LESS THAN PICTURE PERFECT: THE LEGAL RELATIONSHIP BETWEEN PHOTOGRAPHERS' RIGHTS AND LAW ENFORCEMENT

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I. INTRODUCTION

Threats to national security and public safety, whether real or perceived, result in an atmosphere conducive to the abuse of civil liberties. History is littered with examples: The Alien and Sedition Acts of 1798, the suspension of habeas corpus during the Civil War, the Palmer Raids during World War I, and McCarthyism in the aftermath of World War II.[1] Unfortunately, the post-9/11 world represents no departure from this age-old trend. Evidence of post-9/11 tension between national security and civil liberties is seen in the heightened regulation of photography; scholars have labeled it the "War on Photography"—a conflict between law enforcement officials and photographers over the right to take pictures in public places.[2] In many cases, police officers and private security guards have invoked blanket notions of "national security" to prohibit the press and private photographers from taking pictures of structures that are in plain view of

1. *Civil Liberties in War Time*, BILL MOYERS JOURNAL, http://www.pbs.org/moyers/journal/07132007/civilliberties.html (last visited Jan. 25, 2011).

2. *See, e.g.*, Bruce Schneier, *The War on Photography*, SCHNEIER ON SECURITY (June 5, 2008, 6:44 AM), http://www.schneier.com/blog/archives/2008/06/the_war_on_phot.html.

the general public.[3] In other cases, law enforcement officials have used broadly worded criminal statutes such as "obstruction of justice" or "interfering with a police officer" to prohibit the press and private photographers from taking part in what is constitutionally protected behavior.[4] A simple Google search reveals countless incidents of overzealous law enforcement officials detaining or arresting photographers and, in many cases, confiscating their cameras and memory cards, despite the fact that these individuals were in *lawful* places, at *lawful* times, partaking in *lawful* activities.[5]

For at least two reasons, the argument that the heightened regulation of the right to take pictures in public places enhances national security or public safety is deeply flawed. First, the prevailing evidence indicates that the perpetrators of past terrorist attacks never photographed their targets.[6] Why would they need to, after all? The Internet and modern technology have made it possible to obtain pictures of most structures, especially ones located in urban areas, with the click of a mouse. For example, Google Earth provides images of almost any address in the country from a variety of distances and angles.

Second, even if terrorists did photograph their targets, it would be totally impractical to try to stop them. Bruce Schneier, an internationally known security technologist and author, notes:

> Billions of photographs are taken by honest people every year, 50 billion by amateurs alone in the US. And the national monuments you imagine terrorists taking photographs of are the same ones tourists like to take pictures of. If you see someone taking one of those photographs, the odds are infinitesimal that he's a terrorist.[7]

Questioning for the purpose of identifying potential terrorists persons taking pictures of the Empire State Building in New York City or the White House in Washington, D.C., makes less sense than trying to find a needle in a haystack, because, chances are, the needle does not exist.

Even more troubling is the fact that the misconduct on behalf of officials is not always motivated by a good-faith belief that their actions will promote public safety. In some instances, it appears to be motivated by distrust, even hostility, towards the press and private photographers.[8] One reason for this distrust and hostility could be awareness on behalf of officials that photographers (or anyone with a cell-phone camera for that

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3. *See, e.g.*, incidents described *infra* notes 11–16, 40–49, 64–73.

4. *See, e.g.*, incidents described *infra* notes 11–16, 40–49, 64–73.

5. *See, e.g.*, incidents described *infra* notes 50–54, 82–86.

6. *See* Bruce Schneier, *The War on Photography*, SCHNEIER ON SECURITY (June 5, 2008, 6:44 AM), http://www.schneier.com/blog/archives/2008/06/the_war_on_phot.html.

7. *Id.*

8. *See, e.g.*, incidents described *infra* notes 11–16, 40–49, 64–73.

matter) can expose police misconduct. Because the press and private photographers serve as a check on official authority, police officers and security guards have an incentive to limit the power of individuals with cameras.

To make matters worse, for at least three reasons the victims of police misconduct in the area of photography rights will have a difficult time obtaining an adequate remedy at law. First, few effective remedies exist for compensating victims of photography rights violations. Second, courts have much discretion in awarding the remedies that do exist and often show deference to officials. Third, the nature of photography renders it difficult to prove damages to the degree of certainty the law requires.

This article examines the so-called War on Photography and the remedies available to those who have been unlawfully detained, arrested, or have had their property seized for taking pictures in public places or private places open to the public. It discusses recent incidents that highlight the growing infringement of photography rights and the magnitude of the harm that law enforcement officials have inflicted, paying particular attention to the themes these events have in common. It explores the existing legal framework surrounding photography rights and the federal and state remedies available to those whose rights have been violated. It examines the adequacy of each remedy including: (1) declaratory and injunctive relief, (2) § 1983[9] and *Bivens*[10] actions, and (3) state tort remedies. It discusses the obstacles associated with each remedy and the reasons why these obstacles are particularly hard to overcome in the context of photography. It then argues that most, if not all, of the remedies discussed are either inadequate or altogether impractical considering the costs of litigation. Lastly, this article will discuss the reasons why people should be concerned about the War on Photography and possible ways to reverse the erosion of photography rights.

II. RECENT INCIDENTS INVOLVING THE VIOLATION OF PHOTOGRAPHY RIGHTS

A. Incidents Involving Law Enforcement Officials

In August 2002, four police cars arrived on the scene at a river in Northwest Portland, Oregon, to investigate a report of suspicious activity involving people of Middle Eastern descent taking pictures near Portland bridges.[11] The suspects' names were Emily and Jenny, two high school students taking pictures for an art exhibit at the Portland Institute for Contemporary Art as part of a project called "Northwest Artists Respond to

9. 42 U.S.C. § 1983 (2006).
10. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
11. Cliff Collins, *Defending the Right to Shoot*, 69 OR. ST. B. BULL. 42, 42 (2009).

Global Warming."[12] They were taking pictures of oil-storage tankers by the river when a security guard confronted them, questioned them, and later called the police.[13] The girls explained what they were doing, but the security guard responded that, since 9/11, they were not allowed to "do things like take pictures of bridges anymore."[14] The police came and, after investigating the incident, contacted the FBI, describing the girls as "two Middle Eastern-looking teenagers taking pictures near Portland bridges."[15] The officers threatened to confiscate the girls' film and told them that they would be placed on the FBI terrorism watch list.[16]

In July 2006, police in Philadelphia, Pennsylvania, arrested Neftaly Cruz, a Penn State University senior, and threatened to charge him with "conspiracy, impeding an investigation and obstruction of justice."[17] Cruz said that he heard a commotion and walked out of his back door to find the street lined with police cars.[18] He pulled out his camera phone and took a picture of the action.[19] Moments later, an officer came to Cruz's back gate.[20] Cruz stated that the officer "opened the gate and took me by my right hand."[21] The officer then "threw [Cruz] onto a police car, cuffed him and took him to jail."[22] Cruz said that the "police told him that he broke a new law that prohibits people from taking pictures of police with cell phones."[23] After about an hour in jail, the police "told him he was lucky because there was no supervisor on duty, so they released him."[24]

In July 2009, Gordon Haire, formerly both a law enforcement officer and newspaper reporter, was on campus at the University of Texas Medical Branch (UTMB) at Galveston, passing time before a doctor's appointment.[25] While sitting at a table, he snapped a picture of a university police officer walking in his direction.[26] The officer approached Haire and informed him that "it was against the law to photograph the Galveston

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Man Arrested For Taking Cellphone Photo of Police Activity*, INFORMATION LIBERATION (July 28, 2006, 11:40 PM), http://www.informationliberation.com/?id=13834.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Carlos Miller, *Texas Cops Prohibit Photography, Forbid the Filing of Complaints Against Them*, PHOTOGRAPHY IS NOT A CRIME (July 28, 2009, 1:13 AM), http://carlosmiller.com/2009/07/28/texas-cops-prohibit-photography-forbid-the-filing-of-complaints-against-them/.
26. *Id.*

National Laboratory" as doing so presented a "security threat."[27] Haire had not photographed the laboratory,[28] and questioned the officer as to whether it was really against the law to photograph the laboratory.[29] The officer requested Haire's identification, thereafter relaying through his collar microphone Haire's full name and date of birth "in a loud voice."[30] He then informed Haire that "it was illegal to even photograph the sidewalk" and left.[31] The next day, Haire walked into the UTMB Police Department with intentions of filing a complaint.[32] He was told he needed to "produce a photo ID," and when he could not, he was ushered out of the police station.[33]

In November 2006, Seattle police arrested and jailed amateur photographer Bogdan Mohora for snapping a few photographs of police officers arresting a man.[34] Two officers took his camera, wallet, and satchel, arrested him, and took him to a holding cell at the Seattle Police Department.[35] Mohora was never charged, and the police never wrote an incident report on the arrest.[36] He was released an hour later and was told that he could have been charged "with disturbing the peace, provoking a riot or endangering a police officer."[37] The American Civil Liberties Union (ACLU) intervened on his behalf and the city's claim department agreed to pay Mohora eight thousand dollars.[38] Both officers were "disciplined with written reprimands for a lack of professionalism and poor exercise of discretion."[39]

In June 2007, Indianapolis police questioned Walter Miller, a NASA employee, while Miller was touring the city and taking pictures.[40] Miller

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* Christine Clarridge, *Man Jailed in Photo Incident Awarded $8,000*, SEATTLE TIMES, Nov. 9, 2007, http://seattletimes.nwsource.com/html/localnews/2004003761_photographer09m.html; *see also* Kathleen Davis, *The Crime of Photography: Rewarded!*, POP PHOTO FLASH DAILY BLOG (Nov. 19, 2007, 12:05 PM), http://flash.popphoto.com/blog/2007/11/the-crime-of-ph.html.
35. *See* Clarridge, *supra* note 34.
36. *See id.*
37. *Id.*
38. *See id.*
39. *Id.*
40. Carlos Miller, *Indianapolis Police Claim It Is Unlawful to Photograph Government Buildings*, PHOTOGRAPHY IS NOT A CRIME, (June 26, 2007, 10:53 PM), http://carlosmiller.com/2007/06/26/indianapolis-police-claim-it-is-unlawful-to-photograph-government-buildings/#more-151 (citing Sandra Chapman, *Visitor Didn't Feel Hoosier Hospitality*, WTHR EYEWITNESS NEWS, http://www.wthr.com/story/6698469/visitor-didnt-

was photographing an art exhibit that happened to be outside the Indianapolis City County Building.[41] Two police cars drove up to Miller, "[o]ne on the side of [him] and one behind [him] with their lights flashing."[42] The officers asked Miller what he was taking pictures of, and Miller replied, "[w]ell, the art exhibit."[43] One of the officers asked to see his camera, stating "I need to see it, for matters of homeland security."[44] The officer added, "You can't be taking pictures around here."[45] According to the Indianapolis Metropolitan Police Department (IMPD), "pictures of certain government facilities are off limits."[46] After questioning him, the officers allowed Miller to leave.[47] IMPD officials "say law enforcement is concerned about pictures of federal office buildings, military installations, major bridges and other infrastructure that could be considered a terrorists [sic] target."[48] If in doubt, IMPD officers say, "tourists should confine their photographs to marked tourists [sic] spots."[49]

In October 2009, in Anne Arundel County, Maryland, Antonio Amador "grabbed his camera to photograph a fatal accident that took place outside his home."[50] He was taking the photographs as part of an ongoing project aimed at highway safety and speed reduction.[51] Amador stated, "[s]uddenly I hear this screaming, like somebody really mad."[52] He continued, "I see this guy charging at me saying, 'delete those pictures now!'"[53] The officers threatened to arrest him if he did not delete his photos, and Amador complied.[54]

In February 2007, Miami multimedia journalist Carlos Miller was taking pictures of police officers for an article he was writing.[55] Officers demanded that Miller stop taking pictures, describing their actions as "a private matter."[56] Miller replied that it was a "public road."[57] The officers

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feel-hoosier-hospitality?redirected=true (last visited Jan. 25, 2011)).

41. *See* Miller, *supra* note 40.

42. Chapman, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.*

48. *Id.*

49. *Id.*

50. Carlos Miller, *Maryland Cops Force Photographer to Delete Photos*, PHOTOGRAPHY IS NOT A CRIME (Nov. 6, 2009, 4:41 AM), http://carlosmiller.com /2009/11/06/maryland-cops-force-photographer-to-delete-photos/.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Carlos Miller, *About the Blog*, PHOTOGRAPHY IS NOT A CRIME, http://carlosmiller.com/about/ (last visited Jan. 25, 2011).

56. *Id.*

then escorted Miller across the street and ordered him to keep walking away from the scene of the investigation.[58] Miller stated, "When I refused and continued to take their photo, they tackled me and bashed my head against the pavement, breaking a $400 camera flash and threatening to shoot me with a Taser gun."[59] Miller spent sixteen hours in the county jail on nine misdemeanor counts, the main charge being "obstructing traffic."[60] After sixteen months of delays, Miller finally went to trial.[61] After two days, Miller was acquitted of all criminal charges.[62] He was, however, found guilty of resisting arrest without violence, a charge he appealed pro se.[63]

B. Incidents Involving Private Security Guards

In December 2008, in New York City, Amtrak police arrested photographer Duane Kerzie for trespassing while he was taking pictures from the train platform.[64] Kerzie was taking pictures in an attempt to win Amtrak's annual photo contest entitled "Picture Our Trains."[65] The winner of the contest receives a grand prize of one thousand dollars in travel vouchers and the winning photo is published in Amtrak's annual calendar.[66] Amtrak security guards approached Kerzie with a black Labrador Retriever and instructed Kerzie to allow the dog to sniff his bag.[67] Kerzie complied and the dog sniffed his bag for explosives.[68] The security guards next asked for his ID and to see the photos. After viewing the photos, the guards demanded that Kerzie delete them.[69] Kerzie said "absolutely not," and the security guard replied that "it [is] illegal to photograph trains."[70] When Kerzie asked: "[W]here is the sign that says that?,"[71] the security guards

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* Miller was successful in his appeal of the charge of resisting arrest without violence. *Id.*
64. Carlos Miller, *Amtrak Photo Contestant Arrested by Amtrak Police in NYC's Penn Station*, PHOTOGRAPHY IS NOT A CRIME, (Dec. 27, 2008, 2:29 AM), http://carlosmiller.com/2008/12/27/amtrak-police-arrest-photographer-participating-in-amtrak-photo-contest/.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

pulled out handcuffs and arrested him on the spot.[72] Police placed Kerzie in a cell and later charged him with trespassing.[73]

In July 2008, Marilyn Parver, a 56-year-old grandmother, was taken off a JetBlue flight in handcuffs when she refused to delete a video she filmed of a "minor altercation between [two] passengers."[74] When she refused, the airline "threatened to blacklist her and accused her of interfering with a flight crew, which is a federal crime."[75] Two police officers, a TSA agent, and a JetBlue Airways representative escorted Parver off the flight.[76] She was taken to the Las Vegas Metropolitan Police Department, where police eventually released her with no charges.[77]

In October 2009, in Chicago, Illinois, an amateur photographer filmed a House of Blues security guard repeatedly pushing a female concertgoer to the ground.[78] The security guard took away the female's camera after she shot a picture of him.[79] The video captures the female attempting to take her camera back and the security guard violently shoving her and repeatedly pushing her to the ground.[80] The police arrested the security guard and charged him with misdemeanor battery.[81]

In October 2007, security guards removed Reza Michael Farhoodi, a University of Maryland student, from his seat in FedEx Stadium during a Washington Redskins game and questioned him about taking shots of the game and his friends with his SLR camera.[82] Security officers confiscated his camera and told him that he could pick it up at Guest Services after the game.[83] He was told that "professional" cameras were not permitted without press credentials, even though the printed rules did not distinguish between "professional" and "amateur" cameras.[84] Only hours later, a team executive

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72. *Id.*

73. *Id.*

74. Christopher Elliot, *Grandmother Arrested After Refusing to Delete JetBlue Fight Video*, ELLIOT BLOG (Aug. 14, 2008), http://www.elliott.org/blog/grandmother-arrested-after-refusing-to-delete-jetblue-fight-video/.

75. *Id.*

76. Aaron Royster, *Woman Detained by Airline Over Video*, KINGMAN DAILY MINER (Aug. 7, 2008, 6:00 AM), http://www.kingmandailyminer.com/main.asp?SectionID=1&subsectionID=1&articleID=16860.

77. *Id.*

78. Steve Bryant, *HoB Security Guard Assaulted Young Girl: Cops*, NBC CHICAGO (Oct. 4, 2009, 12:14 PM), http://www.nbcchicago.com/news/local-beat/house-of-blues-hanson-assault-camera-64210757.html.

79. *Id.*

80. *Id.*

81. *Id.*

82. Marc Fisher, *At FedEx Field, an Eventual Victory for Shutterbugs*, THE WASHINGTON POST, Sept. 25, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401521.html?sub=new.

83. *Id.*

84. *Id.*

called and apologized.[85] The executive explained that the ushers and officers were wrong for treating him as they did.[86]

C. Common Themes

The first major theme that emerges from all or most of these incidents is the use of broad statutes with sweeping language to arrest, charge, and prosecute photographers.[87] These statutes include, but are not limited to: loitering, disorderly conduct, assault, obstruction of justice, failure to obey police orders, disturbing the peace, provoking a riot, and resisting a police officer.[88] Eve Burton, Vice President and General Counsel of the Hearst Corporation, published an article in *Communications Lawyer* examining law enforcement officials' use of criminal statutes and tactics to limit newsgathering.[89] In the article, Burton argues that "[t]he criminal cases that present the greatest threat to a strong press [may be] insidious efforts by local police departments to curtail lawful newsgathering activities through the use of state criminal 'disorderly conduct,' 'assault,' and 'obstruction of justice' statutes."[90] She notes that these cases generally "stem from press coverage of crimes, accidents, and public appearances by political figures" and "are brought in nearly every state."[91] For example, it took nearly two years for California government officials to drop charges against a photographer for "interfering with a police officer" when he took pictures of police assaulting gang members.[92]

Another trend in many of these cases is police interference with photographers based on the all-encompassing notion of "national security."[93] Inquiries into which "national security" law they have violated often yield poor outcomes. Keith Garsee, a Los Angeles resident, described what happened when he took a picture with his camera phone while waiting to board a subway.[94] Garsee explained that after he took the picture, a subway employee stated: "Hey! It's against the 9-11 Law to take pictures

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85. *Id.*

86. *Id.*

87. *See* Eve B. Burton, *Where Are All the Angry Journalists? The Use of Criminal Statutes and Tactics to Limits Newsgathering*, COMM. LAW, Summer 1998, at 19, 19.

88. *See id.* at 19–21. *See generally* PHOTOGRAPHY IS NOT A CRIME, http://photography isntacrime.com/ (last visited Jan. 25, 2011) (providing multiple examples of photographers charged under a variety of statutes for taking photographs).

89. Burton, *supra* note 87.

90. *Id.* at 20–21.

91. *Id.* at 21.

92. *Id.*

93. *See, e.g.*, Keith Garsee, *Orweillian Los Angeles*, KEITH GARSEE'S MYSPACE BLOG (May 14, 2008, 3:13 PM), http://blogs.myspace.com/index.cfm?fuseaction=blog.view &friendID=71473815&blogID=394235689.

94. *Id.*

down here man!"[95] Garsee asked the subway employee to which law he was referring. The subway employee asked Garsee if he was a lawyer, to which Garsee replied "no." The subway employee then stated, "No pictures. You could be a terrorist. Very strict!"[96] Garsee said that shortly following the altercation with the subway employee, a woman announced over the intercom: "Attention to the gentleman in the plaid shirt: you are not allowed to take photographs in the Subway. You will be arrested if you continue to take photos and harass the metro worker."[97] After getting off the subway, Garsee contacted the sheriff's station and spoke with a deputy who told him that "there is no such law."[98]

Ignored in many of these cases is the fact that a Google image search can reveal a multitude of images of many of these places, some of which are likely similar to those the photographers have captured (or have attempted to capture) with their lenses.[99] In fact, Google Earth allows one to retrieve photos of nearly any address in the country from a variety of angles and distances.[100] Given this broad, public access to images of public buildings, transportation stations, and the like, it is not entirely clear why law enforcement officials, or those who write their policy manuals, are convinced that limiting photography enhances national security.[101]

III. PHOTOGRAPHERS' RIGHTS—THE EXISTING LEGAL FRAMEWORK

One of the more troubling things about the incidents discussed in Section II is that no law exists prohibiting the photographers' behavior.[102] As a general rule, subject to only a few exceptions, photographers have the right to take pictures in public places and in private places opened to the public.[103] This section discusses the existing legal regime surrounding the right to take photographs.

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *See* GOOGLE IMAGES, http://www.google.com/imghp (last visited Jan. 25, 2011).
100. *See* GOOGLE EARTH, http://www.google.com/earth/index.html (last visited Jan. 25, 2011).
101. *See* Bruce Schneier, *The War on Photography*, SCHNEIER ON SECURITY (June 5, 2008, 6:44 AM), http://www.schneier.com/blog/archives/2008/06/the_war_on_phot.html.
102. *See* Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1088 (1998).
103. *See id.*

A. Public Places

1. The Right to Photograph People in Public Places

Photographers generally have a right to take pictures of others in public places.[104] This is the case even if the subject of the photograph has not authorized the picture.[105] "[C]ourts consistently have upheld the rights of photographers to take unauthorized photographs of others in or from public places."[106] Dean Prosser explains:

> On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.[107]

Tort law therefore assumes that persons implicitly consent to being photographed upon leaving the confines of their homes.[108] However, both tort and criminal law recognize a few exceptions to this general rule and place limits on the methods photographers may use to obtain photographs of people.[109]

Four distinct torts exist that protect the privacy interests of the individual: (1) intrusion upon the seclusion or solitude of another, (2) public disclosure of private facts, (3) publicity that places another in a false light, and (4) appropriation of another's name or likeness for one's own advantage.[110] Generally, a privacy tort action against a photographer taking pictures in public places only exists where a photographer has failed to act within the bounds of common decency and respect for others.[111] For example, a claim for intrusion upon seclusion would lie where a sudden gust of wind blows a woman's skirt over her head and a photographer

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104. *See id.* at 1089 (noting the law's general "assumption that a person who leaves the confines of a private location implicitly consents to being photographed").

105. *Id.*

106. *Id.* at 1088 (citing Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1116–17 (Md. Ct. Spec. App. 1986); Forster v. Manchester, 189 A.2d 147, 150 (Pa. 1963)); *see also* Durant v. State, 188 P.3d 192, 195 (Okla. Crim. App. 2008).

107. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 391–92 (1960) (footnotes omitted).

108. Note, *supra* note 102, at 1089.

109. *Id.* (noting the existence of various privacy torts as well as criminal statutes such as harassment).

110. RESTATEMENT (SECOND) OF TORTS § 652A (1976).

111. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A–E (1976).

immediately begins snapping pictures.[112] Likewise, a photographer may not use a high-powered lens to stand on a public sidewalk and photograph the inside of a person's bedroom through a crack in the blinds.[113]

In addition to these limits, several states have civil and criminal statutes prohibiting harassment.[114] For example, California's harassment statute refers to "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose."[115] New York enacted a statute stating "that a person is guilty of harassment . . . when he or she possesses the 'intent to harass, annoy, or alarm another person,' and 'follows a person in or about a public place' or 'engages in a course of conduct . . . which alarms or seriously annoys' another person."[116] Thus, in obtaining a photograph of a person in a public place, photographers in some states are prohibited from using intrusive tactics like those described above.

Criminal penalties may also result from interfering with police investigations of crimes or accidents.[117] In most states, photographers must remain a certain minimum distance from accidents and police investigations.[118] Courts have routinely upheld these limitations on the ground that police need room to do their job, and a mob of photographers and flashes will almost certainly impede their progress.[119]

Courts have also upheld prohibitions on taking pictures in areas that impede traffic.[120] In *Siegman v. District of Columbia*, the District of Columbia Court of Appeals upheld a police regulation mandating that "No person licensed [thereunder] should impede traffic while engaged in taking photographs, nor remain longer than five minutes at any one location on the streets, sidewalks, or other public places."[121] While the state (or District, in the case of *Siegman*) might have a valid interest in restricting photographers' rights in the name of security or maintaining order, these types of regulations must be narrowly tailored to prevent imposing restrictions on photographers greater than those necessary to prevent

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112. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c, illus. 7 (1976).

113. *See id.* § 652B cmt. b, illus. 2.

114. Note, *supra* note 102, at 1089 (noting existence of harassment laws).

115. *Id.* at n.26 (citation omitted).

116. *Id.* (citation omitted).

117. *See, e.g.*, N.Y. PENAL Law § 195.05 (McKinney 2010).

118. *See, e.g.*, *id.*

119. *See, e.g.*, Decker v. Campus, 981 F. Supp. 851, 857 (S.D.N.Y. 1997) (holding that "where the fact of physical interference with an official function is clear as a matter of law, an officer's decision to arrest an individual for obstructing governmental administration is generally reasonable"); State v. Lashinsky, 404 A.2d 1121, 1130 (N.J. 1979) (finding that the action of an officer in ordering a photographer to move away from an accident scene was "plainly reasonable in objective terms because [the photographer's conduct caused] an actual interference" in the officer's work).

120. *See, e.g.*, Siegman v. District of Columbia, 48 A.2d 764, 767 (D.C. 1946).

121. *Id.* at 764, 767.

impeding traffic.[122] For example, in *Connell v. Town of Hudson*, the federal district court in New Hampshire noted that police officers violated a news photographer's First Amendment rights at an automobile accident scene to the extent that the restrictions imposed upon him were greater than those necessary to prevent his unreasonable interference with the police and emergency functions.[123]

In sum, a photographer's right to take pictures of people in public places is fairly broad under existing federal and state laws.[124] "People" includes all people—children, security guards, police officers, people committing crimes, people being arrested, celebrities, etc.[125] Tort law assumes that when a person leaves his or her home, he or she implicitly consents to being photographed.[126] The four torts protecting individuals' privacy interests usually require some type of clearly intrusive or obviously inappropriate behavior on behalf of the photographer.[127] This is also the case with civil and criminal harassment.[128] Lastly, photographers are prohibited from getting too close to accident scenes or investigations when photographing police, victims, or arrestees, or they run the risk of being charged pursuant to criminal statutes such as obstruction of justice.[129]

2. The Right to Photograph Structures Visible from Public Places

Courts have consistently upheld the right to photograph buildings visible from public places.[130] In 1990, Congress passed the Architectural Works Copyright Protection Act, establishing a new category of copyright protection for works of architecture.[131] However, Congress specifically limited the protection afforded architectural works with an amendment protecting the right to photograph buildings visible from public places.[132]

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122. *See, e.g.*, Connell v. Town of Hudson, 733 F. Supp. 465, 469 (D.N.H. 1990).

123. *Id.*

124. *See* Prosser, *supra* note 107, at 391–92.

125. *See* BERT KRAGES, LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES 26 (Michelle Perkins ed., 2nd ed.) (2007).

126. Note, *supra* note 102, at 1089.

127. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A–E.

128. *See* Note, *supra* note 102, at 1089 n.26.

129. *See, e.g.*, State v. Lashinsky, 404 A.2d 1121, 1128 (N.J. 1979).

130. *See, e.g.*, R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999) (footnote omitted) ("[A] property right does not normally include the right to exclude viewing and photographing of the property when it is located in a public place."); Landrau v. Solis Betancourt, 554 F. Supp. 2d 102, 113 (D.P.R. 2007) (noting that the Architectural Works Copyright Protection Act, 17 U.S.C. § 120(a) (2006), allows the taking and publishing, without the architect's consent, of photographs of buildings located in or visible from public places).

131. 17 U.S.C. § 102(a)(8) (2006).

132. *See* 17 U.S.C. § 120(a) (2006). The amendment states,

In copyright suits involving the right to photograph buildings, courts have taken this amendment seriously, typically ruling in favor of photographers.[133]

"Buildings" include both residential and commercial buildings.[134] Bridges, industrial facilities, public utilities, transportation facilities (e.g., airports), and almost all other structures visible from public places fall within this definition.[135] However, a few exceptions do exist. Commanders of military installations can prohibit photographs of specific areas when they deem it necessary to protect national security.[136] Additionally, the U.S. Department of Energy can prohibit photography of designated nuclear facilities although the publicly visible areas of nuclear facilities are usually not designated as such.[137] Outside of these narrow exceptions, the right to photograph buildings and other structures is virtually unlimited under existing law.[138]

B. Privately Owned Places Open to the Public

The law governing the right to take photographs in privately owned places open to the public is relatively straightforward. As discussed earlier, there are virtually no limits on the right to photograph privately owned structures that are visible from public places.[139] Property owners have no right to prohibit others from photographing their property from other locations.[140] However, property owners *do* have a right to prohibit photography occurring *on* their property, even if it is open to the public.[141] If no signs are posted prohibiting photography in areas such as shopping malls, private museums, amusement parks, restaurants, train stations, and

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> The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

Id.

133. *See, e.g.*, Leicester v. Warner Bros., 232 F.3d 1212, 1228–29 (9th Cir. 2000) ("In other words, if you want to copyright a building as constructed and thereby prevent others from constructing buildings that copy your design, you have to permit people to take, display and distribute pictures of your building without limitation.").

134. *See* KRAGES, *supra* note 125, at 18–19.

135. *Id.* at 14.

136. *Id.* at 43–44.

137. *Id.* at 44.

138. *See, e.g.*, *R.M.S. Titanic Inc.*, 171 F.3d at 970.

139. *Id.*

140. *Id.*

141. *See* KRAGES, *supra* note 125, at 18–19.

airports, it is probably safe to assume that it is allowed.[142] Further, if no signs are posted, photographers are free to take pictures of people or things on the property,[143] subject only to the limitations described above (e.g. privacy torts, harassment, obstruction of justice for interfering with an investigation, accident, arrest, etc.).[144] Even if no signs are posted, property owners or operators may still request that one stop taking pictures.[145] If a photographer ignores these requests, he or she may be charged with trespassing.[146] Property owners are not, however, permitted to confiscate one's camera or film.[147]

C. Observations

A few things become apparent after examining the existing legal framework surrounding photography rights. First, there are very few actual limits on the right to take pictures in public.[148] Second, existing limits seem to be aimed at the most obnoxious and intrusive behavior, such as taking pictures underneath a woman's skirt or repeatedly harassing someone after being asked to stop taking pictures.[149] Third, no post-9/11 laws specifically prohibit the right to take pictures in public.[150] With so few "on the books" limitations, one may wonder how and why photographers such as those discussed in Part II are continually questioned, arrested, and charged for taking pictures in public places.

In many instances, law enforcement officials assert authority pursuant to the following: (1) broadly worded criminal statutes that were never intended to apply to photographers under the existing circumstances;[151] (2)

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142. *Id.* at 19.

143. *Id.*

144. *See supra* text accompanying notes 109–29.

145. *See* KRAGES, *supra* note 125, at 18–20.

146. *Id.* at 18–19 ("[T]here is no general legal right of access to private property for the purpose of taking photographs, which means that photographers must obey the same laws that apply to the general public. Because private property owners have the right to exclude others from their property and to limit the activities of those they allow to enter, photographers face liability for trespass if they enter . . . .").

147. *Id.* at 22.

148. *See, e.g.*, *Leicester*, 232 F.3d at 1228–29; *R.M.S. Titanic, Inc.*, 171 F.3d at 970; *Landrau*, 554 F. Supp. 2d at 113.

149. *See* KRAGES, *supra* note 125, at 25–30 ("Despite the importance that society places on personal privacy, the law imposes relatively few restrictions on photographing people.").

150. *See* Bruce Schneier, *Are Photographers Really a Threat?*, THE GUARDIAN (June 5, 2008), http://www.guardian.co.uk/technology/2008/jun/05/news.terrorism ("There's nothing in any post-9/11 law the restricts your right to photograph.").

151. Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment*, 16 COMM. LAWYER: J. MEDIA, INFO. & COMM. LAW 19, 19 (1998); *see also* Burton, *supra* note 87, at 19–21.

"national security" or "9/11" laws;[152] or (3) nothing at all (i.e., "it's just the law" or "taking pictures here is illegal"). Often, charges are eventually dropped and apologies are issued,[153] but at that point, the damage has already occurred. It is impossible to recreate the newsworthy events a journalist could have captured had he or she not been handcuffed. Likewise, it is impossible to "undelete" a memory card with days', months', or even years' worth of pictures. Neither dropping charges nor issuing apologies compensates a photographer for the embarrassment and possible harm to his reputation experienced when a crowd of people sees him surrounded by blue lights and shoved into a police car. Moreover, a photographer whose rights have been abused has very few legal remedies,[154] and most of the remedies that are available are either inadequate or are totally impractical when the costs of litigation are considered.[155] The next section explores these remedies and explains why each is inadequate.

IV. REMEDIES FOR VIOLATIONS COMMITTED BY LAW ENFORCEMENT OFFICIALS IN PUBLIC PLACES

A. Declaratory Relief

The Uniform Declaratory Judgments Act, which has been adopted with slight modifications in the vast majority of states, provides that "[c]ourts . . . shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."[156] The Federal Declaratory Judgment Act provides the following:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[157]

In certain situations, declaratory judgment statutes can provide relief to a plaintiff whose rights have been violated within the context of photography. For example, a photographer who is charged pursuant to a broadly worded "obstruction of justice" statute may bring an action seeking a declaration that the statute is unconstitutionally vague or broad or that the behavior he or she was engaged in is lawful. Additionally, if a law

152. *See, e.g.*, Garsee, *supra* note 93.
153. *See supra* notes 82–86 & 90–92 and accompanying text.
154. *See* discussion *infra* Part IV.
155. *Id.*
156. UNIF. DECLARATORY JUDGMENTS ACT, G.L. § 1 (1922).
157. 28 U.S.C. § 2201(a) (2006).

enforcement officer threatens a photographer with charges for lawful behavior, and that threat is sufficiently real, the photographer may seek from a court a declaration of his or her rights or confirmation that the behavior at issue is lawful.

Certain obstacles and limitations are associated with declaratory relief. First, a court will not award declaratory relief unless the claim is sufficiently "immediate and real."[158] Raymond Beauchamp provides the following guidance:

> The Supreme Court has stated that declaratory relief is appropriate when "a refusal on the part of the federal courts to intervene . . . may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity. To determine if a claim is sufficiently immediate and real, "[t]he [Supreme] Court spread the justiciability question along a continuum ranging between 'a general threat by officials to enforce those laws which they are charged to administer' and 'a direct threat of punishment against a named [party] . . . for a completed act'" with those closer to the direct threat more likely to be an actual controversy.[159]

A photographer merely *threatened* with charges may experience difficulty demonstrating a "direct threat of punishment." If he or she is not able to convince a court that the threat is sufficiently immediate, he or she is forced to decide between foregoing what he or she believes to be constitutionally protected behavior and potentially being charged with a crime.

Even if a plaintiff establishes a justiciable claim, it may be difficult to convince a judge to declare the statute at issue (for example, "obstruction of justice") unconstitutionally vague or broad. Law enforcement officials could argue that the statute is only applied when a person comes within a certain number of feet from the arrest and interferes with police duties. Even if the journalist was much further from the arrest—which sophisticated cameras make possible—it is the law enforcement official's word against the journalist's. A judge may be hesitant to strike down a statute that officers can "legitimately" use to prevent the press from interfering with the successful performance of their duties.

Even if a judge were to declare the statute unconstitutionally vague or broad and drop the charges, the journalist has still has suffered a substantial amount of harm. She has been publicly humiliated by being handcuffed and placed in a police car. Additionally, she may have lost the opportunity to cover a breaking news story. Even if a court declares the statute unconstitutional, the journalist will still be responsible for the time commitment and costs associated with litigation. Further, if the statute is

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158. Raymond W. Beauchamp, *England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3103 (2006).

159. *Id.*

eventually rewritten to define "obstruction of justice" more narrowly, say to include coming within ten feet of an arrest or investigation, not much has changed. The scenario could repeat itself with the same outcome—the police officer's word against the journalist's.

Lastly, declaratory judgment represents a limited remedy in that it provides a plaintiff only with a declaration of his or her rights or the constitutionality of a statute, not pecuniary damages. A declaration of one's rights will allow a plaintiff to resume his or her constitutionally protected activities and result in charges being dropped; however, it will not compensate a photographer or journalist for the loss of news stories, damage to person or property, or deleted pictures.

B. Injunctive Relief

An injunction is an equitable remedy in the form of a court order, whereby a party is required to do, or to refrain from doing, certain acts.[160] To secure an injunction, a plaintiff must meet the Article III "case or controversy" requirement.[161] The Ninth Circuit set the following standard:

> The "irreducible minimum" demanded of a proper plaintiff by Article III's constitutional demands . . . requires that a plaintiff show he has "personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that can be "fairly" traced to the defendant's challenged conduct, and which "is likely to be redressed by a favorable decision."[162]

Under limited circumstances, an injunction may provide a remedy for a plaintiff within the context of photography and newsgathering. Suppose the plaintiff is a well-known journalist in a city who has covered instances of police misconduct in the past and has had a number of altercations with police while covering stories. He has been arrested for obstruction of justice while photographing a political rally (charges were dropped) and threatened with charges a number of other times. The plaintiff believes that his First and Fourth Amendment rights were violated and will be violated in the future.

To succeed in a claim for injunctive relief, the plaintiff would need to show that his First or Fourth Amendment rights were violated.[163] This requires showing that officers lacked probable cause to arrest him and thus

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160. *See* Thompson v. Lantz, No. 3:04cv2084, 2008 WL 762465, at *1 (D. Conn. Mar. 20, 2008)

161. *See* LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985).

162. *Id.* The court further noted that "at least when injunctive relief is sought, litigants must adduce a 'credible threat' of recurrent injury." *Id.*

163. *See* Worthington v. Kenkel, 684 N.W.2d 228, 232 (Iowa 2004).

violated his Fourth Amendment rights.[164] He would also need to show that his behavior did not violate any legitimate laws (i.e., he observed distance limitations, etc.) and is protected by the First Amendment.[165] The plaintiff must demonstrate that his arrest and the officers' many threats to arrest him represent a "pattern of police misconduct."[166] Lastly, the plaintiff must show that he is likely to be threatened, arrested, or both in the future for newsgathering activities that are protected by the Constitution.[167]

Securing an injunction under these circumstances will be difficult. First, police officers will likely take the position that the plaintiff was in fact interfering with the execution of their duties by being too close or interfering with the police officers' control over the situation.[168] It will be the officers' word against the journalist's, and a judge may show deference to the officers. Second, showing a pattern of illicit law enforcement behavior may be difficult. Cases in which the court has found such patterns have included extensive factual findings over extended periods of time.[169] In any case, showing a pattern of illicit behavior represents a fact-specific inquiry[170] that can translate into costly and time-consuming litigation. Additionally, injunctive relief, like declaratory relief, is an equitable remedy and may not provide compensatory damages.

C. 42 U.S.C. § 1983 Action

42 U.S.C. § 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

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164. *See* Stewart v. Abraham, 275 F.3d 220, 228 (3d Cir. 2001) (discussing injunctions within the context of the Fourth Amendment).

165. *See Worthington*, 684 N.W.2d at 232.

166. *See* Thomas v. Cnty. of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992) ("[T]he Supreme Court requires a showing of an intentional and pervasive pattern of misconduct in order to enjoin a state agency.").

167. *See* Haney v. Miami-Dade Cnty., Nos. 04-20516-CIV-JORDAN, 04-20516-CIV-BROWN, 2004 WL 2203481, at *2–3 (S.D. Fla. Aug. 24, 2004). The court held that an injunction was proper and recognized that "when the threatened acts that will cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again." *Id.* (quoting 31 Foster Children v. Bush, 329 F.3d 1255, 1266 (11th Cir. 2003)).

168. *See* State v. Taylor, 118 A.2d 36, 49 (N.J. Super. Ct. App. Div. 1955) (holding defendant guilty for interference with an officer in lawful discharge of his duties while using loud and offensive language).

169. *See, e.g.*, LaDuke v. Nelson, 560 F. Supp. 158, 160 (E.D. Wash. 1982); Allee v. Medrano, 416 U.S. 802, 805–09 (1974).

170. *Id.*

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[171]

Section 1983 provides a federal remedy for individuals whose federal constitutional rights are violated by persons acting under the color of state law.[172] In most cases, private security guards will not be considered persons acting under the color of state law for the purposes of this statute.[173] However, exceptions exist and will be covered in Part V.[174]

There are three major hurdles that a § 1983 plaintiff within the photography context must clear: (1) establishing a constitutional violation,[175] (2) the doctrine of qualified immunity,[176] and (3) proving damages.[177] It is noted that since § 1983 applies only to persons acting under color of state (not federal) law, references to the First and Fourth Amendment assume incorporation of these amendments into the Fourteenth Amendment through its Due Process clause.[178] The following section examines these three hurdles using a variety of hypothetical scenarios.

1. Establishing a Constitutional Violation

Suppose Person A is standing on a sidewalk photographing a major bridge. A security guard approaches her and informs her that she is not allowed to take pictures of the bridge for reasons of "national security." Person A is convinced she is doing nothing wrong and continues to take pictures. The security guard threatens to call the police and eventually does to report the "suspicious activity." The police come, blue lights flashing, and interrogate Person A for thirty minutes. They finally leave after forcing her to delete her pictures by threatening to place her on an FBI watch list. Person A refrains from taking any more pictures of bridges or buildings for fear of similar consequences.[179] Person A brings a § 1983 claim for violation of her First Amendment rights, seeking damages for the embarrassment and humiliation she experienced while the police were questioning her, as well as the loss of all the pictures on her camera.

As stated above, § 1983 only applies to persons acting under color of state law, so Person A probably will not be able to name the private security

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171. 42 U.S.C. § 1983 (2006).

172. *Id.*

173. *But see* discussion *infra* Part V.A (discussing exceptions where security guards were found to be acting under color of state law).

174. *Id.*

175. *See* Montefusco v. Nassau Cnty., 39 F. Supp. 2d 231, 242 n.7 (E.D.N.Y. 1999).

176. Smith v. Kenny, 678 F. Supp. 2d 1093, 1105 (D.N.M. 2009) (citations omitted).

177. United States v. Henry, 447 U.S. 264, 269 (1980).

178. U.S. CONST. amend. XIV, § 1.

179. *See* Portland incident *supra* Part II.A. (providing the basis for this hypothetical).

guard as a defendant.[180] Thus, Person A is only able to sue the police officers. Person A could assert that her First Amendment right to freedom of expression was violated.[181] However, since "images . . . must communicate some idea in order to be protected under the First Amendment," Person A's claim is unlikely to hold up.[182] Even when plaintiffs have claimed that they plan to use photographs they have taken for expressive and transformative purposes, courts have refused First Amendment protection in these instances.[183] Therefore, Person A must allege something other than a First Amendment violation to recover under § 1983.

Person B, a journalist for a small newspaper, is riding in his friend's car when his friend is pulled over for no apparent reason. The officer never articulates a reason for stopping the vehicle. He asks Person B's friend whether he has been drinking and whether there are weapons or drugs in the vehicle. Despite the friend's insistence that he has not been drinking and that there are no drugs or weapons in the vehicle, the officer continues to question him aggressively about where they have been and where they are going. Outraged at the inappropriate and invasive nature of the officer's questioning, Person B begins recording the exchange on his phone. After making both get out of the car and conducting a search of the vehicle, the officer notices that Person B has been recording the entire incident. He demands that Person B stop recording and delete the footage. Without doing either, Person B puts the phone into his pocket. The officer confiscates Person B's phone, deletes the video, and arrests him for failing to obey police orders. The officer lets Person B's friend drive away. Charges are eventually dropped, but Person B brings a § 1983 suit for violation of his First Amendment right to freedom of the press, among other rights.

Although Person B has a better chance at demonstrating a violation of freedom of the press than Person A (since he may be considered "press" capturing a potential news story),[184] his claim is still questionable. As Eric Ugland has noted, "courts have not reached a consensus about the shape that a definition [of the press] should take. The Supreme Court has provided little guidance, and the lower court approaches and statutory definitions are inconsistent and sometimes arbitrary."[185] It is not entirely clear whether a

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180. *But see* discussion *infra* Part V.A. (discussing exceptions where security guards were found to be acting under color of state law).

181. *See* Montefusco v. Nassau Cnty., 39 F. Supp. 2d 231, 241 (E.D.N.Y. 1999) (citations omitted).

182. *See id.*

183. *Id.* at 242 n.7.

184. *See* Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 174–75 (2008).

185. *Id.* at 137. "As Justice White wrote in *Branzburg*, trying to define who is a

court would consider Person B a member of the "press"[186] for the purpose of First Amendment protection. Even if Person B is classified as press, courts are torn over the extent to which First Amendment protections extend to the newsgathering process.[187] The Supreme Court has recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."[188] While most courts agree that newsgathering does "qualify for First Amendment protection,"[189] this protection is qualified.[190] According to the Supreme Court of Ohio, for instance, "[t]he [F]irst [A]mendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering."[191] One can see how police officers can claim "wrongful behavior" for any number of actions by the press an officer considers to be interfering with an investigation.

In Person B's case, any First Amendment newsgathering right he possesses may be trumped if a state statute exists prohibiting the recording of police investigations. In Massachusetts for example, a statute prohibits "interception of any . . . oral communication . . . ."[192] Under Massachusetts law, "the term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device. . . ."[193] In *Commonwealth v. Hyde*, the defendant was prosecuted for secretly recording a police investigation during a routine traffic stop.[194] The dissenting justices of the Massachusetts Supreme Judicial Court argued that

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journalist would 'present practical and conceptual difficulties of a high order.'" *Id.* at 136.

186. *Id.* at 137.

187. Professor Ugland writes:

> Over the past three decades, journalists have sought to broaden the definition of press freedom to protect newsgathering, arguing that if they are to serve the highest purposes of their profession, freedom of the press must encompass more than the right to publish what they know . . . . They have also challenged restrictions that intrude too deeply on . . . journalistic expression and investigative zeal . . . .
>
> Some courts have been sympathetic to these challenges, but many have rejected them, showing little patience for what judges often construe as media demands for "special rights."

Id. at 120–21.

188. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

189. *Branzburg*, 408 U.S. at 681.

190. Boddie v. Am. Broad. Co., 881 F.2d 267, 271 (Ohio 1989).

191. *Id.*

192. MASS. GEN. LAWS ch. 272, § 99 (2010).

193. *Id.* § 99(B)(4).

194. Commonwealth. v. Hyde, 750 N.E.2d 963, 969 (Mass. 2001).

"[t]he defendant's secret recording of the words of the police officers should be lawful, because such recording may tend to hold police officers accountable for improper behavior."[195]

In sum, Person B will have a difficult time convincing a court that his First Amendment right to freedom of the press was violated. First, it is uncertain whether Person B qualifies as press.[196] Second, it is not clear that a court would extend First Amendment protection to newsgathering under these circumstances.[197] Third, even if it did, the presence of a state statute prohibiting Person B's behavior will trump any First Amendment protections he may possess.[198]

In the context of photography, a § 1983 plaintiff will have more success establishing a violation of his or her Fourth Amendment rights. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . . ."[199] "[A] search ordinarily must be based on individualized suspicion of wrongdoing."[200] In order "[t]o prevail on a § 1983 claim under the Fourth Amendment based on an allegedly unlawful *Terry* stop,[201] a plaintiff first must prove that he was seized."[202] A police officer may approach an individual and ask questions without intruding on Fourth Amendment rights, because this would not be a seizure.[203] "[T]o determine whether a [police] encounter constitutes a seizure, a court must consider . . . whether a reasonable person . . . [would feel] free to decline the officers' requests or otherwise terminate the encounter."[204] If a court finds that a seizure occurred, a plaintiff must then demonstrate that the police officer lacked "reasonable suspicion of criminal activity."[205] A court will consider the

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195. *Id.* at 969.

196. *See supra* text accompanying notes 184–86.

197. *See supra* text accompanying notes 187–91.

198. *See supra* text accompanying notes 192–95.

199. U.S. CONST. amend. IV.

200. Relford v. Lexington-Fayette Urban Cnty. Gov't, 390 F.3d 452, 458 (6th Cir. 2004) (citing Chandler v. Miller, 520 U.S. 305, 313 (1997)).

201. Terry v. Ohio, 392 U.S. 1, 30–31 (1968) ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

202. Brown v. City of Oneonta, 221 F.3d 329, 340 (2d Cir. 2000).

203. United States. v. Lee, 916 F.2d 814, 819 (2d Cir. 1990).

204. Florida v. Bostick, 501 U.S. 429, 439 (1991).

205. United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000).

"totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."[206] In order to actually arrest an individual without a warrant, police officers must have probable cause to believe that the individual committed a crime.[207]

In many of the incidents described in this article, a seizure by police officers did occur.[208] In some of the incidents, police arrested persons taking pictures.[209] In others, multiple officers arrived on the scene and questioned those taking pictures for extended periods of time.[210] A court could reasonably find in many, if not most, of the incidents, that the person being questioned did not feel "free to decline the officers' requests or otherwise terminate the encounter."[211] The bigger issue will be "whether the detaining officer ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing."[212]

Simply taking pictures of tall buildings or major bridges—nothing more—certainly does not give rise to a reasonable suspicion of criminal activity.[213] No law exists prohibiting taking pictures of these structures,[214] so the "criminal activity," from the officer's perspective, is presumably the plotting of a terrorist attack.[215] But millions of people take pictures of tall buildings all of the time, so before seizing a person, an officer's reasonable suspicion must be based on some other facts that indicate the plotting of a terrorist attack.[216] In the Portland incident described above, the police had no other facts yet questioned the two girls for an extended period of time.[217] The police eventually contacted the FBI, describing the girls as "two Middle Eastern-looking teenagers taking pictures near Portland bridges."[218] A court hearing these facts would likely conclude that the officers lacked reasonable suspicion to seize them.[219]

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206. United States. v. Arvizu, 534 U.S. 266, 273 (2002) (citation omitted).

207. *See* United States v. McClain, 444 F.3d 556, 562–63 (6th Cir. 2005).

208. *See* incidents *supra* Part II.

209. *See supra* text accompanying notes 17–24, 34–39, 55–63.

210. *See supra* text accompanying notes 11–16, 25–33, 40–49.

211. Florida. v. Bostick, 501 U.S. 429, 439 (1991).

212. *See* Harris v. State, 806 A.2d 119, 126 (Del. 2002) (quoting *Arvizu*, 534 U.S. at 273).

213. *See* United States v. McClain, 444 F.3d 556, 562 (6th Cir. 2005).

214. *See supra* notes 130–38 and accompanying text.

215. *See, e.g.*, incidents described *supra* notes 11–16.

216. Ortega Melendres v. Arpaio, 598 F. Supp. 2d 1025, 1033 (D. Ariz. 2009)

217. *See supra* notes 11–16 and accompanying text.

218. *See supra* note 15 and accompanying text.

219. *See Harris*, 806 A.2d at 127–28. "[A]n 'inchoate and unparticularized suspicion or hunch' of experienced police officers is insufficient to support a finding of reasonable suspicion as a matter of law." *Id.* (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980)).

As stated earlier, if an officer makes an arrest without a warrant, he or she must have probable cause to believe the suspect committed a crime.[220] In most cases, arresting someone without a warrant or probable cause constitutes an unreasonable seizure in violation of the Fourth Amendment.[221] For a seizure to be reasonable, the behavior the suspect is believed to be engaging in must be criminal pursuant to some statute, law, or regulation.[222] Arresting someone in the name of "national security" for engaging in conduct that could hardly be construed as suspicious is not enough. A § 1983 plaintiff in such a case could successfully demonstrate a Fourth Amendment violation.

Suppose officers are making a forceful arrest on a street corner. A man walking by immediately begins snapping photographs of the incident. He is told to stop taking pictures. He continues to take pictures from a distance. Other people begin noticing the chaos and gather around the scene. The man is arrested for provoking a riot. Assume provoking a riot is prohibited by statute. Did the police have probable cause to believe that the man provoked a riot by taking pictures of an already chaotic arrest? Probably not. First, it is questionable whether people gathering around the scene of an arrest constitutes a riot. Second, it is uncertain whether there was probable cause to believe that the man taking pictures caused the people to gather around. It seems more likely that the arrest itself attracted the attention of passersby. A court would likely find that the officers did not have probable cause to believe that the man taking pictures of the arrest provoked a riot.[223]

In some cases where police officers arrest photographers pursuant to broadly worded statutes,[224] factual disputes and problems of proof may arise. For example, suppose Person A is taking pictures on a public sidewalk thirty feet away from a car that is being searched by police for drugs and weapons. The police officers demand that Person A stop taking pictures or risk being arrested. Person A is convinced he is not breaking any laws and continues to take pictures. The police officers arrest him for obstruction of justice. The obstruction of justice statute prohibits interfering with a police investigation. The statute defines "interfering" as coming within fifteen feet of an investigation or arrest for purposes of photographing the scene. Determining whether police had probable cause to believe Person A was obstructing justice will likely come down to Person A's word against the word of the police officers. Given these facts, a court likely will show deference to the police officers.[225] It is possible that Person

220. *See McClain*, 444 F.3d at 562.

221. *Id.*

222. *Id.*

223. *See Harris*, 806 A.2d at 127–28.

224. *See* Powell, *supra* note 151, at 19; *see also* Burton, *supra* note 87, at 19–21.

225. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 27–28 (1998) ("Despite the requirement that a police

A could have an expert view the pictures and testify that they were taken from a distance of much more than fifteen feet. However, this may be difficult considering the zoom function on most cameras. It would also be extremely costly, and probably not worth the amount Person A would recover in damages.

In sum, a § 1983 plaintiff has a stronger chance of establishing a Fourth, rather than a First Amendment violation. However, factual disputes and difficulties in establishing proof will arise. A plaintiff will first have to show that he was seized.[226] The plaintiff will then need to show that no reasonable suspicion existed for the seizure.[227] If the detention was not pursuant to any statute or regulation, proving the absence of reasonable suspicion will not be problematic. On the other hand, if the detention was pursuant to something more than, for example, "national security purposes," showing no reasonable suspicion existed will be more difficult. Reasonable suspicion is a low standard and courts often show deference to police officers.[228]

2. Qualified Immunity

Establishing a constitutional violation is only the first of a few hurdles one must clear to ultimately succeed in a § 1983 suit. The next hurdle for a plaintiff is qualified immunity, which is enjoyed by both state and federal officials. Federal officials are not liable for violations of constitutional rights committed in "good faith."[229] In *Smith v. Kenny*, the federal district court in New Mexico stated that "courts recognize the affirmative defense of qualified immunity, which protects 'all but the plainly incompetent or those who knowingly violate the law.'"[230] The *Smith* court set out a two-part test for qualified immunity: "Once a defendant asserts the affirmative defense of qualified immunity, the burden then shifts to the plaintiff to establish (1) a violation of a constitutional or federal statutory right by the defendant, and (2) that the constitutional right allegedly violated was

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officer's decision to stop a suspect must be based on an articulable suspicion, the Supreme Court has shown increasing deference to the judgment of police officers in its interpretation of this requirement. The practical effect of this deference is the assimilation of police officers' subjective beliefs, biases, hunches, and prejudices into law.") (citations omitted).

226. *See* Brown v. City of Oneonta, 221 F.3d 329, 340 (2d Cir. 2000).

227. *See* United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000) (noting that both a search and seizure are "constitutionally reasonable" when "based upon reasonable suspicion that criminal activity is afoot."); *Jones*, 745 A.2d at 861 (citing *Terry*, 392 U.S. at 21) ("[A] police officer may detain an individual for investigatory purposes for a limited scope and duration, but only if such detention is supported by a reasonable and articulable suspicion of criminal activity.").

228. *See* Davis, *supra* note 225, at 27–28.

229. *See* Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991) (citing Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988)).

230. Smith v. Kenny, 678 F. Supp. 2d 1093, 1105 (D.N.M. 2009).

clearly established at the time of the violation."[231] The previous section addressed the many difficulties that arise in establishing a constitutional violation;[232] this section will focus on the second prong of the analysis.

The inquiry as to whether a plaintiff's right was "clearly established" is one that focuses on factual correspondence between the alleged unlawful actions and case law.[233] Officers lose qualified immunity when the unlawfulness of their actions was apparent[234] or when there was no legitimate question as to the unlawfulness of the conduct. [235] Officials may lose their immunity even if "the very action in question" had not been declared unlawful.[236] Courts are split on what type of authority may render a right clearly established. Some courts have stated that only decisions by the Supreme Court, a court of appeals, or a state's highest court may indicate that a right is clearly established.[237] Additionally, some courts have held that a constitutional provision that requires a balancing of interests is generally not a clearly established right.[238] The Ninth Circuit has held that it is the "[p]laintiff's burden . . . to identify the universe of statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established."[239]

A §1983 plaintiff's success in showing that a right is clearly established at the time of a violation depends on which right the plaintiff claims and the manner in which the plaintiff frames this right. It will be easier to demonstrate that a plaintiff's right was clearly established under the Fourth Amendment than under First Amendment. Freedom of the press is "clearly established," but the extent to which the First Amendment protects newsgathering activities is more ambiguous.[240] Most courts agree that newsgathering qualifies for First Amendment protection because "[w]ithout some protection seeking out the news, freedom of the press could be eviscerated."[241] However, the Supreme Court has also stated that, "[t]he [First] [A]mendment does not reach so far as to override the interest of the public in ensuring that neither the reporter nor the source is invading the rights of other citizens through reprehensible conduct forbidden to all other

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231. *Id.* at 1106.

232. *See supra* Section IV.C.1.

233. *See* Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986).

234. Anderson v. Creighton, 483 U.S. 635, 639–40 (1987).

235. Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985) (noting when there is a legitimate question as to the legality of an official's actions at the time the official engages in the actions, the conduct "cannot be said [to] violate[] clearly established law").

236. *See Anderson*, 483 U.S. at 639–640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . .").

237. Courson v. McMillian, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991).

238. *Benson*, 786 F.2d at 276.

239. Elder v. Holloway, 975 F.2d 1388, 1392 (9th Cir. 1991).

240. Ugland, *supra* note 184, at 121.

241. Branzburg v. Hayes, 408 U.S. 655, 693 (1972).

persons."[242] Professor Erik Ugland writes that there is an "[a]bsence of uniformity [among courts] regarding whether the First Amendment provides merely a negative barrier against government intrusions or also provides a set of affirmative rights—rights of access to places and information . . . ."[243] He notes that many courts "uniformly shape rights by a negative construction."[244]

Suppose Person A is photographing police who are trying to control a political protest in a city park. Police demand that he stop, but he continues. Person A is arrested for disorderly conduct and obstruction of justice. He will need to demonstrate that his right to photograph political protests for news purposes is clearly established. This will be hard considering most courts have given only passive support to any affirmative right to gather the news.[245] Under the Seventh Circuit's interpretation, since the right to gather the news requires a balancing of interests, it is not clearly established for the purposes of qualified immunity.[246] Courts have made it clear that any protections afforded to the newsgathering process do not provide a shield from liability under criminal statutes.[247] Consequently, even if a court were to recognize newsgathering as a clearly established right, it may find that this right stops at the point where Person A's actions constitute disorderly conduct or obstruction of justice.

Showing that the right to freedom of photographic expression is clearly established is even more difficult. The Supreme Court has held that "[p]hotography, painting, and other two-dimensional forms of artistic reproduction . . . are plainly expressive activities that ordinarily qualify for First Amendment protection."[248] The Supreme Court has also found that "works which, taken as a whole, possess serious artistic value are protected by the First Amendment."[249] However, other courts have held that "images . . . must communicate some idea in order to be protected under the First Amendment."[250] Although it is clearly established that photographs may fall within the scope of First Amendment protection, it is not clearly established that the *act* of taking the photograph that may later be used to express ideas is a right secured by the First Amendment.[251] As a whole, courts have been

242. *Id.* at 691–92.

243. Ugland, *supra* note 184, at 139.

244. *Id.* at 143.

245. *Id.* at 121.

246. Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986).

247. For example, the Sixth Circuit has stated that "The [F]irst [A]mendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering." Boddie v. Am. Broad. Co., 881 F.2d 267, 271 (6th 1989).

248. Massachusetts v. Oakes, 491 U.S. 576, 591 (1989).

249. *See* Miller v. California, 413 U.S. 15, 24 (1973).

250. Montefusco v. Nassau Cnty., 39 F. Supp. 2d 231, 241 (E.D.N.Y. 1999) (citing Berry v. New York, 97 F.3d 689, 695 (2d Cir. 1996)).

251. *See id.* at 242 n.7.

reluctant to extend First Amendment protection to plaintiffs who have claimed that they do not plan to use photographs they have taken for expressive and transformative purposes.[252]

In sum, arguing that First Amendment rights within the newsgathering and pre-expressive photography contexts are clearly established will be difficult. Although courts have extended some First Amendment protection to newsgathering and photographic expression, these protections are loaded with caveats and qualifications.[253] In most cases, a balancing of interests is involved, and many courts are hesitant to consider rights clearly established that require case-by-case balancing.[254]

A § 1983 plaintiff has a better chance of convincing a court that rights protected under the Fourth Amendment are clearly established, as Fourth Amendment protection against unreasonable searches and seizures is clearly established law.[255] Thus, the issue in establishing the second prong of the qualified immunity test generally will be "whether or not the officers made a reasonable mistake as to what the law requires."[256] In *Hudson v. Felder*, the United States District Court for the Eastern District of Kentucky held that "[i]f a police officer . . . arrests a citizen where probable cause is so clearly absent that the officer sheds his or her qualified immunity, the officer may be held accountable under § 1983 for the wrongful conduct."[257] The Supreme Court illuminates when probable cause might be found: "Probable cause exists where 'the facts and circumstances within . . . [the agent's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant [one] of reasonable caution in the belief that an offense has been or is being committed."[258] Reasonableness is evaluated from the perspective of a government actor at the scene, not with the benefit of hindsight.[259]

In order for an officer to have a reasonable "belief that an offense has been or is being committed," there must be an underlying offense.[260] If the

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252. *See id.*

253. *See id.* at 242 (citing *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, (1995); *See also* Ugland *supra* note 184, at 121 (noting that courts are not at a consensus as to the protection provided to newsgathering under the First Amendment).

254. *See* Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986).

255. Gale v. Storti, 608 F. Supp. 2d 629, 633 (E.D. Pa. 2009). *See also* Herren v. Bowyer, 850 F.2d 1543, 1547 (11th Cir. 1988) ("The law is 'clearly established' that an arrest without a warrant or probable cause to believe a crime has been committed violates the [F]ourth [A]mendment . . . .").

256. *Gale*, 608 F. Supp. 2d at 634.

257. Hutson v. Felder, No. 5:07-183-JMH 2008 WL 4186893, at *3 (E.D. Ky. Sept. 10, 2008).

258. Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

259. Graham v. Connor, 490 U.S. 386, 396 (1989).

260. *Brinegar*, 338 U.S. at 175–76.

arrest is not made pursuant to an offense defined by statute, law, or regulation, then an officer cannot have a reasonable belief that an offense has been or is being committed and probable cause would not exist.[261] Thus, if Person A, discussed in the hypothetical above, is arrested pursuant to a vague assertion of national security for taking pictures of bridges or buildings, a court may find that "probable cause is so clearly absent that the officer [has] shed[] his or her qualified immunity."[262]

The right to be free from unlawful detention is "clearly established" for the purposes of clearing the qualified immunity hurdle.[263] In most of the incidents examined in this article, however, people taking pictures of bridges, buildings, national laboratories, etc., are never ultimately arrested.[264] They are detained in many instances, which requires a "reasonable suspicion that the person has been, is, or is about to be engaged in criminal activity."[265] As the federal district court in Arizona held, "Reasonable suspicion to support an investigatory stop exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion."[266]

In the Portland incident described earlier (involving the high school girls who were held and questioned for photographing oil tankers near bridges),[267] the suspected criminal activity in this case was presumably potential terrorist activity.[268] The only articulable fact an officer could base reasonable suspicion was the fact that it appeared as if the girls were taking pictures of a bridge.[269] Courts have held that "[a]n individual's fundamental Fourth Amendment right to be free from 'unreasonable searches and seizures' does not dissipate merely because of generalized, unsubstantiated suspicions of terrorist activity."[270] Therefore, in the Portland case, the plaintiffs would likely be able to show a violation of a clearly established right.

Showing a violation of a clearly established Fourth Amendment right is much harder when a plaintiff is charged under a broadly worded criminal statute.[271] In such a case, there will be more factual disputes over what

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261. *See Herren*, 850 F.2d at 1545–46.

262. *Id.*

263. *See* Scheier v. City of Snohomish, No. C07-1925-JCC, 2008 WL 4812336, at *6 (W.D. Wash. Nov. 4, 2009).

264. *See supra* text accompanying notes 25–33 & 35–54.

265. Michigan v. Summers, 452 U.S. 692, 698 n.7 (1981).

266. Ortega Melendres v. Arpaio, 598 F. Supp. 2d 1025, 1026 (D. Ariz. 2009).

267. *See supra* text accompanying notes 11–16.

268. *Id.*

269. *See supra* text accompanying notes 14–15.

270. Scheier v. City of Snohomish, No. C07-1925-JCC, 2008 WL 4812336, at *11 (W.D. Wash. Nov. 4, 2009).

271. *See supra* note 151 and accompanying text.

actually happened. Moreover, the breadth of such statutes often makes it easy to build a case against a plaintiff since many activities can reasonably be construed as being criminal under sufficiently broad language.[272] For purposes of qualified immunity, the Supreme Court has held that even when a plaintiff perceives an officer's conduct to be malicious, immunity may attach if the officer's conduct is found to be *objectively* reasonable.[273] In cases where an officer "reasonably but mistakenly" believed that probable cause existed to effect the arrest or that certain exceptions applied to justify an arrest absent probable cause, the officer generally will be relieved from liability on the basis of qualified immunity.[274] Thus, it is easy to imagine how vague statutory language may unintentionally (or perhaps intentionally) provide law enforcement with the ability to claim for their conduct objective reasonableness and hence curtail civil liberties under the guise of "national security."

If a court were to determine that an officer "reasonably but mistakenly" believed that a journalist's conduct constituted disorderly conduct or obstruction of justice, the officer will not be subject to liability.[275] State statutes prohibiting disorderly conduct and obstruction of justice are generally broadly written[276] and consequently cover a wide range of conduct. A Michigan city ordinance makes it unlawful to "[a]ssault, obstruct, resist, hinder, or oppose any member of the police force . . . ."[277] The Sixth Circuit upheld qualified immunity where an officer arrested a person pursuant to this ordinance for interrupting him during questioning of a third party.[278] This court also upheld qualified immunity under circumstances where an officer arrested a person for refusing to provide identification.[279] In *Washpon v. Parr*, the United States District Court for the Southern District of New York upheld qualified immunity where officers arrested and charged the plaintiff with disorderly conduct for allegedly disobeying officers' orders to leave a courthouse.[280] With respect to whether the officers had probable cause to arrest the plaintiff, the *Washpon* Court found that "reasonably competent police officers could disagree,"[281] and thus the officer was entitled to qualified immunity.[282]

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272. *See e.g.*, incidents described *supra* notes 17–24, 34–39, 55–63.

273. *See* Malley v. Briggs, 475 U.S. 335, 341 (1986); *see* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (holding that an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner).

274. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

275. *See id.*

276. *See* Burton, *supra* note 87, at 19.

277. Risbridger v. Connelly, 275 F.3d 565, 568 (6th Cir. 2002) (quoting EAST LANSING, MICHGAN, Code, Title IX, Ch. 108, § 9.102(19)).

278. *See* King v. Ambs, 519 F.3d 607, 608 (6th Cir. 2008).

279. *See Risbridger*, 275 F.3d at 567.

280. Washpon v. Parr, 561 F. Supp. 2d 394, 395 (S.D.N.Y. 2008).

281. *Id.* at 403.

282. *Id.* at 404.

Other courts have upheld qualified immunity where no probable cause existed for the crime the plaintiff was arrested for but existed for some other criminal charge. In *Ware v. James City County, Virginia*, for example, the United States District Court for the Eastern District of Virginia found that the "[defendant's] initial reason for making the arrest need not be the criminal offense that ultimately is supported by probable cause from the known facts."[283] The aforementioned cases demonstrate the extent to which courts show deference to police officers when considering whether or not to uphold qualified immunity.

The obstacle of qualified immunity can be overcome when police officers detain or arrest persons for some vague assertion of "national security concerns" or unsubstantiated suspicions of "terrorist activity."[284] Additionally, a plaintiff may be able to overcome qualified immunity if he or she has been charged under a broad criminal statute, and it is obvious that officers were acting outside of accepted practice or perhaps had nefarious motives for the arrest (e.g., preventing a photographer from publishing pictures of police misconduct). Otherwise, overcoming the bar of qualified immunity is difficult. Although Fourth Amendment rights are "clearly established," police officers are not liable unless they violate such rights unreasonably.[285] Doing so is difficult, considering that most of the broadly worded statutes used to charge journalists and photographers are all encompassing and criminalize a broad spectrum of conduct.[286] In addition, courts tend to be highly deferential to police officers so as to prevent a judgment against law enforcement officials conducting their jobs as we would expect.[287] Even assuming a plaintiff does make it past the nearly impenetrable barrier of qualified immunity, he or she must still prove damages, which can be difficult.

3. Proving Damages

The U.S. District Court for the District of Columbia explained that "[t]he purpose of a damage award under § 1983 is 'to compensate persons for injuries that are caused by the deprivation of constitutional rights.'"[288] Indeed, "[c]ompensatory damages may include out-of-pocket loss,

283. Ware v. James City Cnty., Virginia, 652 F. Supp. 2d 693 (E.D. Va. 2009).

284. Scheier v. City of Snohomish, No. C07-1925-JCC, 2008 WL 4812336, at *10 (W.D. Wash. Nov. 4, 2008).

285. *Id.* at *6.

286. *See* Burton, *supra* note 87, at 19; *see also* incidents cited *supra* notes 17–24, 34–39, 55–63 (providing examples of broadly worded criminal statutes used to bring charges against photographers).

287. Teressa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 709 (2008).

288. Elkins v. District of Columbia, 610 F. Supp. 2d 52, 60 (D.D.C. 2009) (quoting Carey v. Piphus, 435 U.S. 247, 254 (1978)).

impairment of reputation, humiliation, and mental anguish and suffering."[289] In addition, the Ohio Court of Appeals has held that "[a] prevailing party [in a § 1983 action] should be allowed attorney fees unless 'special circumstances' would render awarding fees unjust."[290] Professor Teressa Ravenell provides a helpful background on the Supreme Court's shift in § 1983 cases:

> In *Carey v. Piphus*, the U.S. Supreme Court held that a plaintiff alleging a deprivation of a procedural due process right must show that the deprivation resulted in an actual injury in order to receive more than nominal monetary damages.[291] Shortly thereafter, the Court extended its holding to all Section 1983 cases for money damages, regardless of the underlying constitutional deprivation.[292] Thus, to receive monetary damages, all Section 1983 plaintiffs must prove that they suffered an actual injury.[293]

As alluded to above, proving damages can present legal hurdles in the context of these photography cases. Suppose Person A tours the United States for three weeks, accumulating hundreds of pictures on his memory card. At his last stop, an officer detains him and deletes all of his pictures for suspected terrorist activity. He successfully brings a § 1983 claim. Person A may never visit any of the places on his trip again, and he considers the deleted pictures to be priceless. The nature of his losses renders full compensation impossible, for the sentimental value of the photographs may be irreplaceable. Likewise, in the case of the girls taking pictures of a bridge in Portland,[294] does existing tort law provide a remedy for being placed on an FBI terrorist watch list?

The first problem Person A will face is the nearly impossible task of convincing a judge or jury of an "evidentiary link between the defendant's breach and [Person A's] injury."[295] Some courts apply a tort-based approach to causation in § 1983 cases, asking "whether the defendant should have foreseen that his conduct would result in the plaintiff's injury."[296] In applying this approach, a court may find that the officer who arrested Person A could not have reasonably foreseen the loss experienced by Person A. The court would probably agree with the defendant's argument that the officer reasonably would not have known that Person A was a journalist and intended to publish the photos (although it seems

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289. *Id.* at 59 (citing Memphis Cmty. Sch. Dist. V. Stachura, 477 U.S. 299, 307 (1986)).

290. Thomas v. City of Cleveland, 892 N.E.2d 454, 458 (Ohio App. 8 Dist. 2008).

291. Carey v. Piphus, 435 U.S. 247, 264 (1978).

292. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309–10 (1986).

293. Ravenell, *supra* note 287, at 709.

294. *See supra* text accompanying notes 11–16.

295. Ravenell, *supra* note 287, at 714.

296. *Id.* at 722.

obvious that this would be the precise reason the officer deleted the pictures). Therefore, a court would likely agree with the defendant's categorization of Person A's alleged damages as speculative. As Professor Ravenell notes, "Courts have used [damages] causation to limit liability in § 1983 wrongful conviction claims."[297]

All said, § 1983 plaintiffs within the context of the War on Photography are not likely to receive full compensation for their injuries.[298] A plaintiff may be able to collect for mental anguish and humiliation resulting from being arrested or detained, but showing any further harm will be difficult. While the true value of a journalist's pictures is not fully realized until after they are published, the constitutional violation due to their destruction occurs much before then.[299] Courts are likely to discard any arguments regarding the potential uses of the photographs as speculative and attenuated and perhaps unforeseen—thereby dealing a final, crucial blow to establishing legal causation.

4. § 1983 Summary

In most cases, § 1983 will not provide an adequate remedy for a plaintiff suffering a First or Fourth Amendment violation within the context of taking photographs in public places. First, establishing a constitutional violation will be difficult. Courts have given only passive support to § 1983 claims involving photography rights under the First Amendment.[300] Courts have been even more hesitant to extend any meaningful First Amendment protections to the newsgathering process, and where they have, the protections are heavily qualified.[301] A plaintiff has a much better chance of establishing a Fourth Amendment violation, but doing so may involve factual disputes and difficulty in providing the necessary proof.[302] In many cases, it will amount to the officer's word against the plaintiff's, and courts are generally deferential to officers.[303]

Second, qualified immunity represents a major obstacle to a § 1983 plaintiff.[304] Police officers are armed with broadly written criminal statutes that can be interpreted to prohibit a wide range of conduct,[305] in addition to

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297. Ravenell, *supra* note 287, at 693.

298. *See supra* text accompanying notes 295–97.

299. *But see, e.g.*, Montefusco, 39 F. Supp. 2d 231, 242 n.7 (asserting that it is not clearly established whether the act of taking a photograph is protected by the First Amendment).

300. *See Montefusco*, 39 F. Supp. 2d at 242 n.7; *see also supra* notes 180–83, 185–86 and accompanying text.

301. *See supra* notes 180–191 and accompanying text.

302. *See supra* notes 192–204 and accompanying text.

303. *See supra* note 225 and accompanying text.

304. *See supra* note 229 and accompanying text.

305. *See, e.g.*, incidents cited *supra* notes 17–24, 34–39, 55–63.

the deference of courts.[306] Even if an officer commits a Fourth Amendment violation, as long as the officer was not completely incompetent in doing so,[307] a court will probably find that he acted reasonably under the circumstances and is thus entitled to qualified immunity.[308]

Finally, assuming a plaintiff successfully clears these § 1983 obstacles, she still must prove damages. Professor Ravenell has noted that courts use damages causation to limit the scope of liability of state officials under § 1983.[309] The nature of photography and journalism is not conducive to proving damages.[310] First of all, it is difficult to put a dollar value on photographs that are worth different things to different people. One may consider photographs from a three-week vacation to be worth a great deal. A judge or juror may not fully appreciate this, and compensation will reflect that. Secondly, the value of photographs is realized upon publication; however, courts may consider the time in between the violation and publication and the process of publication itself as enough to render damages speculative.[311] Courts may also use causation to limit damages by finding that a defendant could not have foreseen that the plaintiff was (1) a journalist (2) who intended to publish the photographs, and (3) would be personally and professionally damaged by having his or her pictures deleted.[312] Within the context of violations occurring while photographing police misconduct, this seems naive at best. Arguably, a violation itself occurs because of the officer's realization that a journalist is snapping pictures that will be published and expose the officer's misconduct. So to hold in this context that the defendant could not have foreseen the damages is illogical.

Because proving damages involving photographs is inherently difficult, a plaintiff may collect only nominal damages or damages for humiliation and embarrassment resulting from the arrest itself.[313] Nominal damages are significant since they are generally accompanied with attorney fees,[314] and damages for humiliation and embarrassment will provide some relief for a plaintiff. However, jumping through all of the hoops required to succeed in a § 1983 action is a lengthy, arduous, and costly process. When litigation is commenced, a plaintiff has no guarantee that the days, weeks, and sometimes years her attorney spends on the case will be paid for by someone other than herself. Even if attorney's fees are provided, litigation

306. *See, e.g.*, *supra* notes 225, 228, 278, 280–83 (providing examples of courts showing deference to police officers).

307. *See supra* note 230 and accompanying text.

308. *See supra* notes 255–59 and accompanying text.

309. *See* Ravenell, *supra* note 287, at 733.

310. *See supra* text accompanying notes 295–97.

311. *See supra* text accompanying notes 288–90.

312. *See supra* text accompanying notes 295–97.

313. *See supra* note 289 and accompanying text.

314. *See supra* note 290 and accompanying text.

is time-consuming. Given the burdens of litigation, § 1983 does not provide a meaningful remedy to most plaintiffs suffering constitutional violations for taking pictures in public places.

D. Bivens *Action*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court established a federal common law cause of action for damages caused by a federal agent acting "under color of his authority" in violation of a claimant's constitutional right.[315] If a federal official violates a person's constitutional rights, a plaintiff cannot recover under § 1983, and must instead bring a *Bivens* action. "A *Bivens* action is a nonstatutory counterpart of a suit brought pursuant to 42 U.S.C. Section 1983, and is aimed at federal rather than state officials."[316] *Bivens* actions apply in limited settings, generally to violations of the Fourth and Fifth Amendments.[317] Unfortunately, the Supreme Court has been reluctant to extend *Bivens* liability to violations of the First Amendment, precisely those that would presumably apply to photography cases involving journalists, bloggers, etc.[318]

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315. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). Factors that strongly suggest that a police encounter has become a seizure include:

> [T]he threatening presence of several of officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects . . . and a request by the officer to accompany him to the police station or a police room.

Brown v. City of Oneonta, 221 F.3d 329, 340 (2d Cir. 2000) (quoting United States v. Hooper, 935 F.2d 484, 491 (2d Cir. 1991)). This remedy stands in contrast to most of the others examined herein in that it applies specifically to federal agents; the other scenarios and incidents explored here have involved state law enforcement or private security guards.

316. Mahoney v. Nat'l Org. for Women, 681 F.Supp. 129, 132 (D.Conn. 1987).

317. Davis v. Passman, 442 U.S. 228, 229–30 (1979).

318. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1939 (2009). The *Ashcroft* Court states:

> For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. Petitioners do not press this argument, however, so we assume, without deciding that respondent's First Amendment claim is actionable under *Bivens*.

Id. (internal citations omitted).

The requirements for successfully bringing a *Bivens* claim are stringent.[319] A plaintiff must first allege specific facts sufficient to support a violation of a right secured by the Constitution,[320] and the failure to allege such a constitutional violation is "fatal to their case."[321] A plaintiff must next show that his or her constitutional right was violated by an agent of the United States acting under color of law.[322] When "a constitutionally recognized interest is adversely affected by the actions of federal employees," the Court applies a two-pronged analysis: (1) is there an alternative judicial process that can '"protect the interest" which is "convincing" enough for the Court to refrain from providing a new remedy; or (2) if there is no convincing alternative process, are there any "special factors counseling hesitation before authorizing a new kind of federal litigation."[323] If the answer to the first prong is yes, then a new remedy will not be created.[324] If the answer is no, the court will consider "special factors"[325] such as the adequacy of alternative remedies,[326] difficulty in defining legitimate action by government actors,[327] the importance of protecting the constitutional interest,[328] the demand and cost on the judicial system from creating a mass of new litigation in the area,[329] the difficulty in defining a broader doctrine,[330] and the ability of Congress to legislate a remedy.[331] Through a successful *Bivens* claim, a plaintiff may collect money damages from agents of the United States in their individual capacities.[332]

The *Bivens* remedy is a wholly inadequate solution to the growing problem of photography rights violations. The remainder of this subsection will discuss both the general obstacles a *Bivens* plaintiff faces and also the specific obstacles present within the context of photography.

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319. Duxbury Trucking, Inc. v. Mass. Highway Dep't, No. 04cv12118-NG, 2009 WL 1258998, at *2 (D. Mass. Apr. 29, 2009).

320. *Id.* (citing *Mahoney*, 681 F. Supp. at 132).

321. Mattox v. City of Forest Park, 183 F.3d 515, 520 (6th Cir. 1999).

322. *Id.*

323. Wilkie v. Robbins, 55 U.S. 537, 550 (2007).

324. *See id.*

325. *See id.*

326. *See id.* at 555.

327. *See id.*

328. *See id.* at 577.

329. *See id.*

330. *See id.*

331. *See id.* at 562.

332. *See id.* at 575.

1. General Obstacles to *Bivens* Recovery

Between 1971 and 1989, twelve thousand *Bivens* suits were filed and only thirty resulted in judgments on behalf of the plaintiffs.[333] A number were reversed on appeal and only four judgments were actually paid by the individual federal defendant.[334] According to Perry M. Rosen, a former trial attorney for the U.S. Department of Justice specializing in *Bivens* cases, a number of factors explain these statistics.

First, plaintiffs in *Bivens* suits are procedurally disadvantaged.[335] A "*Bivens* plaintiff must plead the alleged constitutional tort with greater specificity than other claims."[336] Additionally, courts have "construed jurisdiction, venue, and other preliminary issues in *Bivens* suits so as to favor the individual government defendant."[337] Second, judges and juries are extremely reluctant to render judgments in favor of the plaintiff when they know that such a judgment will result in thousands of dollars out of pocket for a federal employee.[338] Judges and juries are aware that federal officials often have limited resources and do not want to pin a sizable judgment on an official who may have been simply trying to do his job.[339] Third, juries are less likely to side with plaintiffs in *Bivens* actions because it is "more difficult to 'see' the injury from a constitutional tort . . . then [sic] the injury from a common-law tort involving personal injury."[340] Fourth, federal officials have qualified immunity and are not liable for violations of constitutional rights committed in "good faith."[341] Fifth, even if a plaintiff receives a judgment in its favor, it is far from certain that the federal agent will have funds to compensate the plaintiff.[342] The "deep pockets" of the federal government are not available to *Bivens* plaintiffs.[343]

2. Obstacles to *Bivens* Plaintiffs within the Context of Photography Rights

Alleging specific facts sufficient to support a constitutional violation will be difficult for a number of reasons. As stated earlier, courts have been somewhat reluctant to extend *Bivens* liability to First Amendment

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333. Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 343 (1989).
334. *Id.* at 343–44.
335. *Id.* at 345.
336. *Id.*
337. *Id.*
338. *Id.* at 347.
339. *Id.*
340. *Id.*
341. *Id.* at 348–49.
342. *Id.* at 347.
343. *Id.*

violations.[344] It is unclear how receptive a court would be to the claim that federal officials violated one's right to photographic expression or freedom of the press within the newsgathering context. If a plaintiff makes it past this initial hurdle, he or she still must show that there is no judicial process that can protect his or her interest that is convincing enough for the court to refrain from providing a new remedy.[345] On this point, the Supreme Court has said that "[s]o long as the plaintiff [has] an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability."[346] Since Congress has created no statutory scheme addressing First Amendment violations in the context of photography, a court would likely find that no convincing remedy exists.

Congress created a remedy for certain torts committed by federal employees in the Federal Tort Claims Act.[347] The Act gives the district courts jurisdiction over the loss of property "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ."[348] Current law also provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ."[349] But the Court has found it to be "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability."[350] Courts are unlikely to preclude a plaintiff's *Bivens* claim solely based on the availability of a claim under the FTCA.[351]

Next, a plaintiff must maneuver around a number of "special factors" that may counsel hesitation before a court will authorize a new kind of federal litigation.[352] Recently, scholars have noted that courts have broadly interpreted the "special factors" to narrow the scope of *Bivens*.[353] Natalie Banta argues that the *Bivens* test has become "more legislative than judicial in nature, because the Court can now make policy decisions as to whether or not to apply the remedy instead of looking solely to the remedies available and assessing whether they are adequate."[354] The special factors established in *Wilkie v. Robbins* are expansive, leaving courts with virtually

344. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1947–48 (2009).

345. Rosen, *supra* note 333, at 357.

346. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001).

347. *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006).

348. *Id.*

349. 28 U.S.C. § 2674 (2006).

350. *Corr. Servs. Corp.*, 534 U.S. at 68.

351. *Cf.* Rosen, *supra* note 333, at 358 (noting other circumstances in which the Court has allowed a plaintiff to simultaneously maintain her actions under the FTCA and the Eighth Amendment).

352. *Id.* at 359.

353. Natalie Banta, *Death by a Thousand Cuts or Hard Bargaining?: How the Court's Indecision in* Wilkie v. Robbins *Improperly Eviscerates the Bivens Action*, 23 BYU J. PUB. L. 119, 135 (2008).

354. *Id.*

unlimited discretion in fashioning reasons to reject *Bivens* claims.[355] A court could easily reject a photographer's *Bivens* claim based on broad, inarticulate concerns such as avoiding a flood of litigation or difficulty in judicially defining a broad doctrine.[356]

Assuming a plaintiff can prove facts sufficient to support the assertion of a constitutional violation, demonstrate that no other adequate remedy exists, and navigate through the maze of special factors, he or she must next survive the doctrine of qualified immunity, which in most *Bivens* cases is fatal.[357] As stated earlier, federal employees possess qualified immunity and are not held liable for violations of constitutional rights committed in good faith.[358] A state actor is not entitled to qualified immunity if: (1) the plaintiff's allegations, assuming they are true, establish a constitutional violation, (2) the constitutional right at issue was clearly established at the time of the putative violation, and (3) a reasonable officer, situated similarly to defendant, would have understood the challenged act or omission to contravene the discerned constitutional right.[359] Since qualified immunity in *Bivens* actions is essentially the same doctrine applied in § 1983 cases, and since the previous section explains the ways in which qualified immunity drastically reduces a plaintiff's chances of securing relief, no further discussion will be provided in this section.

3. *Bivens* Summary

In most cases, a *Bivens* action will not provide a plaintiff with an adequate remedy in the context of photography rights. The two most obvious constitutional provisions applicable to photography rights in public places include the First Amendment freedom of the press and freedom of expression. Although some courts have extended the scope of *Bivens* to cover First Amendment violations, no court has recognized a *Bivens* action for violation of freedom of the press due to interference with the "newsgathering" process.[360] Nor has a court extended *Bivens* to a First Amendment violation of photographic expression. Even if a plaintiff successfully alleges a constitutional violation that cannot be remedied by an alternative judicial process, a court may still use one of a number of special factors to avoid extending the scope of *Bivens* liability.[361] If a court does recognize the action, qualified immunity presents a nearly impenetrable

355. Wilkie v. Robbins, 551 U.S. 537, 555, 561 (2007).

356. *See id.* at 555, 561.

357. *See* Rosen, *supra* note 333, at 348.

358. *See id.* at 348–49.

359. Savard v. Rhode Island, 338 F.3d 23, 27 (1st Cir. 2003).

360. *See generally* Spagnola v. Mathis 809 F.2d 16, 32 (D.C. Cir. 1988) (reversing dismissal of First Amendment *Bivens* claim).

361. *See* Rosen, *supra* note 333, at 359.

barrier that judges and juries are more than willing to apply.[362] Even a plaintiff who successfully brings a *Bivens* suit may not be compensated fully.[363] Federal employees do not have the "deep pockets" of the federal government and may not be able to afford the judgment against them.[364] Most important of all, attorneys' fees are not available in *Bivens* actions.[365] A *Bivens* judgment would have to be quite large to cover both the attorneys' fees (which will likely be substantial) and any damages the plaintiff suffered. As explained within the context of § 1983, damages associated with photography rights are inherently difficult to prove and courts use causation to limit the damages for which *Bivens* defendants will be responsible.[366] In essence, a *Bivens* plaintiff faces all the obstacles faced by a § 1983 plaintiff plus more. Mr. Rosen notes that "governmental liability and the right to attorneys' fees, which are not made available to a *Bivens* plaintiff, combined with the extra restrictions applicable only in *Bivens* actions, make the task of the *Bivens* plaintiff that much more difficult than that of an individual suing under Section 1983."[367] Thus, *Bivens* represents an inadequate remedy that fails to provide a plaintiff with any meaningful chance of recovery against a federal official.

V. VIOLATIONS COMMITTED BY SECURITY GUARDS IN PRIVATELY OWNED PLACES OPEN TO THE PUBLIC

As stated earlier, the right to photograph in privately owned places open to the public is governed by relatively straightforward law.[368] Virtually no limits exist on the right to photograph privately owned structures that are visible from public places.[369]

When analyzing the remedies available to plaintiffs harmed by a private security guard, the first inquiry will be whether or not the security guard was acting under color of state law.[370] If the security guard was acting under color of state law, a plaintiff may bring a § 1983 claim.[371] If a court finds that the security guard was not acting under color of state law, a plaintiff must resort to state tort remedies for compensation.[372] Subsection A discusses the requirements for bringing a § 1983 claim against a private

362. *Id.* at 348.
363. *Id.* at 347.
364. *Id.*
365. *Id.*
366. *See supra* pp. 135–37 and accompanying notes.
367. Rosen, *supra* note 333, at 366.
368. *See supra* Section III.B and accompanying notes.
369. *See* R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999).
370. *See* 42 U.S.C. § 1983 (2006).
371. *See id.*
372. *See id.*

security guard. Subsection B discusses the remedies available to a plaintiff harmed by a private security guard not acting under color of state law.

A. Private Security Guards Acting under Color of State Law

A private security guard will be considered to be acting under color of state law when his or her conduct is "fairly attributable to the State."[373] In *Chapman v. Higbee Co.*, the Sixth Circuit relied on the Supreme Court's battery of three tests for determining whether a state action exists: "(1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test."[374] The Seventh Circuit has held that private police officers licensed to make arrests could be considered state actors under the public function test.[375] The Sixth Circuit provides further clarification: "Under the public function test, a private entity is said to be performing a public function if it is exercising powers traditionally reserved to the state, such as holding elections, taking private property under the eminent domain power, or operating a company-owned town."[376]

In order for a plaintiff to show that a private security guard acted under color of state law, he or she will generally need to show that the private actor exercised a "power exclusively reserved to the state, e.g., the police power," rather than "a power traditionally reserved to the state, but not exclusively reserved to it, e.g., the common law shopkeeper's privilege."[377] A plaintiff must demonstrate that the private security guard was "endowed by law with plenary police power such that they are *de facto* police officers."[378] If a plaintiff is unable to show that a security guard was a "*de facto* police officer" and his or her actions are not "fairly attributable to the state," [379] that plaintiff is left with no choice but to resort to common law tort claims for compensation.

Heidi Boghosian writes in the *Missouri Law Review* that private security guards and police officers may be found to be acting under color of law; however, courts have been hesitant to make such a finding.[380] Boghosian states:

> [S]ome courts have ruled that special police status alone does not establish color of law and that the imposition of liability [under § 1983] depends on

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373. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1981).

374. Chapman v. Higbee Co., 319 F.3d 825, 833 (6th Cir. 2003) (citations omitted).

375. Payton v. Rush-Presbyterian-St. Luke's Med. Ctr., 184 F.3d 623, 630 (7th. Cir. 1999).

376. Romanski v. Detroit Entm't, L.L.C., 428 F.3d 629, 636 (6th Cir. 2005).

377. *Id.* at 637.

378. *Id.*

379. *See id.* at 636–37.

380. *See* Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 208–09 (2005).

> whether the officers were performing a "public function"—one traditionally performed for the public good by the state. The Supreme Court has been clear that the scope of public functions is limited, reaching only activities that have been "traditionally the exclusive prerogative of the State."[381]

B. State Tort Claims Available against Private Security Guards not Considered to Be Acting under Color of State Law

As discussed above, if a security guard confiscates a person's camera or unlawfully detains someone, that person will not be able to sue the security guard under § 1983 if the security guard was not "acting under the color of state law."[382] A plaintiff whose rights have been violated must resort to remedies available at state law. Such state tort claims may include, but are not limited to: (1) false imprisonment, (2) false arrest, (3) assault, (4) battery, (5) intentional infliction of emotional distress, (6) interference or conversion of property, and (7) tortuous interference with economic opportunity.[383] The remedies available to plaintiff will be whatever remedies state law provides for each cause of action.[384]

Recall the Chicago incident described in Section II. A girl was standing in line for a concert at the House of Blues and snapped a picture of the security guard, who immediately seized her camera.[385] The girl attempted to take her camera back and the security guard repeatedly shoved her and finally pushed her to the ground.[386] Although the girl may not sue the security guard under § 1983 since he is not acting under the color of state law, she may sue him for use of excessive force, assault, battery, and conversion of her property. Considering the egregious nature of the incident, she would likely succeed on many of these claims.

Ms. Boghosian writes: "Although they perform a range of law enforcement-related activities, private security guards are frequently ill-trained, unsupervised, and may themselves have criminal records."[387] She notes that "the Chicago Housing Authority police chief estimated that 20 percent of guards working private security at the Chicago Housing Authority in 1996 were active gang members."[388] Private security guards "outnumber[] public police by three to one in the United States—in a range of law enforcement activities that put[] them in direct contact with the

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381. *Id.* at 208 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982)).

382. *See Romanaski*, 428 F.3d, at 636.

383. *See, e.g.*, Bryant, *supra* note 78 (describing incident where plaintiff would have been able to bring a state tort claim against a security guard).

384. *See, e.g.*, *id.*

385. *Id.*

386. *Id.*

387. Boghosian, *supra* note 380, at 177.

388. *Id.*

public."[389] Although in some cases, plaintiffs harmed by private security guards may be adequately compensated by bringing state tort claims, there are a number of obstacles a plaintiff may face.

First, the possibility always exists that the security guard will be insolvent.[390] Second, attorney's fees and court costs may be considerable and render litigation impractical. For example, assume a private security guard confiscates or breaks Person A's camera and deletes the memory card. The court costs of bringing a claim against the security guard may quickly add up to equal or exceed the cost of the camera, and it will be difficult for a plaintiff to receive adequate compensation for the loss of pictures on a memory card because of the difficulty of proving their intended use or estimated worth.

Although plaintiffs suing private security guards pursuant to state torts may face a series of obstacles, these plaintiffs are more likely to be adequately compensated than those bringing a § 1983 suit, for though they will not have access to the deep pockets of the state and will be responsible for court costs and attorney's fees, they will not have to show a constitutional violation nor to circumvent the doctrine of qualified immunity.[391]

VI. SUMMARY OF REMEDIES

A person who turns to the courts for relief when damaged by another's negligent, reckless, or intentional actions can expect to sacrifice time and money to get compensated.[392] This is no surprise. What makes the case of a person damaged within the context of public photography and journalism uniquely unfortunate is that, most of the time, there is no pot of gold at the end of the rainbow.[393] In every step of § 1983 and *Bivens* litigation there are obstacles that often prove insurmountable.[394] Assuming a plaintiff can convince a court of a constitutional violation (which is hindered by courts' ambiguous stance with respect to newsgathering and photographic

389. *Id.*

390. *See id.* at 184 ("The median annual income in 2002 for security guards was $19,140.").

391. *See* Rosen, supra note 333, at 339 (actions under 42 U.S.C. § 1983 involve "constitutional deprivations by government officials" and involve issues of immunity).

392. *See generally id.* Rosen notes additionally that *Bivens* suits have resulted in few plaintiff's verdicts: "Of these [suits], a number have been reversed on appeal and only four judgments have actually been paid by the individual federal defendants." *Id.* at 343–44.

393. *See id.* at 341 (In *Bivens* suits, "[c]ourts and juries [are] therefore left to look to the Park Service policeman, the INS official, or the FBI agent to be financially responsible for the actions each took on behalf of the federal government.").

394. *See id.* at 343 ("The Supreme Court created the *Bivens* doctrine for the express and sole purpose of providing a damages remedy to the victims of constitutional torts. That purpose has simply not been achieved.").

expression), he still must clear the qualified immunity hurdle.[395] Courts apply qualified immunity liberally, even where defendant clearly committed the violation in question.[396] With the help of broadly written criminal statutes, courts are able to find that nearly all official conduct either did not violate the plaintiff's rights or violated them but did so on a reasonable basis.[397]

If an officer behaves so incompetently that he waives qualified immunity, courts may still use causation to limit damages.[398] Damages within the photography and journalism context are difficult to prove,[399] and it is hard if not impossible to put a price on photographs and photographic opportunities. Basically, from beginning to end, § 1983 litigation is packed full of balancing tests, special factors, and subjective notions of what it "reasonable under the circumstances."[400] A court has an unlimited amount of wiggle room and countless opportunities to show deference to police officers.

Bivens actions have all of the bugs (or, if you are a law enforcement officer, features) of § 1983, plus more.[401] Since a *Bivens* action is a judicially created remedy, the court has even greater discretion in limiting the scope of liability and finding "factors that counsel hesitation."[402] Most significantly, courts have not interpreted the *Bivens* remedy to include attorneys' fees.[403]

A plaintiff always has the option of seeking injunctive or declaratory relief, but these remedies come with their own set of problems,[404] the most obvious being their failure to provide pecuniary damages.[405] Securing these forms of relief generally requires extensive factual findings of "patterns of

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395. *Id.* at 348.

396. *See id.* at 354.

397. *See id.* ("Under the [qualified immunity] test, a federal official who knew he was violating the clearly established constitutional rights of the plaintiff or who acted with malicious intent to violate those rights would still be immune so long as a reasonable official would not have been aware that the actions at issue violated clearly established law.").

398. Ravenell, *supra* note 287, at 722.

399. *See id.* (Some federal courts have applied a strict approach to § 1983 litigation, which "requires that the plaintiff's harm be related to the risk the constitutional amendment was intended to protect.").

400. *Id.* at 692 n.25.

401. *See* Rosen, *supra* note 333, at 357.

402. *Id.*

403. *Id.* at 364.

404. *See* LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985) ("[W]hen injunctive relief is sought, litigants must adduce a 'credible threat' of recurrent injury."); Evans Med. Ltd. v. Am. Cyanamid Co., 980 F. Supp. 132, 135 (S.D.N.Y. 1997) (finding declaratory relief not available unless a threat is "immediate and real").

405. *See* Rosen, *supra* note 333, at 369 (a "mere violation of constitutional right" does not "automatically result in damages.").

police behavior" and "credible threats" of "recurrent injury."[406] Officers will defend by alleging misconduct or illegal behavior on behalf of the plaintiff (such as "interfering with an investigation" or disturbing the peace).[407] On more than one occasion, courts have taken the officer's word in such a dispute, stating that the First Amendment "does not override the interest of the public," or facilitate "reprehensible conduct forbidden to all other persons."[408]

Practically speaking, the best chance a photographer plaintiff has of securing a meaningful remedy is in a state tort suit against a private security guard. This is because there is no need to establish a constitutional violation and qualified immunity is not at issue. Plaintiffs, however, must bear the financial burden of the litigation, which may be considerable, and also prove damages. A plaintiff's inability to prove the damages he or she suffered could mean a lot of court costs and attorney's fees with little compensation.

In sum, a person has a right to be in a public place, a right to have a camera, and a right to use that camera to photograph persons or structures visible from public places.[409] With few exceptions, federal, state, and local laws do not prohibit such conduct specifically.[410] But when a person's rights in this context are violated, there is no meaningful and practical remedy. The following section discusses why this is a problem and why we should be concerned.

VII. IMPLICATIONS OF AN INADEQUATE REMEDIAL STRUCTURE

In his article *Rights Essentialism and Remedial Equilibration*, Professor Daryl J. Levinson states that, "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape and very existence."[411] Indeed, Levinson continues, "it has long been understood that rights and remedies are, in many important contexts, functionally inseparable."[412] The article quotes Oliver Wendell Holmes, who once observed, "[A] legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by

406. *See LaDuke*, 762 F.2d at 1323–24.

407. *See* State v. Taylor, 118 A.2d 36, 45 (N.J. Super. Ct. App. Div. 1955).

408. Branzburg v. Hayes, 408 U.S. 665, 691–92 (1971); *see also* Burton, *supra* note 87, at 19 ("Long ago the Court made it clear that the First Amendment does not 'invalidate every incidental burdening of the press that may result from the enforcement of civil and criminal statutes of general applicability.").

409. *See* R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999).

410. *See id.*

411. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

412. *Id.*

judgment of the court—and so of a *legal right*."[413] Levinson explains: "'This or that way' is, of course, the remedy."[414] Rights are preserved through remedies because remedies provide a strong incentive for people to recognize and respect those rights. Without remedies, it is unlikely that either federal officials, state officials, or private security guards will be deterred from conduct that violates the rights of others—thus, the right to take photographs in public places will erode.

VIII. WHAT'S WRONG WITH THIS PICTURE?

The erosion of photography rights is a multi-dimensional problem, troubling for a variety of reasons that reflect both substantive and procedural concerns. The first and most obvious concern is that photography is an essential part of the newsgathering process, which is itself essential to a free press. Second and of equal cause for concern is the process by which the right to take pictures in public places has been diminished and the lack of accountability reflected by this process. Lastly, the erosion of photography rights has not been accompanied with a corresponding increase in national security or public safety, nor will it be in the future. This section discusses each of these three problems in some detail.

A. The Erosion of Photography Rights Will Diminish Public Awareness, Transparency, and Accountability

Almost everyone is familiar with the adage "A picture is worth a thousand words." A 1998 *Harvard Law Review* note cites two particular instances in American history demonstrating the power of photographs.[415] First, it mentions the picture depicting the aftermath of the infamous 1970 shooting at Kent State University.[416] On May 4, 1970, the Ohio National Guard opened fire on a large group of student protesters without warning.[417] The photograph, taken by John Paul Filo, shows a young woman kneeling over the body of a dead student.[418] The look on her face is one of disbelief and horror, reflecting the prevailing sentiment of those who experienced the massacre.[419] Within days, the image appeared on the front pages of

413. *Id.* (citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897)) (emphasis added).

414. *Id.*

415. *See* Note, *supra* note 102, at 1095 (citing VICKI GOLDBERG, THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES 7 (1991)).

416. *See id.* at 1095.

417. *See id.*

418. *See id.*

419. *See id.*

newspapers across the country.[420] Vicki Goldberg, a photography critic and author, notes that "'[t]he photograph helped galvanize the stalled antiwar movement on college campuses and came to symbolize a nation's shock that its children were dying at the hands of its protectors.'"[421] The second photograph, taken by Huynh Cong Ut, captured the horror of the Vietnam War,[422] showing several children in South Vietnam frantically fleeing a napalm strike.[423] The central figure is a young girl "stark naked and badly burned; she had torn off all of her clothes in a futile attempt to escape the searing effects of napalm."[424] Tremendously disturbing, this photograph became an icon of the antiwar movement.[425] Susan Sontag, author of a collection of essays on the history and present-day role of photography, stated that Ut's photograph "'probably did more to increase the public revulsion against the war than a hundred hours of televised barbarities.'"[426]

These images are striking examples of the power of photography to increase public awareness, shape the nation's conscience, inspire change, and instantaneously convey volumes of information in a manner often more effective than through the written or spoken word. As Goldberg notes, "'[p]hotographs have a swifter and more succinct impact than words, an impact that is instantaneous, visceral, and intense.'"[427] A powerful image is simply harder to ignore than a written or spoken description of the same image. One reason for this is that an image's effectiveness in conveying an idea does not depend as much on the viewer's trust in the source. The viewer has the ability to see for him or herself, making it harder to dismiss the information on the basis of questionable validity. For these and other reasons, photography represents a powerful tool for increasing public awareness and inspiring reform.

Photography is also a valuable means of enhancing accountability on behalf of law enforcement officials and private security guards. The mere awareness that one's behavior can be captured on camera provides a powerful incentive for officials to avoid acting outside the scope of their authority. Additionally, when police misconduct does occur and is captured on film, publication of the footage inspires public outrage and, consequently, reform (or at least increased vigilance). Take for example the reaction to the police beating of Rodney King, captured on camera in March 1991.[428] An individual captured Los Angeles Police Department

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420. *See id.*
421. *Id.* (quoting GOLDBERG, *supra* note 415, at 237).
422. *See id.*
423. *See id.*
424. *Id.* at 1095–96.
425. *Id.*
426. *Id.* (citing SUSAN SONTAG, *In Plato's Cave*, in ON PHOTOGRAPHY 3, 18 (1977)).
427. Note, *supra* note 102, at 1095 (quoting GOLDBERG, *supra* note 415, at 7).
428. *See* Elizabeth F. Loftus & Laura A. Rosenwald, *The Rodney King Videotape: Why the Case Was Not Black and White*, 66 S. CAL. L. REV. 1637, 1637 (1993).

officers repeatedly striking King with their batons.[429] A portion of the footage was aired by news agencies around the country, causing public outrage over police brutality.[430]

The foregoing illustrates that the right to take pictures in public places is an important one not only because of its communicative and expressive value, but also because it helps ensure the survival of other rights by promoting accountability and transparency. Unfortunately, much of the usefulness of photography in this capacity depends on the ability of photographers to take pictures without the burden of undue governmental regulation. When police officers unlawfully prohibit a photographer from taking a picture, the individual photographer is harmed, but more importantly, the incident contributes to a chilling effect on photography in general. A photographer who fears that taking a picture may result in criminal charges and that few if any legal remedies are available may decide that taking the picture is not worth the risk. The value of photography to individuals and to society cannot be fully realized if those holding the camera are forced to think before they snap.

B. The Erosion of Photography Rights Reflects Insulated Policymaking Void of Accountability

The process by which photography rights have been diminished is equally troubling as the concerns discussed in the previous section. The so-called "War on Photography" is not the product of a calculated effort on behalf of policymakers designed to enhance national security or public safety. Instead, it seems to be the result of haphazard snap judgments on part of law enforcement officials and security guards, which seem to be motivated either by the belief that they are promoting national security or public safety, or in some cases, a desire to avoid having their behavior caught on camera. Their source of authority? Generally, they point either to a fictitious "national security" or "9/11" law or a broadly worded statute the drafters of which probably never intended to apply to the photography in question. Because of the lack of adequate remedies and the courts' reluctance to entertain claims under the remedies that do exist, law enforcement officials have no incentive to avoid interfering with lawful behavior.

Undoubtedly, in many cases, police officers are simply trying to promote public safety and do their job. The problem is that when an officer determines that a person should not be able to photograph a skyscraper, a bridge, or an ongoing arrest, the officer is not doing *his* job—he is doing the job of the legislature. It is the responsibility of the legislature to determine which behaviors are unlawful; the province of law enforcement officers is determining whether or not a particular person's actions constitute the

429. *See id.*
430. *See id.*

behavior proscribed by the legislature. As stated throughout this article, few laws exist prohibiting photography in public places, and the ones that do prohibit only the most obnoxious or intrusive behavior. Thus, when an officer unilaterally determines that taking pictures in a particular instance is prohibited, he abandons the role of a law enforcer and assumes the role of policymaker. When unelected officials such as law enforcement officials make policy judgments they are not entitled to make, the link between citizen and policymaker is severed and accountability is destroyed. To make matters worse, the inadequate remedial structure within the realm of photography rights combined with courts' deferential treatment to law enforcement officials effectively insulate officers' conduct from consequences. Law enforcement officials have little incentive to refrain from such conduct and photographers have few avenues available to them to initiate change.

C. The Erosion of Photography Rights Has not Been and Will not Be Accompanied by an Increase in National Security or Public Safety

Undue regulation of the right to take photographs in public is not only intrusive, burdensome and limiting; it is also ineffective at enhancing national security or public safety. Modern technology has made it possible to access online images of buildings, transportation stations and a multitude of other structures from a variety of angles and distances.[431] What is the advantage of limiting a person's ability to photograph structures when the same or similar images are widely available to the general public? Additionally, evidence exists that the perpetrators of past terrorist plots never photographed their targets. Bruce Schneier, an internationally renowned security technologist and author noted:

> The 9/11 terrorists didn't photograph anything. Nor did the London transport bombers, the Madrid subway bombers, or the liquid bombers arrested in 2006. Timothy McVeigh didn't photograph the Oklahoma City Federal Building. The Unabomber didn't photograph anything; neither did shoe-bomber Richard Reid. Photographs aren't being found amongst the papers of Palestinian suicide bombers. . . . Even those manufactured terrorist plots that the US government likes to talk about—the Ft. Dix terrorist, the JFK airport bombers, the Miami 7, the Lackawanna 6—no photography.[432]

Schneier argues that even if terrorists did photograph their targets, it would not be practical to prevent it:

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431. *See, e.g.*, GOOGLE EARTH, http://www.google.com/earth/index.html (last visited Jan. 25, 2011).

432. Schneier, *supra* note 2.

> Billions of photographs are taken by honest people every year, 50 billion by amateurs alone in the US. And the national monuments you imagine terrorists taking photographs of are the same ones tourists like to take pictures of. If you see someone taking one of those photographs, the odds are infinitesimal that he's a terrorist.[433]

Indeed, one can argue that photography enhances rather than hinders national security. In a *Popular Mechanics* article entitled *Photo Phobia*, University of Tennessee College of Law Professor Glenn Reynolds writes: "Even in potential terrorism cases, the presence of lots of ordinary folks carrying cameras actually enhances public security. In the hours after the failed Times Square car-bomb attempt, officials searching for clues didn't just look at their own security-camera footage, they also sought out home movies shot by tourists."[434] Ironically, then, law enforcement officials' efforts to enhance security by limiting photography are likely to have exactly the opposite effect.

The following section of this article proposes solutions for preserving the right to take pictures in public places and ideas to prevent further violations of these critical rights. Some of the solutions discussed are prophylactic while others are more remedial in nature.

IX. POSSIBLE SOLUTIONS

A. Know Your Rights

The first way photographers can prevent abuse is to know their rights. When confronted by law enforcement officers, photographers who do not know and understand their rights are more likely to apologize for their conduct and comply with authority, whether or not this authority is legitimate. As a consequence, Bruce Schneier writes, "[l]aw enforcement officials and security guards are then emboldened to enforce a nonexistent law and trample on constitutional rights, and there is no incentive for them to do otherwise."[435] Schneier advises photographers, journalists, and others to carry cards or pamphlets listing their legal rights and obligations in the event they are confronted by law enforcement officials for taking photographs.[436] Attorney Bert P. Krages also advocates the use of pocket guides and provides one on his website.[437] He advises photographers to

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433. *Id.*

434. Glenn Harlan Reynolds, *Photo Phobia*, POPULAR MECHANICS, Aug. 2010, at 52–53.

435. Bruce Schneier, *The War on Photography*, SCHNEIER ON SECURITY (June 5, 2008, 6:44 AM), http://www.schneier.com/blog/archives/2008/06/the_war_on_phot.html.

436. Bruce Schneier, *Are Photographers Really a Threat?*, THE GUARDIAN, June 5, 2008, http://www.guardian.co.uk/technology/2008/jun/05/news.terrorism.

437. Bert P. Krages, *The Photographer's Right*, *available at* http://www.krages.com/ThePhotographersRight.pdf.

carry the guide in their wallet or camera bag for "quick access to your rights and obligations concerning confrontations over photography."[438]

B. Publicize Violations

Organized media at every level (local, state and national) should shed light on incidents where photography rights are curbed. Throughout this article there are a number of examples of how media organizations have the power to publish stories that serve as a catalyst for change. Consistent publication of violations of photographers' rights will increase public awareness of the issue and motivate people to act. Increased attention may also motivate law enforcement brass to be more vigilant in monitoring their officers' behavior and discipline them for acting outside their authority.

News organizations should ensure that journalists understand their right to photograph and inform journalists of the relatively few restrictions that exist on those rights. They should advise journalists and photographers that if they feel they are about to be the victim of unlawful police conduct and believe themselves to be acting within the scope of the law, they should continue taking photographs or filming what is happening. The photos or footage may prove to be valuable evidence in litigation and an effective tool for educating the public and inspiring action. Lastly, media organizations should provide attorneys for photographers charged by police and indemnify them on any judgments rendered.[439]

C. Attorneys: Attack the Statute

It is important for attorneys who defend photographers and journalists to include in their defense an attack on the statute or regulation itself. Counsel should not limit their position to a purely factual defense. In addition to this argument, counsel should attack the statute itself on the basis that it criminalizes constitutionally protected behavior and is being unconstitutionally applied to press. Counsel should attack broadly written statutes as unconstitutionally vague or overbroad and argue that these statutes give law enforcement officials unlimited discretion to target press.

Attacking the statute itself represents an efficient way to combat police misconduct, because it works to eliminate one of law enforcement officials' primary tools for suppressing journalists and photographers. It also increases courts' awareness that such "all-purpose" statutes are being used to target the organized media and hinder the newsgathering process. Attacking the statute also makes it more likely that you will achieve your client's goals and also helps prevent future abuse of photography rights.

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438. Bert P. Krages, *The Photographer's Right*, BERT P. KRAGES, ATTORNEY AT LAW PHOTOGRAPHER'S RIGHTS PAGE, http://www.krages.com/phoright.htm (last visited Jan. 25, 2011).

439. *See* Burton, *supra* note 87, at 22.

D. An Organized Front on Behalf of News Media

The third solution is for media organizations at all levels (local, state and national) to dedicate resources to developing an organized front to combat abuses of newsgathering and press rights. Eve Burton, Vice President and General Counsel of the Hearst Corporation, argues that the organized media's reaction to violations of newsgathering and press rights has been weak.[440] Her article *Where Are All the Angry Journalists?* argues that the organized media and the general public have not demonstrated an appropriate level of outrage at the restriction of press rights.[441]

In addition to investing in able attorneys to represent journalists in civil actions, Burton proposes that the organized media create a national or state-by-state data bank of information regarding violations of newsgathering and press rights.[442] With this information at their fingertips, counsel for media organizations can make a more convincing and well-documented argument that the statute in question has been used to target the constitutionally protected activities of the organized media. Additionally, a data bank could be useful in equipping media lobbyists with strong evidence that could be used to convince legislators to repeal or amend existing statutes.

E. Observe the Efforts of Photographers Abroad

The efforts of journalists and photographers in other countries provide helpful guidance in applying pressure to federal officials in the United States. In London, *Amateur Photographer* magazine, the Royal Photographic Society and the British Institute of Professional Photography have all been instrumental in influencing the government to take measures to prevent the abuse of press rights.[443] In March 2009, the Home Office invited representatives of the media to "help draft guidance that will aim to ensure police do not misuse anti-terrorism legislation to unfairly stop photographers."[444] This invitation came in response to a request by *Amateur Photographer* that Parliament "adopt a common-sense approach when dealing with photographers."[445] In addition to efforts by the organized media, hundreds of photographers staged a demonstration outside New Scotland Yard to protest broad anti-terrorism legislation that they felt would be used to target the lawful activities of photographers.[446]

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440. *Id.* at 19.

441. *Id.* at 21–22.

442. *Id.*

443. Chris Cheesman, *Photographers Meet home Office Minister Over Rights "Abuse,"* AMATEUR PHOTOGRAPHER, Mar. 12, 2009, http://www.amateurphotographer.co.uk/news/photographers_meet_home_office_minister_over_rights_abuse_news_278619.html.

444. *Id.*

445. *Id.*

446. *Id.*

F. Expand the § 1983 Definition of "Acting under Color of State Law" to Include Private Security Guards

In response to abuse by private security guards, media organizations and other groups should pressure Congress and the courts for an expanded § 1983 definition of "acting under state law."[447] Security guards stop, detain and search people just like police. They wear uniforms similar to those of police and carry the same weapons police carry. As Heidi Boghosian's observes, "[T]he private police industry relies on uniforms to imbue its agents with the public police's implied monopoly on state-sanctioned use of force and coercion . . . . As a result, private security personnel are frequently mistaken for public police."[448]

As discussed in Section V., courts are hesitant to make a finding that a privacy security guard "acted under color of state law." Attorneys for media organizations need to argue for an interpretation of "acting under color of state law" that more accurately reflects the reality that police officers and private security guards often assert the same authority and are in many cases indistinguishable. In addition, attorneys should encourage courts to fashion equitable remedies under § 1983 in the form of improved training and oversight of security guards.[449] Improved training and increased accountability will help decrease future abuses by security guards.

G. New Legislation under the Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution empowers Congress to pass laws that protect the civil rights of citizens.[450] Media organizations and other groups affected by police misconduct in the realm of photography rights should pressure Congress to adopt legislation aimed at preventing the abuses of the variety described in this article. Professor Glenn Reynolds considers the abuse of rights in the realm of photography to be "one of the comparatively few issues that could merit a new federal civil rights law."[451] Professor Reynolds believes that a clear federal law would limit situations in which "local officials use their power to harass those who might keep an eye on them. Passing such a law would make us all safer."[452]

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447. *See* Boghosian, *supra* note 380, at 208–09 (describing uncertainty regarding whether courts will treat security guards as "acting under color of state law").

448. *Id.* at 204.

449. *Id.* at 211.

450. U.S. CONST. amend. XIV, § 5.

451. Reynolds, *supra* note 434.

452. *Id.*

X. CONCLUSION

The law in the United States places few restrictions on the right to take pictures in public places.[453] Yet since 9/11, photographers have repeatedly been harassed, questioned, detained, and charged with crimes. The War on Terror has augmented law enforcement's already distrusting and hostile attitude towards photographers. Police officers have repeatedly charged or threatened to charge journalists pursuant to broadly worded criminal statutes and vague references to national security.[454] Photographers have had their cameras taken unlawfully, memory cards deleted, and their dignity sullied by police officers and private security guards acting outside of their authority. Worse yet, photographers whose rights have been violated have few, if any, meaningful remedies available to them under existing law. All of the remedies discussed in this paper are difficult to obtain and unlikely to compensate a plaintiff fully. In most cases, the chance of recovery is slim, and the amount of recoverable damages is uncertain. Considering the time and resources associated with litigation, it is often impractical for a victim to pursue legal remedies for violations of his or her photography rights.

Without meaningful remedies, the right to take pictures in public places will further erode. Photography is a powerful mode of expression and a valuable communicative tool. It is an essential part of a free press, which is itself essential to democracy. Violations of rights within the context of newsgathering and photography indubitably cause harm to the individual. But more importantly, these violations cause significant damage to society by threatening the free flow of information and ideas.

Ameliorating what scholars have labeled "the War on Photography" will require the efforts of both the organized media and grassroots organizations. Both should seek to educate people about their legal rights and increase the public's awareness of abuses described. The organized media needs to dedicate the resources necessary to defend those charged with crimes and to pressure courts and legislatures to make and interpret law in a way that holds officials accountable for their actions.

These and other efforts are needed to prevent the continuation of widespread abuse of photography and newsgathering rights. The meaningful remedies needed to preserve the right to free press and expression are currently lacking. In the words of one scholar, "[t]he death of a free press can occur not only by a dictator's edict but by slow erosion, one case at a time."[455] If efforts are not made to resolve the current problem,

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453. Note, *supra* note 102, at 1088.

454. *See generally* Burton, *supra* note 87 (providing examples of journalists being charged under broadly worded criminal statutes).

455. Burton, *supra* note 87, at 22 (citing John Grogan, *A Case of Ethics vs. Pursuit of Justice*, SUN-SENTINEL, Oct. 11, 1996, at 1B.).

both individuals and society at large will suffer. Freedom of press and expression will indeed be diminished "one case at a time."[456]

456. *Id.*