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Qualified Immunity and the Unintentional, or Intentional, Chill on Free Speech

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Qualified Immunity and the Unintentional, or Intentional, Chill on Free Speech

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INTRODUCTION

Qualified immunity was first recognized by the Supreme Court in 1967, and the current test for qualified immunity was established in 1982 by the Supreme Court’s decision in Harlow v. Fitzgerald. The decision made all government employees immune from civil liability when acting within the scope of their employment. However, qualified immunity has taken on a life of its own in protecting government employees from legal repercussions and it is violating the First Amendment to do it.

In order for a lawsuit to survive the hurdle of proving a government official does not have qualified immunity, the plaintiff must prove that the official’s actions were clearly established as a violation of someone’s rights. If the circuit does not have clearly established law, many circuits automatically grant the official immunity. The Supreme Court previously held in Saucier v. Katz that qualified immunity would be judged on (1) “whether the facts alleged… or shown… make out a violation of a constitutional right,” and (2) “if so, whether the right at issue was ‘clearly established’ at the time of the defendant's alleged misconduct,” effectively creating a two-step process. The second prong of this process is a difficult hurdle to overcome and is often the contested area in later discussed cases. The Supreme Court, in 2009, changed course in Pearson v. Callahan, leaving it to the discretion of the district courts to determine whether or not to evaluate the first prong of the Saucier test, which is whether there is a constitutional claim, and allowing the courts to jump to the second prong of the Saucier test, whether the law was clearly established. Leaving the district courts with this kind of discretion has led to a wide variety of reasoning in the holdings between different circuits, and even within

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2 See INST. FOR JUST., supra note 1.
4 INST. FOR JUST., supra note 1.
5 Id.
7 See generally, INST. FOR JUST., supra note 1 (explaining that, more often than not, plaintiffs do not overcome the burden).
8 See Pearson, 555 U.S. at 236 (2009).
the districts themselves.⁹ Chief Justice Robert’s court has been described as “enforc[ing] [qualified immunity] aggressively,” sending the signal that district courts need to enforce immunity or risk being overturned by the Supreme Court.¹⁰ This trend of cases worried Justice Sotomayor, who considered this to be a “disturbing double standard” of previous decisions of the Court.¹¹

Some commentators believe that the qualified immunity doctrine “does not adequately serve the purposes it was meant to promote.”¹² The doctrine has morphed from its original intent to a powerful tool used by government officials to suppress the First Amendment and deny victims the justice they deserve.¹³ The ability of government officials to use qualified immunity as a shield, whether directly or indirectly, is a dangerous power that needs to be reformed, especially as technology and recording devices continue to advance. New issues have arisen since the doctrine was first established, and the political climate is much more polarized, requiring new enlightening discussions and changes to previous precedent.¹⁴ One of the most common ways the doctrine is exploited is through police officers’ ability to sidestep individuals’ First Amendment rights while using qualified immunity as a shield.¹⁵

This Note will discuss how qualified immunity has morphed into a weapon used to infringe on people’s First Amendment rights, specifically dealing with the police and the First Amendment right to record. Part I discusses the differences between one-party and two-party consent. Part II explores different cases from different circuits and how they decided each case as it relates to qualified immunity and the First Amendment right to record the police. Part III discusses how qualified immunity restricts the First Amendment right to protest. Part IV explores solutions to the difficulty of overcoming the burden to the defense of qualified immunity.

I. TWO-PARTY CONSENT VS. ONE-PARTY CONSENT

Before delving into the First Amendment and the right to record the police, it is important to note that different states follow different consent laws for recording

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⁹ Compare Fields v. City of Phila., 862 F.3d 353 (3d Cir. 2017), with Frasier v. Evans, 992 F.3d 1003, 1021 (10th Cir. 2021) (where Fields holds that the public has a right to record the police and Frasier holds that qualified immunity applies).


¹¹ Dodd, supra note 10.

¹² Id.

¹³ See John Guzman, Five Times Police Used Qualified Immunity to Get Away with Misconduct and Violence, LEGAL DEF. FUND (Nov. 21, 2021), https://www.naacpldf.org/qi-police-misconduct/.

¹⁴ See generally Dodd, supra note 10 (explaining that “if courts refuse to resolve legal claims because the law was not clearly established, then the law will never become clearly established.”).

¹⁵ See id. at 11 (discussing the Jessop v. City of Fresno case).
individuals with or without their knowledge. While each state’s statutes have their laws written differently, it is easiest to consider the states to have one of two consent laws: one-party or two-party. A one-party consent state only requires that one party in the conversation knows that they are being recorded. A two-party consent state, also known as all-party consent, requires everyone on the recording to know that they are being recorded. Ten states still follow the two-party consent laws, while thirty-eight states, D.C., and federal law require only one-party consent. Two states follow a mix between the two. This distinction is important because officers in two-party consent states can still bring up the defense of two-party consent when arguing about the right to record the police, especially when it’s a hidden recording. However, the one-party consent laws do not violate free speech under the First Amendment. Under the First Amendment, one generally has a right to speak freely without interference from the government. Here, the person being recorded still has the ability to speak freely, with no abridgment despite the recording, because a person could transcribe the conversation after it ended, and a recording is merely a more accurate depiction of events. Whether or not someone records the conversation does not prohibit other people from saying what they want to say.

II. Police Officers Under Qualified Immunity

Before beginning, it is important to note that qualified immunity protects many police officers in the way it was intended, which was to allow police officers to carry out their official duties without fear of being sued. The alleged public policy rationale behind qualified immunity is that police officers would not be able to do their jobs if they were worried about being sued, and the argument certainly has merit. However, some police officers use qualified immunity to be unethical and suppress people’s ability to speak for what they believe in, and it is a much larger threat than many people realize.

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17 See id.
18 Id. at 1.
19 Id. at 2.
20 Id. at 1.
21 Id.
22 See, e.g., Project of Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020).
23 See, e.g., Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982) (holding that allows the knowledge of only one party in order to record a conversation).
24 U.S. CONST. amend. I.
25 Sullivan, 324 N.W.2d at 60.
27 Id.
28 See generally Schweikert, supra note 3.
A prime example is *Fields v. City of Philadelphia*, where the Third Circuit Court of Appeals held that bystanders and plaintiffs do have a First Amendment right to record the police. In *Fields*, the court analyzed the First Amendment claim in depth, even though current Supreme Court precedent did not require courts to analyze the constitutional claim first. After passing up the issue three separate times, the Third Circuit finally decided to rule on the issue. The district court held that both of the plaintiff's activities were not covered by the First Amendment and declined to decide on the issue of qualified immunity. The Court of Appeals for the Third Circuit recognized the First Amendment right to “protect[] the public's right of access to information about their official's public activities,” which includes holding officials accountable by recording them. The court further acknowledged that the “proliferation of bystander videos has 'spurred action at all levels of government to address police misconduct and to protect civil rights.'” It also noted that activities recorded by citizens protects the officers as well, as it can exonerate them from false claims of misconduct or wrongdoing. The court in *Fields* relied heavily on *Glik v. Cunniffe* (discussed below) to support its holding that people do enjoy a First Amendment right to record the police. The Third Circuit’s analysis of the First Amendment as it applies to this case and the right to record the police is concrete and well supported.

The First, Fifth, Seventh, Ninth, and Eleventh Circuits have issued similar opinions over a timeline of twenty-six years. In *Glik v. Cunniffe*, decided in 2011, the First Circuit granted the right for citizens to record the police despite a wiretap law. The plaintiff in this case was arrested by a police officer for recording the officer acting in his official capacity, and the First Circuit found the arrest unlawful. The Seventh Circuit followed suit in *ACLU v. Alvarez* in 2012, adding to the Ninth Circuit’s decision in *Fordyce v. City of Seattle* in 1995 and the Eleventh Circuit’s decision in *Smith v. City of Cumming* in 2000.

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29 See 862 F.3d 353, 360 (3d Cir. 2017).
30 See id. at 357–60.
31 See id. at 357.
32 See id.
33 Id. at 359.
34 Id. at 360.
35 Id.
36 See id.
37 See generally id. at 358–60. The analysis done by the court in this case is well thought out.
39 Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).
40 Id.
41 See 679 F.3d 583 (7th Cir. 2012).
42 See 55 F.3d 436 (9th Cir. 1995).
43 See 212 F.3d 1332 (11th Cir. 2000).
A. The Tenth Circuit

The Tenth Circuit recently dodged the First Amendment question in Frasier v. Evans in 2021. In this case, officers repeatedly punched an apprehended suspect in the face six times to get alleged drugs out of his mouth, while another officer grabbed the ankle of a screaming female and “pulled her off her feet.” The entire incident was recorded by Levi Frasier. The Tenth Circuit held that the plaintiff’s potential constitutional challenges were not an issue because the officers were covered under qualified immunity. As precedent reads under the Pearson holding, the court was able to choose to not analyze the First Amendment claim of the right to record the police because the court determined first that they had qualified immunity. Frasier set a dangerous precedent going forward because it broke the trend of courts establishing a First Amendment right to record the police.

Mr. Frasier recorded the arrest and then lied to the police when they asked if he had recorded the arrest due to fear of retaliation. The officers then intimidated and threatened Frasier until he produced the video. The court held that qualified immunity requires an objective standard and not a subjective standard. An objective standard is based on what a reasonable person would know, versus a subjective standard of what the officer intended. The Frasier court elected to use an objective test to determine if qualified immunity would stand as an adequate defense to the conduct of the officers.

Here, the officers testified in the district court that all five of the charged officers were aware of the police department’s policy that stated that the public did have a right to record the police. However, the department policy acknowledging the public’s right to record the police was not supported by judicial precedent. Based on this information, the district court decided that the officers’ testimony confirming that they knew about the department policy was enough to overcome the second prong of the Saucier test proving that qualified immunity should not be

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44 Since this paper was written, the tenth circuit has reversed its opinion in Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022). However, the second, sixth, eighth, and D.C. circuit courts still do not have First Amendment right to record the police. See Molina v. City of St. Louis, 59 F.4th 334 (8th Cir. 2023), which directly quotes relevant analysis from the Frasier case in its holding.
45 See 992 F.3d 1003, 1021–22 (10th Cir. 2021).
46 Id. at 1010.
47 Id.
48 See id. at 1009.
49 See id. at 1033 (quoting Pearson v. Callahan, 555 U.S. 223, 232 (2009)).
50 See id. at 1003.
51 Id. at 1010.
52 Id. at 1011.
53 Id. at 1015.
54 See id. at 1016 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
55 Id. at 1015.
56 Id. at 1012.
57 Id.
granted in this case. 58 Pearson allowed the court to skip the first prong of the Saucier test on evaluating the constitutionality of the claim and skip to the second prong of establishing whether the law was clearly established. 59 However, the court of appeals, relying on Supreme Court precedent in the Harlow case, 60 overturned and held that it did not matter that the officers had knowledge that what they were doing was wrong, it only mattered that there was no clear judicial precedent to support that the First Amendment right to record the police was clearly established at the time this event occurred. 61 Thus, because there was no clearly established precedent regarding the right to record police, the officers objectively could not have known that Frasier had such a right according to the Tenth Circuit. 62 Frasier attempted to argue that it was clearly established for two reasons: (1) the general language of the First Amendment, and (2) the weight of authority from other circuit courts holding that people did have a First Amendment right to record the police. 63 The court struck down Frasier’s first argument, citing Supreme Court precedent ruling against “defining clearly established rights at a high level of generality.” 64 As to the second point, the court pointed to major differences in the opinions of the four cases cited 65 and held that the differences did not create a clear weight of authority for them to apply it in Frasier's case. 66

The court’s holding in Frasier is a major setback in protecting people’s First Amendment right to record the police. 67 Not only did the officers in Frasier brutalize the suspect, but they also threatened and intimidated Frasier after he recorded the interaction and suffered no repercussions for their infringement. 68 The analysis in this case is frightening because it allows police officers to disregard official police department policy, leaving citizens to question what other clearly established department policies police officers can violate. Despite a clear policy and all five officers admitting they knew Frasier had a right to record them, the court still decided against the victim, giving Tenth Circuit police officers carte blanche power to disobey rules and regulations of their police department. 69 This opens the door for other circuits to follow the Tenth Circuit’s decision instead of following the other five precedents upholding the First Amendment right to record the police. This threatening analysis allows police officers to infringe on potentially countless other rights so long as there is no clearly established law to hold them accountable.

58 Id.
61 Frasier, 992 F.3d at 1015.
62 Id.
63 Id. at 1020.
64 Id. at 1021.
65 Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012), Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995), Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000).
66 Frasier, 992 F.3d at 1021.
67 It also weakened the protection of other constitutional amendments such as the Fourth Amendment.
68 See id. at 1010.
69 See id. At 1012.
The remaining circuits do not have clear precedent on this issue but usually operate with an unspoken rule of allowing citizens to record the police. The lack of a uniform law or uniform precedent leaves open the potential for a decision like Frasier, which leaves the protection of the First Amendment unstable at best. Before these holdings, many states had a two-party consent rule, allowing police officers to arrest citizens for videotaping them without their consent. Worried that such laws were operating as a First Amendment violation, more than half the states have changed to one-party consent laws and opened the door for courts to hold that there is a First Amendment right to record the police. Cases that analyze cases of qualified immunity such as Frasier creates a new fear about suppression of First Amendment protections, especially if the victim is from a marginalized community, is afraid of retaliation, or does not have the resources to file a lawsuit. In jurisdictions without concrete holdings, the ability to exercise the First Amendment right to record the police remains unconfirmed and leaves citizens vulnerable to abuse by police officers who have no fear of being recorded or suffering the consequences of their actions. The fear of retaliation by the police can be a powerful tool in dissuading people from documenting wrongful actions, leaving police officers’ actions largely unregulated.

B. The Third Circuit in Fields

Although the Third Circuit Court of Appeals found that citizens have a First Amendment right to record the police, it should have gone further in the Fields v. City of Philadelphia case. It arguably reached the wrong conclusion on deciding the officers were protected by qualified immunity in this case.

i. The Facts

This case involves two plaintiffs: Amanda Geraci and Richard Fields. Amanda Geraci was involved with a police watchdog group and attended an anti
fracking protest at the Philadelphia Convention Center.\textsuperscript{80} She had a camera and a pink bandana which identified her as a legal observer of the protest.\textsuperscript{81} While respectfully keeping her distance, she recorded an arrest and, despite her bandana, an officer pushed and “pinned her against a pillar for one to three minutes” resulting in no recording of the event.\textsuperscript{82}

Richard Fields was a student at Temple University who took a picture of officers breaking up a house party from the public sidewalk.\textsuperscript{83} Upon observing him take a picture, an officer asked him to leave, and he refused, which resulted in his arrest, detention, and confiscation of his cell phone.\textsuperscript{84} Not only did the police confiscate his phone, but they also searched the phone, opening several videos and photos.\textsuperscript{85} At the very least, the officers committed a gross invasion of privacy by searching through his phone.

ii. The Analysis

In \textit{Fields}, the officers were granted the protection of qualified immunity even with the court establishing a First Amendment right to record the police.\textsuperscript{86} The police officers being granted qualified immunity in this instance is a gross miscarriage of justice. They prohibited Geraci from ensuring the police were acting legally, in violation of the First Amendment and blatantly interfered with the sole reason she was there.\textsuperscript{87} Geraci had a legal right to be there, and the officer acted outside the scope of his duties and suppressed her First Amendment right, regardless of the fact she was clearly and correctly identified via the pink armband she was wearing.\textsuperscript{88} The court reiterated throughout the holding that citizens do not necessarily enjoy this right if they interfere with official police business or hinder the ability of the officers doing their jobs.\textsuperscript{89} This portion of its analysis is understandable, as interference could result in deadly consequences for both officers and bystanders. However, the facts clearly state that the journalist was in no way interfering with the officer, nor was she in the immediate vicinity of the arrest.\textsuperscript{90} Neither was Fields, who testified he just wanted to “take a cool picture” of the scene when the officer illegally took his phone, searched through it, and issued him a citation.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{See id. at 362.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{See id. at 360.}
\item \textsuperscript{90} \textit{Id} at 356.
\item \textsuperscript{91} \textit{Id. at 357.}
\end{itemize}
The court began the qualified immunity argument by skipping the first prong, as allowed by Pearson, and analyzing the second prong that the officers have to violate a “so clearly established” law that “every reasonable official would know that what they were doing violated that right.” The Third Circuit briefly mentioned that, if there was clear precedent surrounding the issue of recognizing the First Amendment right to record the police, then it would not be bound to this particular way of analyzing the case. However, the court did not feel comfortable being the first to rule in this area, as many courts are, which is detailed by the painfully slow rate these cases are being decided. This seems like taking the “easy way out,” which, ironically, the court expressly notes in the beginning of the decision it did not want to do. This way of analyzing qualified immunity is archaic and needs reform. It binds courts from setting new precedent because the burden to do so is so high, and they are wary about being overturned by a higher court.

The court continued its analysis by explaining that this situation did not overcome the “every reasonable officer” burden. The policy advisor to the police commissioner testified that “the officers didn’t understand that there was a constitutional right to record.” This argument would make it so the burden of proving an official does not have immunity is nearly impossible to overcome if the court accepted it, as seen in Frasier. There will always be someone who does not understand, or someone who is purposefully ignorant to the law and policies. Police officers should be required to uphold the law, as they are the ones who enforce it, although they should not be judged with twenty-twenty hindsight. The advisor contended that, beyond the department’s policies, the officer did not understand that the plaintiffs had a protected First Amendment right to record. This would imply that officers are not required to uphold their internal policies, and, if officers are not held accountable for violating such policies, it gives them an alarming amount of power and ability to act without any fear of consequences.

The facts in Fields make it nearly impossible to understand how the Third Circuit held the officers reasonably did not know that people had a right to record

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92 Id. at 360–61.
93 Id.
94 Compare Fordyce v. City of Seattle, 55 F.3d 436, 436 (9th Cir. 1995), with Fields, 862 F.3d at 353 (showing that Fordyce was decided in 1995 and Fields was decided in 2017).
95 See Fields, 862 F.3d at 357.
97 Fields, 862 F.3d at 361.
98 Id.
99 See id.
100 See Schweikert, supra note 3, at 18 (describing that qualified immunity is necessary when police officers act objectively reasonable under the circumstances).
101 Fields, 862 F.3d at 361.
the police.\textsuperscript{102} The facts in \textit{Frasier}, by the testimony of the officers that they all knew the plaintiff could record them, also makes it impossible to understand why the Tenth Circuit granted the officers qualified immunity.\textsuperscript{103} Over a span of four years, the officers received multiple notices and trainings to ensure they understood that citizens had a protected First Amendment right to record them.\textsuperscript{104} In 2011, the department published a memorandum “advising officers not to interfere with a private citizen’s recording of police activity because it was protected by the First Amendment.”\textsuperscript{105} Then, in 2012, it “published an official directive” reminding police officers that citizens were guaranteed the First Amendment right to record the police.\textsuperscript{106} Not to mention, the memo and the directive were “read to police officers during roll call for three straight days.”\textsuperscript{107} Finally in 2014, after the events that transpired in the case, officers completed a mandatory formal training program to ensure they ceased retaliating against citizens for engaging in their First Amendment right to record.\textsuperscript{108} After all of this, the court still held that it was likely that not every single officer was aware of the policy.\textsuperscript{109} The court argued that, since there was no official case law, as it passed on the opportunity to create it in \textit{Giles, Kelley, and True Blue Auctions},\textsuperscript{110} the officers could not be on notice that they legally had to abide by the department policy.\textsuperscript{111} But, as stated at the beginning of the case, the court was not looking to take the easy way out; although it certainly seems it did.\textsuperscript{112} This is similar to the reasoning presented in the \textit{Frasier} case, that the court cannot say the officers reasonably knew of the policy, even though it was decided four years later.\textsuperscript{113} The reasoning by the court in the qualified immunity portion of the \textit{Fields} case is astonishing and leaves a gap for police departments to continue to argue that every officer was not aware of certain internal policies.\textsuperscript{114} It creates a loophole for police officers to violate citizens’ First Amendment right to record the police. Even though the end result was favorable to establishing the First Amendment right to record the police, it can be argued that the court did not create clear precedent, as seen by the Tenth Circuit’s analysis.\textsuperscript{115} Without a uniform decision creating precedent, cases like \textit{Frasier} will continue to be unfavorably

\textsuperscript{102} See id.
\textsuperscript{103} See Frasier, 992 F.3d at 1015.
\textsuperscript{104} Fields, 862 F.3d at 356.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 362.
\textsuperscript{110} See id. (explaining that the cases listed are not precedent because they never decided the First Amendment claims as they related to recording the police).
\textsuperscript{111} Id.
\textsuperscript{112} See Fields, 862 F.3d at 357.
\textsuperscript{113} See Frasier v. Evans, 992 F.3d 1003, 1003 (10th Cir. 2021).
\textsuperscript{114} See generally id. at 1003 (where this fear came to fruition by the Tenth Circuit decision).
\textsuperscript{115} See id. at 1023 (using the reasonableness standard cited by the \textit{Fields} court).
decided, and the First Amendment right to record the police will continue to be infringed upon.

C. The First Circuit

While the Third and Tenth Circuits chose to remain in the archaic world of using qualified immunity as a shield for police officers to abuse their power and avoid accountability for violating the First Amendment, the First Circuit took a proactive approach toward protecting citizens’ First Amendment right to record the police, first in Glik,\(^{116}\) then in *Project Veritas Action Fund v. Rollins*.\(^ {117}\) Massachusetts passed a law that stated that one could not record someone without the recording device being visible, even if the person being recorded did not have a reasonable expectation of privacy,\(^ {118}\) for example, a police officer carrying out his official duties on a public street.\(^ {119}\) Here, the First Circuit struck down the law and held that someone may secretly record interactions with the police.\(^ {120}\) The First Circuit established that the ability to record the police was cemented in the First Amendment due to the many cited cases of retaliation against people for recording the police.\(^ {121}\) The court was worried about the exact interaction that happened in *Fields*\(^ {122}\) and *Frasier*,\(^ {123}\) where an officer saw someone recording and retaliated against the person in the form of physical, mental, or legal consequences.\(^ {124}\) The First Circuit was the first court to hold that secretly recording the police constitutes a legal recording.\(^ {125}\)

III. PROTESTS AND THE POLICE

A. Rodney King

One of the most infamous incidents that sparked the debate about the First Amendment right to record the police was Rodney King.\(^ {126}\) Rodney King was subjected to vicious police brutality after being caught evading the police and suffered intense injuries as a result of officers continuing to beat him far after he

116 Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).
117 982 F.3d 813, 817 (1st Cir. 2020).
118 MASS. ANN. LAWS ch. 272, § 99 (LexisNexis, LEXIS 1998).
119 *Project Veritas Action Fund*, 982 F.3d at 817.
120 Id.
121 Id. at 840.
122 See *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) (where the officer pushed the first plaintiff and arrested the second).
123 See *Frasier v. Evans*, 992 F.3d 1003, 1008 (10th Cir. 2021) (where a police officer retaliated against a civilian recording him).
124 *Project Veritas Action Fund*, 982 F.3d at 840.
125 See id. at 832.
was able to resist arrest.\textsuperscript{127} The person who recorded the video sent it to the press, causing it to be one of the first viral videos documenting police officers abusing their power.\textsuperscript{128} The video showed one officer supervising while three officers beating Mr. King “over fifty-three times and kicking him seven times” in a savage, uncontrolled manner.\textsuperscript{129} The jury acquitted all defendants except one, whose trial resulted in a hung jury.\textsuperscript{130}

The acquittal of the four white officers led to riots that killed more than sixty people and, depending on the source, injured anywhere between two thousand to seven thousand people.\textsuperscript{131} Without the recording of the beating Mr. King suffered, it is likely he would have been silenced and charged with felony drunk driving, and the cycle of police brutality would have continued uninterrupted.\textsuperscript{132} However, this videotape of the police was the first of its kind, and the question of whether it was legal to record the police began to rise.\textsuperscript{133}

B. The Ninth Circuit

The case was so publicized that no charges were filed against Mr. King, likely due to the high publicity, and the video evidence of the brutality.\textsuperscript{134} The Rodney King protests happened in 1992, and the Ninth Circuit became the first circuit in 1995 to hold that people had a guaranteed First Amendment right to record the police.\textsuperscript{135} It is easy to surmise that the King video exposed this injustice to the nation and served as a catalyst for the Ninth Circuit to hold a person has a First Amendment right to record the police just three years later. This began the process of enabling people to invoke their First Amendment right to record the police, a process that is still ongoing.

The Ninth Circuit established the constitutional right to record the police in \textit{Fordyce v. City of Seattle}.\textsuperscript{136} This case arose when police interfered with Jerry Edmon Fordyce’s attempt to videotape a public protest.\textsuperscript{137} Fordyce was later arrested for videotaping unwilling bystanders, though his criminal case was dismissed.\textsuperscript{138} The Ninth Circuit reversed the grant of summary judgment against

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 516–23.
\item \textsuperscript{129} Levenson, supra note 126, at 516.
\item \textsuperscript{130} \textit{Id.} at 527.
\item \textsuperscript{131} \textit{Riots Erupt in Los Angeles}, supra note 128.
\item \textsuperscript{132} See Levenson, supra note 126, at 524.
\item \textsuperscript{133} See Sanfiorenzo, supra note 128.
\item \textsuperscript{134} See LAPD officers beat Rodney King on camera, HISTORY.COM (March 2, 2021), https://www.history.com/this-day-in-history/police-brutality-caught-on-video.
\item \textsuperscript{135} See Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.} at 438.
\item \textsuperscript{138} \textit{Id.}
Fordyce in the civil suit he brought against the officer for violating his First Amendment right.139

C. Recent Wave of Black Lives Matter Protests

i. Balin Brake

The power of qualified immunity has impacted many protests, most recently the wave of protests that followed the murder of George Floyd, which instigated a surge of Black Lives Matter (BLM) protests.140 Many of the interactions between BLM protestors and police were captured on camera by other protestors and undermine what both the police and the city claimed happened during any given BLM protest by bystanders.141 One example of this is Balin Brake, a BLM protestor in Fort Wayne, Indiana, who lost his eye in a protest and took to Twitter to explain his side of the story.142 According to Brake, a tear gas canister thrown at him exploded, and the shrapnel punctured his eye.143 Fort Wayne Police, after listening to the account of the police officer who fired the tear gas canister, released a press statement claiming that Brake was attempting to throw the canister back at the police when another canister skipped and hit his eye.144 They explained his protest shifted away from being peaceful when he picked up the canister.145 Luckily for Brake, camera footage that clearly showed Brake standing still when a tear gas canister hit him in his eye, causing him to permanently lose vision.146 Brake was not engaged in an unpeaceful protest as the police departments claimed rather, he was exercising his First Amendment constitutional right to protest and speak for what he believed in by protesting.147 Without this camera footage, Brake would most likely be facing legal battles as a defendant instead of a plaintiff, even though his constitutional rights were violated.148 Brake has since filed a lawsuit against the city and the unidentified police officer who shot the canister into the crowd.149 The camera footage exposed the police department for misconstruing the truth and

139 Id. at 439.
141 See, e.g., id.
144 Moore, supra note 140.
145 Id.
146 Id.
147 See id. (The videos confirmed that the canister hit Brake in the eye while he was standing straight and not bent over.).
148 See id. (explaining that Brake, with the help of the ACLU, filed a civil lawsuit).
hopefully opened the public’s eyes to the possibility that there may be many more undocumented instances of constitutional violations.

ii. The Seventh Circuit

Unfortunately, this story may stop other people from protesting. It is alarming to think that a person could be brutalized by the police, and there may be no camera footage around to exonerate the person and ensure it does not happen again. In Brake’s case, without the recording and the Seventh Circuit’s protection of the First Amendment right to record the police, he could be facing criminal charges.150

In ACLU v. Alvarez, the court issued a preliminarily injunction against Illinois’s eavesdropping statute as applied to police officers against people who openly record officers in their official capacity.151 The district court proceeded with caution, dismissing the claim due to precedent set in the seventh circuit regarding the lack of protection by the First Amendment to audio recordings.152 On appeal, the court held that the statute restricted far more speech than necessary and likely violated the First Amendment and reversed and remanded, ordering a preliminary injunction blocking the statute as applied to audio recording the police.153

While Brake just filed his lawsuit, it is not an impractical assumption that the officer will claim qualified immunity and, based on previous case law of courts being reluctant to allow subjective intent,154 the officer will likely win.155 Allowing this police officer to benefit from qualified immunity will have a chilling effect on free speech. It will likely deter people from attending protests and engaging in their protected First Amendment right to free speech. It leads America towards an authoritative state run by the police, where the right to free speech will continue to be violated with no option for recourse by the victim.

The point of the First Amendment is not to be afraid to say what you believe, but also to be protected while saying it. Brake is one of many protestors who were injured by the police during the wave of BLM protests and one of eight who actually lost vision in an eye related to police misconduct.156 When people read newspapers or see the violent videos posted online about police misconduct, it can make them scared to participate in First Amendment protected activities, but it can also bring about a call to action from people by eliciting strong emotions from what they are

150 See ACLU of Ill. V. Alvarez, 679 F.3d 583, 586–87 (7th Cir. 2012).
151 Id. at 586.
152 Id.
153 Id. at 586–87.
154 See Frasier, 992 F.3d at 1016 (relying on Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
155 See id. at 1015 (10th Cir. 2021) (holding that a reasonable officer would not have known that Frasier had a First Amendment right to record).
seeing. The ability to safely document police interactions is important to guaranteeing protection from the ones whose job it is to protect and serve. Free speech is most vulnerable to being chilled when officers are not held accountable for their abusive actions because of qualified immunity, perpetuating the cycle of police brutality and fear of speaking against the police.\footnote{See The Learning Network, What Students Are Saying About the George Floyd Protests, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2020/06/04/learning/what-students-are-saying-about-the-george-floyd-protests.html.}

\textbf{D. The Eighth Circuit}

However, there are documented instances where qualified immunity does not apply and victims are able to seek justice.\footnote{See generally Frasier, 992 F.3d (finding qualified immunity for officers who retaliated against bystander that recorded them).} In \textit{Burbridge v. City of St. Louis}, the Eighth Circuit Court of Appeals held that a First Amendment retaliation claim was not barred by qualified immunity.\footnote{See David L. Hudson Jr., 8th Circuit Allows Excessive-Force, First Amendment Retaliation Claims to Proceed Against Policeman, THE FREE SPEECH CTR. (July 9, 2021), https://mtsu.edu/first-amendment/post/1963/8th-circuit-allows-excessive-force-first-amendment-retaliation-claims-to-proceed-against-policeman.} The victim, Drew Burbridge, was a documentary filmmaker who was covering the protests that erupted after a police officer was found not guilty in the death of Anthony Lamar Smith.\footnote{Id.} A dispersal order was issued but Mr. and Mrs. Burbridge failed to hear it and remained in the area.\footnote{Id.} One of the officers used pepper spray on Mr. Burbridge twice and struck him several times.\footnote{Id.} The court held that a reasonable factfinder could determine that Biggins used excessive force in retaliation of Mr. Burbridge engaging in his protected First Amendment activity.\footnote{See id.}

Outcomes like this case are in the minority and usually end with a police officer being granted qualified immunity.\footnote{See, e.g., Frasier v. Evans, 992 F.3d 1003, 1023 (10th Cir. 2021).} In this case, not being able to hear seems distinctly familiar to the reasoning in \textit{Fields} to grant the officers immunity because it is possible that not every officer knew of the rule.\footnote{See Fields v. City of Philadelphia, 862 F.3d 353, 362 (3d Cir. 2017).} So, while the Burbridges may ultimately get justice, Mr. Burbridge still had to suffer the injustice of assault while exercising his First Amendment right to free speech and had to engage in a lawsuit to receive a fair outcome.\footnote{See Hudson, supra note 159.} His documentaries were his career and his way to express his views, and, had the officer been granted qualified immunity, it would have been an alarming precedent set for future excessive force and retaliation claims involving the First Amendment.
E. The Law is Slow

Allowing people to record the police protects First Amendment rights to an extent but is not a safeguard for everything, as was seen in the recent BLM protests. In the past, police have used violence to break up protests and have been protected by qualified immunity. For a concept that was created less than a century ago, the police firmly believe they cannot do their job effectively without it.

Police officers did their jobs long before qualified immunity was introduced by the Supreme Court in 1967. Not surprisingly, police officers and police unions are the biggest supporters of retaining the doctrine of qualified immunity. In fact, a majority of the public favors getting rid of qualified immunity according to a recent Pew Research Center poll. The poll found that sixty-six percent of Americans favor ending qualified immunity, even though only twenty-six percent of Americans felt that spending on police should be cut, as reflected in Image 1 and Image 2 in the Appendix. This suggests that many of the Americans answering this poll do not have a problem with the police but instead have a problem with the doctrine of qualified immunity. The probability that rights will be squandered by the doctrine of qualified immunity, as applied now, outweighs the good that the doctrine was initially enacted to do, which was protect police officers actually acting within the scope of their employment.

IV. WHAT CAN BE DONE?

A. Support is Falling

It should come as no surprise that the biggest supporters of the doctrine of qualified immunity are the people that benefit most from it: the police and their unions. As mentioned above and displayed in Image 2, sixty-six percent of

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168 See Guzman, supra note 13.
170 See generally Schweikert, supra note 3, at 18 (explaining that officers must make split-second decisions and sometimes need the protection).
172 See Schweikert, supra note 3, at 17 (explaining that unions are against indemnification, alluding to the fact that they want to keep qualified immunity to stop cases from going to trial).
174 Id.
175 See id.
177 See Schweikert, supra note 3, at 17.
178 See APPENDIX.
Americans support the idea that police officers should not have qualified immunity. Based on the results of the Pew Research Center, it is safe to assume a majority of Americans want to reform qualified immunity as it relates to police officers and, more specifically, the right to record police officers. Like all things political, repealing the doctrine of qualified immunity is partisan, and support varies by race; however, it is not inaccurate to surmise that support is decreasing on all sides. According to Image 3, support has decreased in thinking that officers are being appropriately held accountable for police misconduct. This is also much more than a race issue; white support fell dramatically from fifty percent to thirty-four percent, and overall support fell from forty-four percent to thirty-one percent from 2016 to 2020. Black support was already low, dropping from twenty-one percent to just twelve percent. This is an alarmingly low percentage of people who think police officers are held accountable for wrongdoing.

B. Solutions

One way to remedy this doctrine is to make the burden on the victim easier to overcome. The burden established in Saucier, and confirmed in Pearson, that there must be clear and convincing precedent to overcome qualified immunity is often too difficult to attain, especially when a possible constitutional violation is being claimed. The doctrine was supposed to protect honest police officers who wanted to be able to perform only their job functions without fear of being sued. Now, some police officers hide behind the doctrine and use it as an excuse to justify illegal activity in the eyes of the law. Not to mention, this young doctrine, around sixty years old, only gained protection from judicial law and not with the intent of the legislatures in mind. However, as stated, it does have a legitimate purpose for those who use it correctly. Therefore, the main solution proposed by this Note is to make it easier for the plaintiff to overcome the burden and charge the police officer. Cases, like the ones mentioned previously in this Note, should be able to proceed to trial, or at least

180 See id.
181 See id.
182 See APPENDIX.
184 See id.
185 See id.
186 See Pearson v. Callahan, 555 U.S. 223, 227 (10th Cir. 2009); Saucier v. Katz, 533 U.S. 194, 201 (9th Cir. 2001).
187 See Nat’l Conf. of State Legislatures, supra note 176.
188 See Guzman supra, note 13.
189 See generally, Pierson, 386 U.S. 547 (1967) (the first court case where qualified immunity was established).
190 See Schweikert, supra note 3, at 18.
to a spot where they can settle.\textsuperscript{191} The doctrine of qualified immunity being used to suppress a constitutional right is frankly un-American and goes against everything that the founding fathers tried to dissuade with the Constitution and the Bill of Rights. The doctrine is only supposed to protect officers acting in their official capacity as peacekeepers, not to protect them from constitutional violations.\textsuperscript{192} It should not be this controversial or difficult to overcome the burden of defeating qualified immunity and to confirm the ability to record the police is a First Amendment right.

\textbf{C. Attempts to Amend the Blanket of Qualified Immunity}

Republican Senator Mike Braun, from Indiana, introduced the Reforming Qualified Immunity Act on June 23, 2020.\textsuperscript{193} The new act would only allow protections if: “(1) [c]onduct alleged to be unlawful had previously been authorized or required by federal or state statute or regulation[, or] (2) [a] court had found that alleged unlawful conduct was consistent with the Constitution and federal laws.”\textsuperscript{194} Braun’s proposition did not get passed.\textsuperscript{195} Braun got heavy pushback from the Indiana State Police Alliance and the National Fraternal Order of Police (FOP) after Braun stated that the organizations supported his bill.\textsuperscript{196} The State FOP President William Owensby stated there is no conversation about qualified immunity reform that is “worthy or a discussion.”.\textsuperscript{197} The police unions, so far, have been successful in their efforts to halt qualified immunity reform due to multifaceted lobbying.\textsuperscript{198} However, with the recent push for police accountability, the increased use of body cameras, and the ability for most citizens to record police interactions, court precedent may begin to sway towards being more cautious in applying the doctrine, although it was not enough to persuade the court in \textit{Frasier}.\textsuperscript{199}

\textsuperscript{191} \textit{See id.} at 9 (explaining that settlement is usually under less favorable terms than desired by plaintiffs).
\textsuperscript{192} \textit{See generally id.} (describing how qualified immunity is being abused).
\textsuperscript{194} \textit{Id.}
\textsuperscript{196} \textit{See id.} (They both issued statements specifically noting that they do not support the proposed legislation.).
\textsuperscript{197} \textit{See id.}
\textsuperscript{199} \textit{See generally Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021) (holding officers had qualified immunity).}
D. The State of Colorado’s Approach to Amend Blanket Immunity

Victims cannot wait for the stagnant action of the judicial process to protect them. Something needs to be done about qualified immunity now, which is exactly what has happened in Colorado. Colorado passed SB20-217: Enhance Law Enforcement Integrity, which effectively allows Coloradans to sue police officers in state court if the officers violate the Colorado Bill of Rights. This Act will take effect on July 1, 2023, for state claims but does not prohibit the use of qualified immunity under federal claims. If found liable in civil state court, the police officers would be indemnified by their employers, meaning that they will not have to pay the damages themselves. This was in response to the opposition’s arguments that police officers could go into financial ruin if held liable for a large amount of money. It also ensures victims would get their monetary reward if the officer could not pay or subsequently filed bankruptcy.

However, there is a caveat. If the officers “did not act upon a good faith and reasonable belief that the action was lawful” or were criminally convicted for conduct that triggered the civil rights lawsuit,” then they will be personally liable for five percent of the damages, capped at $25,000. This holds officers to a higher standard and allows the victims to recover the damages they are owed. This new law ensures not only that law-abiding officers are not fearful of doing their jobs but holds all police officers accountable for their actions if they engage in gross misconduct. This will allow people not to be wary of attending events like protests and other ways to exercise their freedom of speech. And, if an officer attempts to infringe on their rights, they can take them to court to get a legal remedy to repair the damage that has been done (or as repaired as a person can be after they have experienced any type of traumatic situation and/or physical harm).

This new law could have been in response to the Tenth Circuit’s holding in Frasier, especially since Colorado is in the Tenth Circuit, and it will hold police officers accountable even when the federal court might not. It is unclear if Colorado will include the First Amendment right to record the police under the

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200 See Schweikert, supra note 3, at 1 (explaining that victims are left without remedy).
202 Sibilla, supra note 201.
203 Id.; see also § 18(1), 2020 Colo. Sess. Laws at 461.
204 Sibilla, supra note 201.
205 See id.
206 See id.
207 Id.
208 See id.
209 Id.
210 See Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021).
state’s First Amendment, but it seems likely since it has gone to great lengths to ensure officer accountability with the passage of SB20-217.

Critics were fearful that Colorado would lose cadets and police officers with the enactment of this new law. Critics were fearful that Colorado would lose cadets and police officers with the enactment of this new law. Opponents of the bill hypothesized a sense of anarchy would ensue and police power diminishing to a point that they cannot effectively do their job. Many officers will not mind, just as most officers do not mind body cameras as they often clear officers of allegations of misconduct. All the police officers that have not hidden behind the doctrine of qualified immunity, and have not used it as a tool to wreak havoc, will not be affected by the passage of this bill. However, this law has not been put into effect yet, so more conclusive data will have to be gathered after the bill is enacted to evaluate how it affects the police.

Colorado’s new law allows protections for police officers to act within the scope of their employment but is not as drastic as what Mike Braun introduced in Congress. In an ideal world, Colorado’s law would be enacted at the federal level and include all government officials protected by qualified immunity, not just police officers. In SB20-217, Colorado’s law elected not to include other government officials outside of police officers in this modification of the qualified immunity doctrine. As a perfect solution, SB20-217 would not only cover police officers but all government officials at a state and national level. If enacted at a federal level, it would create a uniform law that all federal courts would be bound to follow. But the world is not perfect, and the bill only covers police officers. This is likely due to the current political climate and concessions that needed to be made to even include police officers. This is a step in the right direction, but to get to an America where qualified immunity does not infringe on First Amendment rights, an entire staircase must be built. While the trend was looking promising, the outcome in the recent Frasier case has taken America a major step backwards.

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211 See generally, Survey Outlines Challenges, Opportunities for Colorado Law Enforcement, PUB. SAFETY COLO. (Mar. 8, 2021), https://www.publicsafetycolorado.com/pressreleases/blog-post-title-one-aykb-gddpp4-h9xyx (results from a survey issued to Colorado police officers cited that 65% of officers leaving the force had concerns about Senate Bill 20-217 amongst other reasons).

212 See Leigh Paterson & Scott Franz, Following a Tough Year, Some Colorado Departments Lose Officers and Struggle to Hire, KUNC (Sept. 1, 2021, 2:00 PM), https://www.kunc.org/news/2021-09-01/following-a-tough-year-some-colorado-departments-lose-officers-and-struggle-to-hire (explaining that Colorado’s new law may not be contribution to the attrition).

213 See generally, id. (An officer discusses that one of the three reasons he left Colorado’s police force was because of the new police reform legislation.)


215 See generally, Schweikert, supra note 3, at 3 (explaining that indemnification protects almost all police officers in civil cases).


217 See Knobeloch, supra note 195.

218 Sibilla, supra note 201.

219 Id.

220 See Frasier v. Evans, 992 F.3d 1003, 1035 (10th Cir. 2021).
F. Other Solutions

Other than the Colorado approach, there are options for reforming qualified immunity to ensure that it does not chill free speech. Enacting the Colorado method nationwide would likely be very unpopular and nearly impossible to do, especially with the police unions vehemently lobbying against it.\textsuperscript{221} The Colorado law barely survived the lobbying of the Colorado Police Union, and more conservative states would never be on board with the idea of eradicating the blanket of qualified immunity.\textsuperscript{222} The current political climate makes it tough to get anything worthwhile passed,\textsuperscript{223} even though Americans are losing trust in the likelihood of police officers to be held accountable for their actions.\textsuperscript{224}

Instead, the Supreme Court could grant certiorari to any of the many qualified immunity cases involving the right to record the police that appeal to them a year.\textsuperscript{225} This would ensure that courts cannot claim that not every reasonable person would know that this activity was constitutionally protected, as the Third Circuit relied on in the \textit{Fields} case, and the argument that there was no clearly established precedent would not stand in the \textit{Frasier} case.\textsuperscript{226}

A reform of this sense would likely lessen the burden of overcoming qualified immunity, assuming the Supreme Court held in favor of allowing recordings to be classified as a First Amendment right.\textsuperscript{227} This would also be an easier way to ensure that all the states participate in the uniformity. This would also eradicate the conundrum that the Tenth Circuit claimed it faced in deciding whether the right to record the police was protected under the First Amendment.\textsuperscript{228} If the Supreme Court elected to go with the Tenth Circuit approach, that would be catastrophically detrimental in guaranteeing the First Amendment right to record the police.

Court cases are time-consuming and very expensive, and many people cannot afford both the time and money that it takes to bring a successful case against the police.\textsuperscript{229} Also, with individual circuits holding different opinions, there is the possibility of plaintiffs losing their First Amendment claim.\textsuperscript{230} With an easier pathway in court, there is a higher chance that the victims will prevail, which will hopefully lead to fewer misconduct violations and a freer America.

\textsuperscript{221} See Kindy, supra note 198.
\textsuperscript{222} See id.
\textsuperscript{224} See Pew Rsch. Ctr., supra note 173.
\textsuperscript{225} See INST. FOR JUST., supra note 1.
\textsuperscript{226} See Fields \textit{v.} City of Philadelphia, 862 F.3d 353, 362 (3d Cir. 2017); Frasier, 992 F.3d at 1015.
\textsuperscript{227} See INST. FOR JUST., supra note 1.
\textsuperscript{228} Frasier, 992 F.3d at 1020 n.4.
\textsuperscript{229} See Schweikert, supra note 3, at 9.
\textsuperscript{230} Compare Fields, 862 F.3d at 360 (holding that a First Amendment right to record police exists under the federal constitution), with Frasier, 992 F.3d at 1020 n.4 (refusing to address whether a First Amendment right to record police exists under the federal constitution).
In order to get the Supreme Court to take up the issue, which is imperative in lessening the burden to overcome the defense of qualified immunity, there needs to be a stronger push from the people. It would also help if a majority of the circuits created precedent confirming the First Amendment right to record the police. That would not only help citizens of that district but compel the Supreme Court to create a uniform law for all districts to follow.

CONCLUSION

The doctrine of qualified immunity, as it is applied today, has dramatically outgrown its original purpose and strayed from its original intent. The doctrine was intended to protect civil servants from liability but instead became a tool individuals exploit to abuse power and destroy people's First Amendment rights. The idea had a good foundation and good intentions but has morphed into an entirely new phenomenon. The extreme burden of overcoming qualified immunity silences victims and harms them mentally, physically, and constitutionally. Adopting a new way to use the doctrine, like Colorado has attempted to do, would ensure the doctrine is used for its original purpose and not used as a tool of abuse. A more feasible and less radical way of amending the doctrine would be to decrease the burden of proof and institute a uniform precedent by the Supreme Court. The current political climate makes the legislative route unhopeful and unlikely, leaving it up to the courts to create a common law reform.
APPENDIX

Image 1:231

Far more Americans favor keeping spending on policing at current levels – or increasing it – than cutting spending

% who say spending on policing in your area should be ...

Note: No answer responses not shown.

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Two-thirds of Americans say civilians need to have the power to sue police officers for using excessive force

% who say ...

<table>
<thead>
<tr>
<th></th>
<th>Police officers need to be protected against lawsuits that may be brought accusing them of excessive force or misconduct</th>
<th>Civilians need to have the power to sue police officers in order to hold them accountable for excessive use of force or misconduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>32</td>
<td>66</td>
</tr>
<tr>
<td>White</td>
<td>38</td>
<td>60</td>
</tr>
<tr>
<td>Black</td>
<td>11</td>
<td>86</td>
</tr>
<tr>
<td>Hispanic</td>
<td>23</td>
<td>75</td>
</tr>
<tr>
<td>Rep/Lean Rep</td>
<td>53</td>
<td>45</td>
</tr>
<tr>
<td>Dem/Lean Dem</td>
<td>14</td>
<td>84</td>
</tr>
</tbody>
</table>

Notes: No answer responses not shown. White and Black adults include those who report being only one race and are not Hispanic; Hispanics are of any race. See topline for full question wording.
Image 3:233

Black and white Americans less likely to rate police positively than in fall of 2016

% who say police around the country are doing an excellent/good job of...

<table>
<thead>
<tr>
<th>Protecting people from crime</th>
<th>Using the right amount of force for each situation</th>
</tr>
</thead>
<tbody>
<tr>
<td>White July '20</td>
<td>White June '20</td>
</tr>
<tr>
<td>68</td>
<td>52</td>
</tr>
<tr>
<td>62</td>
<td>45</td>
</tr>
<tr>
<td>Total</td>
<td>Total</td>
</tr>
<tr>
<td>58</td>
<td>42</td>
</tr>
<tr>
<td>58</td>
<td>42</td>
</tr>
</tbody>
</table>

| Black July '20               | Black June '20                                   |
| 36                           | 21                                               |
| 28                           | 11                                               |
| Sept '16                     | June '20                                          |
| 53                           | 50                                               |
| 47                           | 44                                               |
| 42                           | 44                                               |
| 34                           | 34                                               |
| 34                           | 31                                               |

Note: White and Black adults include those who report being only one race and are not Hispanic.

233 Id.