watch	Police Station	Police
9	Florida - FL	HonorYourOath Civil Rights Investigations	Patrick AFB/Civil Rights Audit (Precious Rights)	Military
10	Florida - FL	rogue nation	Post Office	Post Office
11	Georgia - GA	Georgia Guardian	Police Station	Police
12	Hawaii - HI	Honolulu City News	Navy Base	Military
13	Idaho - ID	Questionable Authority	US District Court	Court
14	Illinois - IL	ChiTown Sue	Post Office	Post Office
15	Indiana - IN	Freedom 2 Film	DOT	Government Building
16	Iowa - IA	highdesert community watch news network	US Federal Courthouse	Court
17	Kansas - KS	Patrick Roth	Leavenworth Prison	Prison
18	Kentucky - KY	Eastern Kentucky Accountability	Government Building	Government Building
19	Louisiana - LA	Constitutional Corner	Sheriff Dept	Police
20	Maine - ME	TRG4YouTV	Bureau of Motor Vehicles	Government Building

Video	State	YouTuber	Location Type	Target
21	Maryland - MD	Chef Justice	US Naval Academy	Military
22	Massachusetts - MA	Josh Russell	Worcester Police	Police
23	Michigan - MI	Freedom New Now	Detroit Arsenal	Military
24	Minnesota - MN	Open Dialogue Initiative	St Paul Police Station	Police
25	Mississippi - MS	News Now Houston	Biloxi,Ms.-Police Dept	Police
26	Missouri - MO	Patrick Roth	Police Station	Police
27	Montana - MT	Questionable Authority	County Law and Justice Center	Government Building
28	Nebraska - NE	News Now Omaha Copblock	State TrooperHQ	Police
29	Nevada - NV	Sunrie	DMV and NDOT	Government Building
30	New Hampshire - NH	RidleyReport	Trooper Office	Police
31	New Jersey - NJ	Southeastern PA. Community Watch	State Prison	Prison
32	New Mexico - NM	johnny five o	Police Department	Police
33	New York - NY	Cmpolyglot	Grand Concourse	Transportation
34	North Carolina - NC	Jeff is here audits	Post Office	Post Office
35	North Dakota - ND	Alexandra Wilson	Court	Court
36	Ohio - OH	BLW TV	Police Station	Police
37	Oklahoma - OK	Patrick Roth	Bureau of Narcotics	Government Building
38	Oregon - OR	Oregno Cop Watcher	DMV	Government Building
39	Pennsylvania - PA	Audit the Audit	Fort Myer	Military
40	Rhode Island - RI	Auditing America	Rhode Island State Hospital	Hospital
41	South Carolina - SC	Trey Citizen	Greer, SC	Government Building
42	Tennessee - TN	Civil Unrest News	Nashville International Airport	Transportation
43	Texas - TX	Pink Camera Magic	FBI Building	Government Building

Video	State	YouTuber	Location Type	Target
44	Utah - UT	James Freeman	Police Station	Police
45	Vermont - VT	New England Truth	State Police Station	Police
46	Virginia - VA	Oath Accountability Project	Defense Logistics Agency	Military
47	Washington - WA	Blind Justice	Municipal Buildings	Government Building
48	Washington - WA	NewsNowSeattle	First amendment audit of the U.S. Court of Appeals 9th Dist	Court
49	Wisconsin - WI	News Now Wisconsin	Post Office	Post Office
50	Wyoming - WY	watching wyco	Department of Transportation	Government Building
51	Cockrell Hill - TX	Patrick Roth	Cockrell Hill, Tx.-"It's simple I.D. or Jail Buddy!"- Police Department	Police
52	Hagerstown, MD	BLACKLAB3L	Hey You Stop! Give Me ID (Copwatch)	Transportation
53	Commerce, CA	The California Citizens Watch	East LA Sheriffs show up in FORCE with HELO @ Fire Station #22 City of Commerce	Government Building
54	California - CA	News Now California	Security Guard Leaves His Work Boundary	Private Facility
55	Port Charlotte, FL	HATETHESTATE	Dont Film My Kids in Public! 911 Called! Public Park 1st Amendment Audit	Public Park
56	Iowa - IA	The Eric Brandt Show	Masked	Prison
57	Texas - TX	News Now Houston	FBI calls Houston Police on Cameraman	Government Building
58	California - CA	News Now Wisconsin	Mirrored Furry Potato Shot	Private Facility

Video	State	YouTuber	Location Type	Target
59	Omaha	News Now Omaha CopBlock	US Department Of Defense I Don't Answer Questions Unlawful Search And Seizures First Amendment Audit	Military

First Cycle Videos

Target	Count
Government Building	15
Private Facility	3
Police	15
Prison	3
Hospital	2
Court	5
Military	7
Transportation	4
Post Office	4
Public Park	1
Total	59

Video Number	Refuse to ID	Refuse to answer questions	Refused to stop / walk away	(Why) Am I detained?	Request Complaint Form	Request-demand Officer Name-ID	Demands Supervisor	Challenged Lawfulness of actions or request - quote a law or order	Harassment or insults or 'education'	You' re Dismissed	Armed
1	YES	YES		YES							
2		YES									
3									YES	YES	
4			YES		YES	YES		YES			
5											
6											
7	YES			YES		YES	YES				
8	YES	YES				YES			YES		
9	YES	YES		YES							
10	YES	YES	YES			YES		YES			
11	YES	YES		YES		YES			YES		
12	YES			YES							
13								YES			
14	YES										
15	YES	YES				YES			YES		YES
16											
17						YES	YES	YES			
18	YES										

Video Number	Refuse to ID	Refuse to answer questions	Refused to stop / walk away	(Why) Am I detained?	Request Complaint Form	Request-demand Officer Name-ID	Demands Supervisor	Challenged Lawfulness of actions or request - quote a law or order	Harassment or insults or 'education'	You' re Dismissed	Armed
19	YES	YES		YES		YES					
20	YES										
21	YES										
22						YES	YES				
23	YES	YES		YES		YES				YES	
24	YES			YES							
25					YES						
26									YES		
27	YES			YES		YES		YES			
28	YES	YES		YES		YES		YES			
29											YES
30	YES					YES		YES			
31		YES					YES	YES	YES		
32						YES			YES		
33	YES					YES		YES	YES		
34	YES					YES		YES	YES		
35								YES			
36								YES			

Video Number	Refuse to ID	Refuse to answer questions	Refused to stop / walk away	(Why) Am I detained?	Request Complaint Form	Request-demand Officer Name-ID	Demands Supervisor	Challenged Lawfulness of actions or request - quote a law or order	Harassment or insults or 'education'	You' re Dismissed	Armed
37	YES	YES	YES					YES			
38								YES			
39	YES	YES				YES		YES			
40						YES	YES				
41	YES	YES				YES	YES	YES			
42	YES					YES					
43											
44	YES	YES		YES							
45						YES			YES		
46	YES	YES		YES		YES		YES			
47											
48	YES			YES		YES		YES			
49	YES	YES	YES					YES			
50	YES	YES			YES	YES	YES	YES		YES	
51	YES	YES				YES	YES	YES			
52	YES	YES		YES		YES		YES			YES
53									YES	YES	
54		YES									

Video Number	Refuse to ID	Refuse to answer questions	Refused to stop / walk away	(Why) Am I detained?	Request Complaint Form	Request-demand Officer Name-ID	Demands Supervisor	Challenged Lawfulness of actions or request - quote a law or order	Harassment or insults or 'education'	You' re Dismissed	Armed
55								YES			
56											
57	YES	YES									
58		YES									
59		YES						YES	YES		
	32	24	4	14	3	26	8	24	12	4	3
First Cycle Videos											

Video	Bait	BaitNote	Issues	IssuesNote
1	Security	Prolonged recording FBI building	Terrorism	You're allowed to take pictures, but we're also allowed to protect our office and figure out who you are. "Terror Threat we have in this country."
2	Safety	Recording personal vehicles	Security	Recording building and employees come and go
3	Nuisance	Annoying questions - where to you keep your drugs, your planter gun, your burner guns?	Harassment	More nuisance than threat
4	Security	Prolonged recording of building	Policy	Recorded building and was leaving. Guard attempted to detain him. Cursed at guard, telling him he had no authority.
5	Security	Prolonged recording of refinery	Security	You can't film private property
6	Policy	Recording outside the hospital - did not go inside	Law	HIPPA laws, privacy
7	Security	Prolonged recording	Security	Can't film checkpoint
8	Safety	Recording personal vehicles	Safety	Told him about a recent shooting

Video	Bait	BaitNote	Issues	IssuesNote
9	Security	Recording the gates	Terrorism	Taking pictures of gate and the higher threat level
10	Policy	Recording in the post office	Policy	Recording the post office. Brings up 2010 HS memo that says he can record.
11	Nuisance	Recording vehicles - city and personal	Privacy	Concern for citizen being filmed
12	Safety	Recording the base	Terrorism	We don't even know who you are. Mentioned concerns about terrorism and surveillance.
13	Safety	Recording the courthouse	Safety	Taking a camera inside is "just like taking a gun"
14	Security	Recording on postal employees	Security	Why are you filming govt property
15	Safety	Recording school bus parking and property armed	Safety	What are you doing? These are our buses, our children, we want to keep them safe.
16	Security	Recording the courthouse	Policy	Allowed to record outside, but not inside
17	Nuisance	Recording the justice center	Law	It's state law, you need permission to record.
18	Security	Recording inside the building	Terrorism	One thing we worry about, as far as terrorism and thing like that. We don't want people coming in and getting shots of our area and then planning it out.
19	Security	Recording outside the building	Security	What are you filming for?

Video	Bait	BaitNote	Issues	IssuesNote
20	Privacy	Recording inside the building	Privacy	Can I ask why you're recording us? "Our customer privacy is important"
21	Security	Recording the outside of the location	Security	We prefer you not record Access Control Points (ACPs) for security
22	Policy	Recording inside the building	Policy	It's our policy that you can't record, like a court house
23	Security	Recording with a mask	Safety	Why are you doing this.
24	Security	Recording outside the building	Safety	Concern about recording the building and license plates
25	Policy	Recording and requesting complaint form	None	None expressed
26	Safety	Recording personal vehicles	Privacy	A parole hearing was in progress.
27	Safety	Recording personal vehicles	Safety	Officer say: "you're acting suspicious, man" and "In this day and age, man, there's some crazy people out there."
28	Security	Recording Trooper HQ	Security	Police were called for a suspicious person.
29	Security	Recording several govt buildings & open carry	Security	auditor was pleasant. Told officer is was a first amendment audit. Auditor has a baby in a stroller.

Video	Bait	BaitNote	Issues	IssuesNote
30	Policy	Recording in the post office	Policy	Worker doesn't want to be recorded. Auditor keeps referring to poster 7. worker asks her to leave. She refuses.
31	Security	Taking pictures of a state prison. Four auditors team up.	Security	Guard: "That is a security breach, when you're taking pictures of a state institution." Guard says, "you are not allowed to take video or pictures of a state facility."
32	Security	Recording police building	Policy	Recording the courthouse. Guard says you can record and leave when he asks for name. He calls them "ladies" and mocks them as they leave. He asks another if he can record, and then argues with her answer. Meanwhile, he reads license plates out loud.
33	Harassment	Filming while loudly mocking and insulting for camera	Harassment	Loud and cursing subject records his insult to the female while complaining about his missing property.
34	Policy	Recording in post office.	Policy	Sets up employee by asking, "I can film here, right? Ever heard of the First Amendment?" "Larry responds, "yeah but you can't film here." After agitating, he goes outside to "wait till the cops show up."
35	Policy	Filming in Court	Policy	Judge: "You have to request to record. Period. You want to record? You're out of my courtroom."
36	Safety	Recording personal vehicles and squads. Goes inside after no response.	Safety	Officer says, "oh, you're one of those guys." "My job is the security of this building."

Video	Bait	BaitNote	Issues	IssuesNote
37	Safety	Recording Narcotics Building	Safety	Officers contact and say they are just curious, wondering what they are doing. Roth walks off. One officer identifies himself and extends his hand, NNH shakes it and gives his first name, David. They asked for his YouTube channel, but he wouldn't give that. Roth refused to ID.
38	Privacy	Filming in DMV office	Policy	Manager explained that they were concerned about the privacy of the people completing forms and verbally providing personal information. A citizen asked why they were filming him, and stated, "You know that's weird, right?" Subjs go outside and wait for police. They are happy to see police arrive. One auditor says, "hey, let's ignore them."
39	Security	Recording defense installation	Law	Prevention of recording military base
40	Policy	Recording in Hospital	Policy	HIPPA laws, privacy
41	Security	Recording vehicles - city and personal	Law	Is that a crime? "Yes sir. Right now in this day and age that we're dealing with it is a crime."
42	Security	Recording airport checkpoints	Policy	TSA staff argue with auditors about right to record them personally, as well as checkpoints. One keeps saying, "you don't have my permission" [to take my picture], and even adds, "I don't work for you."
43	Security	Recording the FBI building and people	None	No one makes contact - she gets bored.

Video	Bait	BaitNote	Issues	IssuesNote
44	Security	Filming inside City Hall	Security	City Manager say, "I'm concerned that you intend to use this video for nefarious purposes. Do you intend to hurt anyone in this building?" The auditor says "No, I can tell you that." The CM asks, "Do you intend to threaten anyone in this building?" Again he says "no." The CM responds, then what's the purpose of it? The CM asks if he can take the auditor's picture. The auditor says he can, then makes it difficult. The CM says "I find it interesting that you don't want me to take your picture, but you want to take mine."
45	Security	Recording inside building	Harassment	The Fish and Game officer met him at the door. The auditor was immediately confrontational and harassing with dumb questions.
46	Security	Recording Federal property	Law	Prevention of recording federal installation. Told auditor that "photographic situations" were not allowed at the federal installation.
47	Security	Recording government buildings	None	No issues expressed by employees
48	Policy	Recording inside the court house	Policy	Advised that the judge can order no filming and no entry without identification
49	Policy	Recording in the post office	Policy	Concern about recording federal property
50	Security	Recording inside the building	Safety	Employee asked what he was doing, and he responds by asking if the building was a public space and demanding the name of the employee.
51	Safety	Filming the gate and PD	Safety	He then explains that there were two separate attacks on a police station last year where officers died (Dallas Texas). He then asks the auditor, "So, is it unreasonable for us as officers who work here to make contact with somebody who's taking pictures of our outside facility?" Roth responds, "Yes."

Video	Bait	BaitNote	Issues	IssuesNote
52	Safety	Facemask (while filming)	Safety	Wearing facemask and carrying bat down the street until police are called.
53	Harassment	Harassing Fire Dept with Loud Speakers	Security	In response to a conflict with Furry Potato, the auditor targets the Fire Department - yelling no justice no peace, no justice for Furry Potato, no peace for the City of Commerce. LA SO officers show up, with a helicopter. Link to Kat's video of incident: https://www.youtube.com/watch?v=-uc-AS84UPM On this video, Kat tells viewers that they have been at this for 24 hours, meaning the FD personnel have gotten no sleep. They then walk down the street yelling on the PA. Another auditor shows up and they show a picture of the offending fireman on Kat's feed.
54	Security	Filming warehouse	Security	NCC films the gate and building of a warehouse. The security guard asks him if he can help him, what he is doing, and what is going on, but he gives the silent treatment. The guard calls a supervisor. He tells someone "he's recording and I don't know why. He's not answering." The guard leaves briefly. The guard can be heard expressing concern that he is recording the warehouse. The video overlays the sound of a baby crying. After multiple contacts, the employees leave. Police are not called.

Video	Bait	BaitNote	Issues	IssuesNote
55	Safety	Filming children	Safety	<p>Approached by an angry mom, who is recording him stating, “This predator is out at the park and making all the parents leave and have their children - there’s children out here playing, but this predator is out here with this ‘beautiful’ sign, being a dickhead, and the cops won’t make him leave because “he has the right!” - whatever. So, let’s just make his face go viral, and I’ll also get uh his tag, and we can post everything. Have a nice day!”</p> <p>The woman then turns to walk away, stating as she leaves, “I hope they kill you.” After she walks away, he follows her and her children, continuing to film. She stops, turns back, and tries to cover his camera with the shirt in her hand. He tells her, “you’re gonna look funny on YouTube.” She answers, “I really don’t care if I look funny on YouTube. I’m gonna look like a mom who’s sick of creeps being at my park, recording my kids. It’s disgusting.” “I don’t know who you think you are, but you think you are just going to stand at my park and record my kids and just think you are going to get away with it? For what, your perverted videos?” The auditor replies, “Yes.” Police finally respond. A crowd of angry people don’t understand why the officer can’t do something.</p>
56	Security	Filming ‘Prison’ Wearing masks	Security	<p>Brandt approaches a prison with two other subjects. All three are wearing masks. Brandt carries his FTB sign. Brandt tells the audience, “so we’re masked, because the only thing that freaks people out more than the word fuck or cunt, or a camera, is masks.” Brandt yells obscenities about police and engages prisoners on the yard. Police drive by but do not engage, resulting in an uneventful video.</p>
57	Security	filming gate and building	Security	<p>Off camera, FBI attempts to ID the auditor. When he refuses, they call the police.</p>

Video	Bait	BaitNote	Issues	IssuesNote
58	Safety	Filming Synagogue	Safety	This video begins after the guard has pulled a gun, so it is not clear how it began. You are not able to see the attire of FP or whether she is wearing a mask in this audit, which she commonly does. The guard has a two-hand hold on a Glock pistol, and FP advises the audience something to the effect of, he said he is going to shoot me dead if I move. The implication is that the police have been called and the guard believes he is holding FP for their arrival. At some point the guard holsters. The guard asks, “why are you filming this institution?” FP does not respond. The guard later draws the pistol again and shortly afterward it discharges. From the video, he does not appear to take aim and, in fact, it appears to be an accidental discharge. Amidst FP yelling “he just shot me in the leg” the guard says, “go away” and “that was a warning shot.” FP is struck in the leg. Police are called. The guard tells by--standers that FP kept trying to break in and he told him not to do it. He also said he shot at the “floor,” which aligns with the video. It seems that the bullet deflected from the concrete and struck FP.
59	Security	Filming DoD bldg	Policy	Soldier explains that their policy is not to allow recording. The auditor responds that there is “a difference between policy and law” and he doesn’t have to follow their policy. There is also discussion over military control of the roadway where the cars travel through. In another location, he is asked not to film, but does so from the sidewalk, noting the no trespassing signs. Police are called. He is never asked for ID.
	59	59	59	59

APPENDIX D. DEPARTMENT OF JUSTICE LETTER TO BALTIMORE



U.S. Department of Justice
Civil Rights Division

JMS:TDM:RJO
DJ 207-35-10

Special Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

May 14, 2012

Mark H. Grimes
Baltimore Police Department
Office of Legal Affairs
601 E Fayette St
Baltimore, MD 21202

Mary E. Borja
Wiley Rein LLP
1776 K St NW
Washington, DC 20006

Re: *Christopher Sharp v. Baltimore City Police Department, et. al.*

Dear Counsel:

Judge Paul W. Grimm scheduled a settlement conference in *Christopher Sharp v. Baltimore City Police Department, et. al.* for May 30, 2012. While we take no position on Mr. Sharp's claim for damages against the individual defendants, it is the United States' position that any resolution to Mr. Sharp's claims for injunctive relief should include policy and training requirements that are consistent with the important First, Fourth and Fourteenth Amendment rights at stake when individuals record police officers in the public discharge of their duties. These rights, subject to narrowly-defined restrictions, engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety.

The guidance in this letter is designed to assist the parties during the upcoming settlement conference. It specifically addresses the circumstances in this case and Baltimore City Police Department's General Order J-16 ("Video Recording of Police Activity"), but also reflects the United States' position on the basic elements of a constitutionally adequate policy on individuals' right to record police activity.

1. Background

In his complaint, Mr. Sharp alleged that on May 15, 2010, Baltimore City Police Department ("BPD") officers seized, searched and deleted the contents of his cell phone after he used it to record officers forcibly arresting his friend. Compl. at 9-12, ECF. No. 2. Mr. Sharp further alleged that BPD maintains a policy, practice or custom of advising officers to detain citizens who record the police while in the public discharge of their duties and to seize, search, and delete individuals' recordings. *Id.* at 7. On November 30, 2011, BPD and Frederick H.

Bealefeld, III filed a Motion to Dismiss Complaint of for Summary Judgment. According to the Motion to Dismiss, BPD promulgated a general order on recording police activity on November 8, 2011. BPD did not file this policy as an exhibit to its Motion to Dismiss. Instead, BPD filed a declaration providing a brief summary of its contents.

On January 10, 2012, the United States filed a Statement of Interest in this matter. In that statement, the United States urged the Court to find that private individuals have a First Amendment right to record police officers in the public discharge of their duties, and that officers violate individuals' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States also opined that, based on the limited information on the record regarding BPD's development of new policies and training on individuals' right to record the police, BPD failed to meet its burden of establishing that it had taken sufficient action to prevent future constitutional violations. On February 10, 2012, BPD provided the Court, Mr. Sharp and the United States with a courtesy copy of General Order J-16. The same day, BPD released General Order J-16 to the public.¹ Following a hearing on February 13, 2012, Judge Legg denied BPD's motion.

Constitutionally adequate policies must be designed to effectively guide officer conduct, accurately reflect the contours of individuals' rights under the First, Fourth and Fourteenth Amendments, and diminish the likelihood of future constitutional violations. BPD's general order does not meet these requirements in some areas. In other areas, BPD's general order does adequately protect individuals' constitutional rights. We discuss those areas below, as well as others in which BPD should amend the general order to ensure that individual's constitutional rights are protected.

2. Guidance on the Right to Record Police Activity.

A. Policies should affirmatively set forth the First Amendment right to record police activity.

Policies should affirmatively set forth the contours of individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties. Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.² See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (“[b]asic

¹ Peter Hermann, *Baltimore Police Told Not to Stop People Taking Photos or Video of Their Actions*, *The Baltimore Sun*, February 11, 2012.

² There is no binding precedent to the contrary. In *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009), the Fourth Circuit issued a one page, unpublished per curiam opinion summarily concluding – without providing legal or factual support – that the “right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.” *Id.* at 853; see also *McCormick v. City of Lawrence*, 130 F. App'x 987 (10th Cir. 2005). In the Fourth Circuit, “[u]npublished opinions have no precedential value.” *United States v. Stewart*, 595 F.3d 197, 199 n.1 (4th Cir. 2010); see also *Glik*, 655 F.3d at 85 (“[T]he absence of substantive discussion deprives *Szymecki* of any marginal persuasive value it might otherwise have had.”).

First Amendment principles” and federal case law “unambiguously” establish that private individuals possess “a constitutionally protected right to videotape police carrying out their duties.”); *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the “First Amendment right . . . to photograph or videotape police conduct.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing the “First Amendment right to film matters of public interest”). The First Amendment right to record police activity is limited only by “reasonable time, place, and manner restrictions.” *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

While courts have only recently begun to refine the contours of the right to record police officers, the justification for this right is firmly rooted in long-standing First Amendment principles. The right to “[g]ather[] information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” *Glik*, 655 F.3d at 82 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The application of this right to the conduct of law enforcement officers is critically important because officers are “granted substantial discretion that may be used to deprive individuals of their liberties.” *Id.*; *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991) (“Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption.”). The “extensive public scrutiny and criticism” of police and other criminal justice system officials serves to “guard[] against the miscarriage of justice,” *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)), a harm that undermines public confidence in the administration of government. When police departments take affirmative steps to protect individuals’ First Amendment rights, departments “not only aid[] in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally.” *Glik*, 655 F.3d at 82-83.

Policies should explain the nature of the constitutional right at stake and provide officers with practical guidance on how they can effectively discharge their duties without violating that right. For example, policies should affirmatively state that individuals have a First Amendment right to record police officers and include examples of the places where individuals can lawfully record police activity and the types of activity that can be recorded.³ While this area of the law

³ Police duties discharged in public settings may include a range of activities, including detentions, searches, arrests or uses of force. In *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), the Third Circuit considered whether there was sufficient case law “establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on ‘fair notice’ that seizing a camera or arresting an individual for videotaping police conduct during the stop would violate the First Amendment.” *Id.* at 262. The Court determined that, because there were no cases specifically addressing the right to record traffic stops and the relevant Third Circuit decisions were inconsistent, there was insufficient case law to support a finding that the right to record traffic stops was clearly established. *Id.* Because the right was not clearly established, the officer involved was entitled to qualified immunity. *Id.* at 262-63. The Third Circuit expressly did not reach the question of whether the First Amendment protects the recording of police activity during a traffic stop, because it did not need to reach that question to decide that the officer should receive qualified immunity. *Id.* In other contexts, the Supreme Court has noted that, when faced with a close call, “the First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it.” *FEC v. Wisconsin Right to*

is still developing, existing case law is instructive. In *Glik*, an individual engaged in protected activity when he recorded officers allegedly engaging in excessive force in a public park, “the apotheosis of a public forum.” *Glik*, 655 F.3d at 84. Individuals have a right to record in all traditionally public spaces, including sidewalks, streets and locations of public protests.

Courts have also extended First Amendment protection to recordings taken on private property, including an individual filming police activity from his or her home or other private property where an individual has a right to be present. See *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007) (activist’s posting of a video of “a warrantless and potentially unlawful search of a private residence” on her website was entitled to First Amendment protection); *Pomykacz v. Borough of West Wildwood*, 438 F.Supp.2d 504, 513 (D. N.J. 2006) (individual was engaging in political activism protected by the First Amendment when she photographed police officer while officer was in police headquarters and in municipal building); *Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Pa. 2005) (individual who videotaped state troopers from private property with the owner’s permission was engaged in constitutionally protected speech). The 1991 videotaped assault of Rodney King at the hands of law enforcement officers exemplifies this principle. A private individual awakened by sirens recorded police officers assaulting King from the balcony of his apartment. This videotape provided key evidence of officer misconduct and led to widespread reform. Congress enacted 42 U.S.C. §14141 in response to this incident. Section 14141 granted the U.S. Attorney General the right to seek declaratory or injunctive relief against law enforcement agencies engaged in a pattern or practice of violating the Constitution or federal law.

BPD’s General Order J-16 should affirmatively set forth that individuals have a First Amendment right to record officers in the public discharge of their duties. At numerous points throughout General Order J-16, BPD refers to “Constitutional rights” that form the basis for the policy. For example, General Order J-16 begins with a statement acknowledging that the purpose of the policy is to “to ensure the protection and preservation of every person’s Constitutional rights,” *id.* at 1, and later refers to bystanders’ “absolute right to photograph and/or video record the enforcement actions of any Police Officer.” *Id.* at 2. Yet, General Order J-16 never explicitly acknowledges that this right derives from the First Amendment. Particularly given the numerous publicized reports over the past several years alleging that BPD officers violated individuals’ First Amendment rights, BPD should include a specific recitation of the First Amendment rights at issue in General Order J-16.

Other areas of General Order J-16 also require further clarification. For example, General Order J-16 states that officers may not prohibit a person’s ability to observe, photograph, and/or make a video recording of police activity that occurs “in the public domain,” General Order J-16 at 1, but never defines this term. BPD should clarify that the right to record public officials is not limited to streets and sidewalks – it includes areas where individuals have a legal right to be present, including an individual’s home or business, and common areas of public and private facilities and buildings.

Life, Inc., 551 U.S. 449, 457 (2007). See also *Bertot v. School Dist. No. 1, Albany County, Wyo.*, 613 F.2d 245, 252 (10th Cir. 1979) (“We prefer that governmental officials acting in sensitive First Amendment areas err, when they do err, on the side of protecting those interests.”).

B. Policies should describe the range of prohibited responses to individuals observing or recording the police.

Because recording police officers in the public discharge of their duties is protected by the First Amendment, policies should prohibit interference with recording of police activities except in narrowly circumscribed situations. More particularly, policies should instruct officers that, except under limited circumstances, officers must not search or seize a camera or recording device without a warrant. In addition, policies should prohibit more subtle actions that may nonetheless infringe upon individuals' First Amendment rights. Officers should be advised not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices.

Policies should prohibit officers from destroying recording devices or cameras and deleting recordings or photographs under any circumstances. In addition to violating the First Amendment, police officers violate the core requirements of the Fourteenth Amendment procedural due process clause when they irrevocably deprived individuals of their recordings without first providing notice and an opportunity to object. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society.”); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007) (The notice defendant provided to the plaintiff “was insufficient to satisfy due process because [plaintiff] did not receive the notice until after his personal property was allegedly discarded . . . [D]iscarding [plaintiff’s] personal property in this manner violated his procedural due process rights.”).

BPD’s General Order J-16 addresses the search and seizure of cameras or recording devices. However, the policy does not prohibit more subtle officer actions that nonetheless may infringe upon individuals’ First Amendment rights. BPD should instruct officers not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or other recording devices.

The order also prohibits officers from damaging or erasing the contents of a device without first obtaining a warrant, General Order J-16 at 2. This is not merely a Fourth Amendment question, however. Under the First Amendment, there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed. BPD’s general order should include clear language prohibiting the deletion or destruction of recordings under any circumstances.

C. Policies should clearly describe when an individual’s actions amount to interference with police duties.

The right to record police activity is limited only by “reasonable time, place, and manner restrictions.” *Glik*, 655 F.3d at 8; *Smith*, 212 F.3d at 1333. If a general order permits individuals to record the police unless their actions interfere with police activity, the order should define what it means for an individual to interfere with police activity and, when possible, provide specific examples in order to effectively guide officer conduct and prevent infringement on activities protected by the First Amendment.

A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (words “likely to cause a fight” are not afforded First Amendment protection); *see also Louisiana ex rel. Gremillion v. National Ass’n for the Advancement of Colored People*, 366 U.S. 293, 297 (1961) (“criminal conduct . . . cannot have shelter in the First Amendment”). Courts have held that speech is not protected by the First Amendment if it amounts to actual obstruction of a police officer’s investigation – for example, by tampering with a witness or persistently engaging an officer who is in the midst of his or her duties. *See Colten v. Commonwealth of Kentucky*, 407 U.S. 104 (1972) (individual’s speech not protected by the First Amendment where individual persistently tried to engage an officer in conversation while the officer was issuing a summons to a third party on a congested roadside and refused to depart the scene after at least eight requests from officers); *King v. Ams*, 519 F.3d 607 (6th Cir. 2008) (individual was not engaged in protected speech when he repeatedly instructed a witness being questioned by a police officer not to respond to questions).

However, an individual’s recording of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference. Nor does an individual’s conduct amount to interference if he or she expresses criticism of the police or the police activity being observed. *See City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) (“Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.”) Even foul expressions of disapproval towards police officers are protected under the First Amendment.⁴ *See, e.g., Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (individual who was “making obscene gestures” and “yell[ed] profanities” at an officer engaged in conduct that “fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution.”).

Time, place, and manner restrictions on First Amendment speech must “leave open ample alternative channels for communication of the information,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). BPD’s general order specifically suggests that, if a bystander’s actions are

⁴ The Supreme Court has carved out an exception for “‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 572. However, the Court has indicated that the fighting words exception “might require a narrower application in cases involving words addressed to a police officer, because ‘a properly trained officer may reasonably be expected to exercise a higher degree of restraint’ than the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’” *Hill*, 482 U.S. at 462. *See also Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003) (detainee’s words “son of a bitch” to police officer were not fighting words); *Posr v. Court Officer Shield #207*, 180 F.3d 409 (2d Cir. 1999) (individual’s statement to officer “one day you’re gonna get yours,” spoken while in retreat, were not fighting words); *Buffkins v. City of Omaha, Douglas County*, 922 F.2d 465, 472 (8th Cir. 1991) (finding no evidence that individual caused “an incitement to immediate lawless action” by calling officer “asshole”).

“approaching the level of a criminal offense,” supervisors should “recommend a less-intrusive location to the bystander from which he/she may continue to observe, photograph, or video record the police activity.” *Id.* at 5. This is effective language to guide supervisor’s conduct. However, BPD’s general order does not permit or recommend that “members” – presumably officers – provide this information to bystanders before effectuating an arrest. BPD should revise its general order to provide “members” with the same authority.

General Order J-16 must set forth with specificity the narrow circumstances in which a recording individual’s interference with police activity could subject the individual to arrest. Recent publicized interactions between citizen-recorders and BPD officers highlight the need for clear guidance on this issue. *See* Peter Hermann, *Police Allow Bystanders to Tape Arrest, But at What Risk?*, *The Baltimore Sun*, April 3, 2012 (president of the city police union stating that officers “are confused right now” about how to appropriately respond to individuals recording police conduct); *see also*, *Fox45 Top News Stories Video*, Fox45 WBFF Baltimore, March 22, 2012 (covering the suspension of a BPD officer who confiscated a cell phone from an individual recording police from a family member’s property)⁵; Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There’s Loitering*, *The Baltimore Sun*, February 11, 2012 (BPD officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest).

Under “General Information,” General Order J-16 at 2, the policy states that bystanders have an absolute right to record police activity as long as the bystanders’ actions do not fall into one of six exceptions. One exception is that bystanders may not “Interfere with or violate any section of the law, ordinance, code, or criminal or traffic article.” While bystanders clearly may not violate the law, it is less clear under what circumstances an individual’s actions would “interfere” with a law or ordinance. This language encourages officers to use their discretion in inappropriate, and possibly unlawful, ways. Instead, General Order J-16 should encourage officers to provide ways in which individuals can continue to exercise their First Amendment rights as officers perform their duties, rather than encourage officers to look for potential violations of the law in order to restrict the individual’s recording.

D. Policies should provide clear guidance on supervisory review.

First line supervision is a critical component of constitutional policing. Policies should include guidance on when an officer should call a supervisor to the scene and what a supervisor’s responsibilities are once he or she arrives at the scene. A supervisor’s presence at the scene should be required before an officer takes any significant action involving citizen-recorders or recording devices, including a warrantless search or seizure of a camera or recording device or an arrest.⁶

⁵ Available at: http://www.foxbaltimore.com/newsroom/top_stories/videos/wbff_vid_12767.shtml.

⁶ Supervisors should be present at the scene to approve any arrest for conduct related to the use of cameras or recording devices. For example, an arrest for quality of life offenses, including “hindering” or “loitering,” may be based upon the individuals’ alleged interference with police duties while using a recording device. *See, e.g.*, Justin Fenton, *In Federal Hill, Citizens Allowed to Record Police – But Then There’s Loitering*, *The Baltimore Sun*, February 11, 2012 (BPD

BPD should clarify the role of supervisors. A supervisor's presence at the scene should be required before an officer takes any significant action involving cameras or recording devices, including a warrantless search or seizure. If feasible, supervisors should be present prior to an individual's arrest related to the use of a recording device. At a minimum, supervisors must be present to approve such arrests before an individual is transported to a holding facility. BPD's general order does not include mandatory language requiring supervisors to be present during these occurrences, but rather advises supervisors to be present "if possible." General Order J-16 at 4.

Moreover, BPD's general order includes inconsistent language regarding when a member should contact a supervisor. On page 4, officers are instructed to notify a supervisor *after* an individual has been arrested. Later on the same page, under the supervisor's responsibilities, the supervisor is advised to go to any scene where the actions of a bystander are "approaching the level of a criminal offense." BPD should reconcile this inconsistency and require, at a minimum, a supervisor's presence at the scene to approve all arrests or any other significant action by a member.

E. Policies should describe when it is permissible to seize recordings and recording devices.

Policies on individuals' right to record and observe police should provide officers with clear guidance on the limited circumstances under which it may be permissible to seize recordings and recording devices. An officer's response to an individual's recording often implicates both the First and Fourth Amendment, so it's particularly important that a general order is consistent with basic search and seizure principles. A general order should provide officers with guidance on how to lawfully seek an individual's consent to review photographs or recordings and the types of circumstances that do—and do not—provide exigent circumstances to seize recording devices, the permissible length of such a seizure, and the prohibition against warrantless searches once a device has been seized. Moreover, this guidance must reflect the special protection afforded to First Amendment materials.

Policies should include language to ensure that consent is not coerced, implicitly or explicitly. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) ("[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."). In assessing whether an individual's consent to search was freely and voluntarily given, Courts may consider "the characteristics of the accused . . . as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter)." *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996). BPD's explanation of the process for obtaining consent includes clear guidelines regarding what steps an officer should take once an individual provides an officer with consent to review a recording. However, BPD's general order should include language to ensure that consent is not coerced, implicitly or explicitly.

officer instructing a citizen-recorder that he would face loitering charges if he failed to move away from the scene of an arrest).

Warrantless seizures are only permitted if an officer has probable cause to believe that the property “holds contraband or evidence of a crime” and “the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.” *United States v. Place*, 462 U.S. 696, 701 (1983). Any such seizure must be a “temporary restraint[] where needed to preserve evidence until police c[an] obtain a warrant.” *Illinois v. McArthur*, 531 U.S. 326, 334 (2001). Seizures must be limited to a reasonable period of time. For example, in *Illinois v. McArthur*, the Supreme court upheld a police officer’s warrantless seizure of a premises, in part, because police had good reason to fear that evidence would be destroyed and the restraint only lasted for two hours – “no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.” *Id.* at 332. Once seized, officers may not search the contents of the property without first obtaining the warrant. *Place*, 462 U.S. at 701 & n.3. In the context of the seizure of recording devices, this means that officers may not search for or review an individual’s recordings absent a warrant.

Police departments must also recognize that the seizure of a camera that may contain evidence of a crime is significantly different from the seizure of other evidence because such seizure implicates the First, as well as the Fourth, Amendment. The Supreme Court has afforded heightened protection to recordings containing material protected by the First Amendment. An individual’s recording may contain both footage of a crime relevant to a police investigation and evidence of police misconduct. The latter falls squarely within the protection of First Amendment. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”). The warrantless seizure of such material is a form of prior restraint, a long disfavored practice. *Roaden v. Kentucky*, 413 U.S. 496, 503 (1973) (when an officer “br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition” of material protected by the First Amendment, such action is “plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards.”). *See also Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (Where sheriff’s deputies suppressed newspapers critical of the sheriff “before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint.”). An officer’s warrantless seizure of an individual’s recording of police activity is no different. *See Robinson v. Fetterman*, 378 F.Supp.2d 534, 541 (E.D. Penn 2005) (By restraining an individual from “publicizing or publishing what he has filmed,” officer’s “conduct clearly amounts to an unlawful prior restraint upon [] protected speech.”); *see Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 637 (D.Minn. 1972) (“it is clear to this court that the seizure and holding of the camera and undeveloped film was an unlawful ‘prior restraint’ whether or not the film was ever reviewed.”).

The warrantless seizure of material protected by the First Amendment “calls for a higher hurdle in the evaluation of reasonableness” under the Fourth Amendment. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). Police departments should limit the circumstances under which cameras and recording devices can be seized and the length of the permissible seizure. BPD’s general order does not convey that the warrantless seizure of recording material is different than the warrantless seizure of many other types of evidence, in that it implicates the First, as well as the Fourth, Amendment. General Order J-16 should make it clear to officers that, in the ordinary course of events, there will not be facts justifying the seizure of cameras or recording devices. Moreover, General Order J-16 does not define “temporary” seizure. BPD should clarify how long and under what circumstances an officer may seize a recording device, even temporarily,

and how the recordings on the device must be maintained after seizure. A policy permitting officers, with supervisory approval, to seize a film for no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant if that film contains critical evidence of a felony crime would diminish the likelihood of constitutional violations.

F. Police departments should not place a higher burden on individuals to exercise their right to record police activity than they place on members of the press.

The Supreme Court has established that “the press does not have a monopoly on either the First Amendment or the ability to enlighten.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978). Indeed, numerous courts have held that a private individual’s right to record is coextensive with that of the press. A private individual does not need “press credentials” to record police officers engaged in the public discharge of their duties. *See e.g., Glik*, 655 F.3d at 83 (“The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press.”); *Lambert v. Polk County, Iowa*, 723 F.Supp. 128, 133 (S.D. Iowa 1989) (“It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events—all of us . . . have that right.”). The First Amendment “attempt[s] to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” including the “promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

This principal is particularly important in the current age where widespread access to recording devices and online media have provided private individuals with the capacity to gather and disseminate newsworthy information with an ease that rivals that of the traditional news media. *See Glik*, 655 F.3d at 84 (“[M]any of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.”).

BPD’s general order appropriately does not place a higher burden on individuals to exercise their right to record police activity than in places on members of the press. Policies should not establish different guidelines for media and non-media individuals. BPD’s general order includes language that accomplishes this goal:

“Members of the press and members of the general public enjoy the same rights in any area accessible to the general public.” *Id.* at 4.

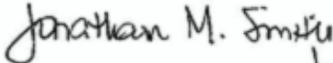
“No individual is required to display ‘press credentials’ in order to exercise his/her right to observe, photograph, or video record police activity taking place in an area accessible to, or within view of, the general public.” *Id.*

These two provisions effectively convey that officers should not place a higher burden on individuals to exercise their right to record police activity than in places on members of the press.

3. Conclusion

Comprehensive policies and effective training are critical to ensuring that individuals' First, Fourth and Fourteenth Amendment rights are protected when they record police officers in the public discharge of their duties. If the parties determine that settlement of this matter is feasible, we encourage the parties to reach an agreement that is consistent with the guidance provided above. Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please feel free to contact us.

Sincerely,


JONATHAN M. SMITH *by SES*
Chief
Special Litigation Section

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APPENDIX E. THE MODEL IACP POLICY



Model Policy

<i>Effective Date</i> December 2015		<i>Number</i>
<i>Subject</i> Recording Police Activity		
<i>Reference</i>		<i>Special Instructions</i>
<i>Distribution</i>	<i>Reevaluation Date</i>	<i>No. Pages</i> 2

I. PURPOSE

This policy provides officers with guidance for dealing with situations in which they are being recorded, to include photographing, videotaping, audiotaping, or both, by members of the public or the press.

II. POLICY

Members of the public, including media representatives, have an unambiguous First Amendment right to record officers in public places, as long as their actions do not interfere with the officer's duties or the safety of officers or others. Officers should assume that they are being recorded at all times when on duty in a public space.

III. DEFINITIONS

Recording: Capturing of images, audio, or both, by means of a camera, cell phone, audio recorder, or other device.

Media: The storage source for visual or audio recordings, whether by film, analog, or digital means.

IV. PROCEDURES

- A. Persons who are lawfully in public spaces or locations where they have a legal right to be present—such as their home, place of business, or the common areas of public and private facilities and buildings—have a First Amendment right to record things in plain sight or hearing,¹ to include police activity. Police may not threaten, intimidate, or otherwise discourage or interfere with the

recording of police activities. However, the right to record is not absolute and is subject to legitimate and reasonable legal restrictions, as follows:

1. A reasonable distance must be maintained from the officer(s) engaged in enforcement or related police duties.
 2. Persons engaged in recording activities may not obstruct police actions. For example, individuals may not interfere through direct physical intervention, tampering with a witness, or by persistently engaging an officer with questions or interruptions. The fact that recording and/or overt verbal criticism, insults, or name-calling may be annoying, does not of itself justify an officer taking corrective or enforcement action or ordering that recording be stopped, as this is an infringement on an individual's constitutional right to protected speech.
 3. Recording must be conducted in a manner that does not unreasonably impede the movement of emergency equipment and personnel or the flow of vehicular or pedestrian traffic.
 4. The safety of officers, victims, witnesses, and third parties cannot be jeopardized by the recording party.
- B. Arrest
1. Persons who violate the foregoing restrictions should be informed that they are engaged in prohibited activity and given information on acceptable alternatives, where appropriate, prior to making an arrest.

¹ In nearly all cases, audio recording of police is legally permissible and subject to the same guidelines as video recording. This is so even in states where eavesdropping statutes require two-party consent.

2. Arrest of a person who is recording officers in public shall be related to an objective, articulable violation of the law unrelated to the act of recording. The act of recording does not, in itself, provide grounds for detention or arrest.
 3. Arrest of an individual does not provide an exception to the warrant requirement justifying search of the individual's recording equipment or media. While equipment may be seized incident to an arrest, downloading, viewing, or otherwise accessing files requires a search warrant. Files and media shall not be altered or erased under any circumstances.
- C. Seizure of Recording Devices and Media
1. Absent arrest of the recording party, recording equipment may not be seized. Additionally, officers may not order an individual to show recordings that have been made of enforcement actions or other police operations.
 2. If there is probable cause to believe that evidence of a serious crime has been recorded, an officer should
 - a. advise and receive instructions from a supervisor;
 - b. ask the person in possession of the recording if he or she will consent to voluntarily and temporarily relinquish the recording device or media so that it may be viewed and/or copied as evidence; and
 - c. in exigent circumstances, in which it is reasonable to believe that the recording will be destroyed, lost, tampered with or otherwise rendered useless as evidence before a warrant can be obtained, the recording device or media may be seized under a temporary restraint. A warrant must be obtained in order to examine and copy the recording and the chain of custody must be clearly documented per department policy.
 3. In exigent situations where it is objectively reasonable to believe that immediate viewing of recordings is necessary to prevent death or serious bodily harm of another before a warrant can be authorized, the recording device or media may be seized and viewed.
 4. Whenever a recording device or media is seized without a warrant or obtained by voluntary consent, the seized item shall be held in police custody no longer than reasonably necessary for the police, acting with due diligence, to obtain a warrant. The device must be returned at the earliest possible time and its owner/operator given instruction on how it can

be retrieved. In all cases property receipts shall be provided to the owner.

D. Supervisory Responsibilities

A supervisor should be summoned to any incident in which an individual recording police activity is going to be, or will most likely be, arrested or when recording equipment may be seized without a warrant or lawful consent.

Note

This document was updated as part of the IACP's Public Recording of Police (PROP) Project. This project was supported by Cooperative Agreement Number 2013-CK-WX-K005 awarded by the Office of Community Oriented Policing Services, U.S. Department of Justice. The opinions contained herein are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice. References to specific agencies, companies, products, or services should not be considered an endorsement by the author(s) or the U.S. Department of Justice. Rather, the references are illustrations to supplement discussion of the issues.

Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors. This document is not intended to be a national standard.

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