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Picture This- A Right with No Meaningful Remedy: The Right to Take Pictures in Public Places and the Inadequacy of Bivens, Section 1983 and Other Remedies

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**Picture This- A Right with no Meaningful Remedy: The Right to Take
Pictures in Public Places and the Inadequacy of Section 1983, *Bivens*
and Other Remedies.**

Morgan Leigh Manning

“Photography is not a crime. Amateur photographers are the documentarians of real life. People with cameras bear witness to the everyday dramas of ordinary people. We capture our world to help us understand it. We are not terrorists. We are not dangerous. And we are certainly not a threat”

-- JPG Magazine Spring Issue 2006

I. Introduction

The “War on Terror” and the “War on Drugs” have helped produce a third war of a different variety. 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 and private areas open to the public. Since 9/11, police officers and private security guards have invoked blanket notions of “national security” to prohibit constitutionally protected behavior. Both press and private citizens have been questioned, charged and arrested for taking pictures in public places of people and things that are in plain view of the general public. A simple Google search reveals countless incidents of overzealous law enforcement officials, including private security guards, detaining or arresting photographers, and in many cases confiscating their camera and memory cards. These incidents are troubling, considering that the people taking pictures were in a lawful place, partaking in a lawful activity.

This article examines the 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 opened to the public. It discusses recent incidents that highlight the growing infringement on 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) Section 1983 and *Bivens*, and (3) state tort remedies. It discusses the obstacles associated with each remedy and the reasons why these obstacles are particularly difficult within the context of photography. This article argues that most, if not all of the remedies discussed are either inadequate, unlikely to hold up in court, or altogether impractical when the costs of litigation are considered. 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.¹ The suspects' names were Emily and Jenny, two high school students taking pictures for an art exhibit at the

¹ Cliff Collins, *Bert Krages Takes Aim at Photography Bans*, 69-MAR OR. ST. B. BULL. 42, 42 (2009).

Portland Institute for Contemporary Art, as part of a project called “Northwest Artists Respond to Global Warming.”² They were taking pictures of oil-storage tankers by the river when a security guard confronted them, questioned them and later called the police. The girls explained what they were doing but the security guard responded that since 9/11, they could not “do things like take pictures of bridges anymore.”³ The police came and after investigating the incident, the police contacted the FBI, describing the girls as “two Middle Eastern-looking teenagers taking pictures near Portland bridges.”⁴ The officers threatened to confiscate the girls’ film and told them that they would be placed on the FBI terrorism watch list.⁵

In July 2006, police in Philadelphia, Pennsylvania arrested Neftaly Cruz, a Penn State University senior, and charged him with “conspiracy, impeding an investigation and obstruction of justice.”⁶ Cruz said that he heard a commotion and walked out of his back door to find the street lined with police cars. He pulled out his camera phone and took a picture of the action. Moments later an officer came to Cruz’s back gate. Cruz stated that the officer “[o]pened the gate and took me by my right hand.”⁷ The officer then

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶Informationliberation.com, Man Arrested For Taking Cellphone Photo of Police Activity, <http://www.informationliberation.com/?id=13834> (Article posted Jul. 28, 2006) [hereinafter Man Arrested].

⁷ Man Arrested, *supra* note 13.

“[t]hrew [Cruz] onto a police car, cuffed him and took him to jail.”⁸ Cruz said that the police told him that he broke a new law that prohibits people from taking pictures of police with cell phones.⁹ After about an hour in jail, the police “[t]old him he was lucky because there was no supervisor on duty,” so they released him.¹⁰ The police stated that Cruz was not on his property when they arrested him, and that they never told him he was “[b]reaking the law with his cell phone.”¹¹

In July 2009, Gordon Haire, a former newspaper reporter and former police officer, was sitting at a table on the campus of the University of Texas Medical branch at Galveston, passing time before a doctor appointment.¹² He snapped a picture of a university police officer walking in his direction. The officer approached Haire and informed him that “[i]t was against the law to photograph the Galveston National Laboratory” as it presented a “security threat.”¹³ Haire had not photographed the laboratory. But even if he had, his camera would not have captured anything that a

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹²Photography is Not a Crime, It’s a First Amendment Right, <http://carlosmiller.com/2009/07/28/texas-cops-prohibit-photography-forbid-the-filing-of-complaints-against-them/> (Jul. 28, 2009) [hereinafter Photography].

¹³ Photography, *supra* note 19.

Google search could not provide.¹⁴ Haire questioned the officer as to whether it was really against the law to photograph the laboratory. After requesting Haire's identification, the officer "[i]n a loud voice," relayed Haire's full name and date of birth through his collar microphone.¹⁵ The officer informed Haire that "[i]t was illegal to even photograph the sidewalk" and left. The next day, Haire walked into the UTMB Police Department with intentions of filing a complaint. He was told he needed to produce a photo ID, and when he could not, he was ushered out of the police station.¹⁶

In November 2007, Seattle police arrested and jailed amateur photographer, Bogdan Mohora for snapping a few photographs of police officers arresting a man.¹⁷ Mohora claimed to be at least ten feet away from the arrest.¹⁸ Two officers took his camera, wallet, and satchel, arrested him and took him to a holding cell at the Seattle Police Department. Mohora was never charged and the police never wrote an incident report on the arrest. He was released an hour later but "[w]as told that he could [have been] charged with disturbing the peace, provoking a riot or endangering a police

¹⁴ See Google Image Search, Galveston National Laboratory,

<http://images.google.com/images?hl=en&source=hp&q=galveston%20national%20laboratory&um=1&ie=UTF-8&sa=N&tab=wi>.

¹⁵ Photography, *supra* note 19.

¹⁶ *Id.*

¹⁷ Posting of Kathleen Davis to Photo Flash blog,

<http://flash.pophoto.com/blog/2007/11/the-crime-of-ph.html> (Nov. 19, 2007, 12:05 EST).

¹⁸ Davis, *supra* note 24.

officer.¹⁹ The ACLU intervened on Mohora’s behalf and the city’s claim department agreed to pay Mohora eight thousand dollars. Both officers were “[d]isciplined with written reprimands for a lack of professionalism and poor exercise of discretion.”²⁰

In June 2007, Indianapolis police questioned Walter Miller, a NASA employee, while touring the city and taking pictures.²¹ Miller was photographing an art exhibit that happened to be outside the Indianapolis City County Building.²² Two police cars drove up to Miller, “[o]ne on the side of [him] and one behind [him] with their lights flashing.”²³ The officers asked Miller, “[w]hat [he was] taking pictures of,” and Miller replied, “[w]ell , the art exhibit.”²⁴ One of the officers asked to see his camera stating, “[I] need to see it, for matters of homeland security.”²⁵ “You can’t be taking pictures around here.” According the Indianapolis Metropolitan Police Department, “[p]ictures of certain government facilities are off limits.”²⁶ After questioning, the officers allowed

¹⁹ *Id.*

²⁰ *Id.*

²¹ Photography is Not a Crime, It’s a First Amendment Right, <http://carlosmiller.com/2007/06/26/indianapolis-police-claim-it-is-unlawful-to-photograph-government-buildings/#more-151> [hereinafter Photograph]

²² Photography, *supra* note 28.

²³ Sandra Chapman, *Visitor Didn’t Feel Hoosier Hospitality*, Eyewitness News <http://www.wthr.com/Global/story.asp?S=6698469>.

²⁴ Chapman, *supra* note 30.

²⁵ *Id.*

²⁶ *Id.*

Miller to leave. IMPD officials say law enforcement is concerned about “[p]ictures of federal office buildings, military installations, major bridges and other infrastructure that could be considered a terrorist target.”²⁷ If in doubt, IMPD officers say, “[t]ourists should confine their photographs to marked tourists spots.”²⁸

In October 2009, in Anne Arundel County, Maryland, Antonio Amador grabbed his camera to photograph a fatal accident that took place outside his home.²⁹ He was taking the photographs as a part of an ongoing project aimed at highway safety and getting driver’s to reduce their speeds.³⁰ Amador stated, “Suddenly I hear this screaming, like somebody really mad. I see this guy charging at me saying, ‘delete those pictures now!’”³¹ The officers threatened to arrest him if he did not delete his photos, so Amador complied.³²

In February 2007, Miami multimedia journalist, Carlos Miller was taking pictures of police officers standing inside a construction zone closed off to traffic.³³ Officers

²⁷ *Id.*

²⁸ *Id.*

²⁹ Photography is Not a Crime, It’s a First Amendment Right,
<http://carlosmiller.com/2009/11/06/maryland-cops-force-photographer-to-delete-photos/>
(Nov. 6, 2009) [hereinafter Photography]

³⁰ Photography, *supra* note 36.

³¹ *Id.*

³² *Id.*

³³ Photography is Not a Crime, It’s a First Amendment Right,
<http://carlosmiller.com/about/> [hereinafter Photography].

demanded that Miller stop taking pictures “as this was a private matter.”³⁴ Miller replied that it was a “public road.”³⁵ The officers then escorted Miler across the street and ordered him to keep walking away from the scene of the investigation. Miller stated: “[W]hen I refused and continued to take their photo, they tackled me and bashed my head against the pavement, broke a four hundred dollar camera flash and threatening to shoot me with a taser gun.”³⁶ Miller spent sixteen hours in county jail on nine misdemeanor counts, the main charge being “obstructing traffic.”³⁷ After sixteen months of delays, Miller finally went to trial and after two days was found not guilty of disobeying a police officer and disorderly conduct. He was found guilty of resisting arresting without violence, a charge he is currently appealing.³⁸

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.³⁹ Kerzie was taking pictures in an attempt to win an annual photo contest sponsored by

³⁴ Photography, *supra* note 40.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Photography is Not a Crime, It’s a First Amendment Right,

<http://carlosmiller.com/2008/12/27/amtrak-police-arrest-photographer-participating-in-amtrak-photo-contest/> (Dec. 27, 2008) [hereinafter Photography].

Amtrak entitled “Picture Our Trains.”⁴⁰ The winner of the contest receives a grand prize of one thousand dollars, travel vouchers, and publication of the winning photo in Amtrak’s annual calendar.⁴¹ Amtrak security guards approached Kerzie with a black lab and instructed Kerzie to allow the dog to sniff his bag. Kerzie complied and the dog sniffed his bag for explosives. The security guards next asked for his ID and to see the photos, and after viewing them demanded that Kerzie delete them. Kerzie said “[a]bsolutely not” to which the security guard replied that “[i]t [is] illegal to photograph trains.”⁴² Kerzie asked “[w]here the sign [was] that sa[id] that.” The security guards pulled out handcuffs and arrested Kerzie on the spot.⁴³ Police placed Kerzie in a cell and charged him with trespassing.⁴⁴

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.⁴⁵ When she refused, the airline “[t]hreatened to blacklist her and accused her of interfering with a flight crew, which is a federal crime.”⁴⁶ Parver was escorted off the flight by two police officers, a TSA agent and a JetBlue Airways

⁴⁰ Photography, *supra* note 46.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Elliot, <http://www.elliott.org/blog/grandmother-arrested-after-refusing-to-delete-jetblue-flight-video/> (Aug. 14, 2008).

⁴⁶ Elliot, *supra* at note 52.

representative.⁴⁷ She was taken to the Las Vegas Metropolitan Police Department where police eventually released her with no charges.⁴⁸

In October of this year, in Chicago, Illinois, an amateur photographer captured a House of Blues security guard repeatedly shoving a female concertgoer to the ground.⁴⁹ The female had taken a picture of the security guard at which time he took away her camera. 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.⁵⁰ The police arrested the security guard and charged him with misdemeanor battery.⁵¹

In October 2007, security guards removed Reza Michael Forhoodi, 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 DSLR.”⁵²

⁴⁷ Aaron Royster, Women Detained by Airline Over Video, <http://www.kingmandailyminer.com/main.asp?SectionID=1&subsectionID=1&articleID=16860> (Aug. 7, 2008).

⁴⁸ Royster, *supra* note 54.

⁴⁹ Steve Bryant, HoB Security Guard Assaulted Young Girl: Cops, <http://www.nbcchicago.com/news/local-beat/house-of-blues-hanson-assault-camera-64210757.html> (Oct. 4, 2009).

⁵⁰ Bryant, *supra* note 56.

⁵¹ *Id.*

⁵² 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>.

Security officers subsequently confiscated his camera and told him that he could pick it up at Guest Services after the game.⁵³ He was told that “professional” cameras were not permitted without press credentials, even though the printed rules offered no distinction between “professional” and “amateur” cameras.⁵⁴ Within hours, a team executive called and “offered his full apologies and explained the errors of the ushers and officers’ ways.”⁵⁵

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. 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. Eve Burton⁵⁶ published an article in the Communications Lawyer Journal examining law enforcement officials’ use of criminal statutes and tactics to limit newsgathering.⁵⁷ “The criminal cases that present the greatest threat to a strong press . . . [may be] insidious efforts by local police department to curtail lawful newsgathering activities through the use of state criminal ‘disorderly conduct,’ ‘assault,’

⁵³ Fisher, *supra* note 59.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Eve Burton is Vice-President and Assistant General Counsel for the Daily News, L.P, publisher of the New York Daily News.

⁵⁷ Eve B. Burton, *Where Are All the Angry Journalists? The Use of Criminal Statutes and Tactics to Limits Newsgathering*, 16-SUM COMM. LAW. 19 (1998).

and ‘obstruction of justice’ statutes.”⁵⁸ 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.⁵⁹ “[I]n California, it took almost two years for the government to drop ‘interfering with a police officer’ charges against a photographer who took pictures of police beating gang members.”⁶⁰ Though most charges are eventually dropped or reduced to noncriminal violations, they are improperly brought to begin with and can result in less news being published and a variety of harm to the photographer.⁶¹

Another trend in many of these cases is police interference with photographers based on the all-encompassing notion of “national security.” When photographers ask officials exactly which “national security” law they violated, the outcome is not positive.⁶² Keith Garsee, a Los Angeles resident, described what happened when he took a picture with his camera phone while waiting to board the LA Red Line.⁶³ “Almost immediately, a vest wearing man with METRO emblazoned on his back [] rushed up to

⁵⁸ Burton, *supra* note 64, at 20-21.

⁵⁹ Burton, *supra* note 64, at 21.

⁶⁰ *Id.*

⁶¹ *See* Burton, *supra* note 63, at 20-22 (noting examples of harm to photographers and also that “[p]olice tactics against journalists are aimed at reducing the flow of unpopular information to the public”).

⁶² *See, e.g.*, Myspace.com/keithgarsee,
<http://blogs.myspace.com/index.cfm?fuseaction=blog.view&friendID=71473815&blogID=394235689> (May 14, 2008 2:13 PM EST).

⁶³ Garsee, *supra* note 68.

me [and stated], ‘Hey! It’s against the 9-11 Law to take pictures down here man!’⁶⁴ Garsee asked, “Could you explain? What law do you mean?” The security guard asked him if he was a lawyer to which he replied “no”. The guard then stated, “No pictures. You could be a terrorist. Very strict!”. “Next thing I knew, a booming female voice very loudly announced over the loudspeaker ‘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.’”⁶⁵ After getting off the subway, Garsee contacted the sheriff’s station and spoke with a deputy who told him “there is no such law.”⁶⁶

Ignored in each of these cases is the fact that a Google image search reveals anything the photographers captured with their lenses. In fact, Google Earth allows one to type in almost any address in the country and retrieve photos of that location from a variety of angles and distances. And it is not entirely clear why law enforcement officials, or those who write their policy manuals, are convinced that limiting photography provides additional security. Bruce Schneier, 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

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

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.⁶⁷ Schneier argues that even if terrorist did photograph their targets, it would not be practical to try to prevent it.

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.⁶⁸

Although evidence exists that at least some terrorists have photographed their targets (e.g. the U.S. embassy bombings in Africa),⁶⁹ Schneier makes a convincing points, especially on the impracticality of prevention.

III. Photographers' Rights- The Existing Legal Framework

A. PUBLIC PLACES

⁶⁷Schneier on Security,

http://www.schneier.com/blog/archives/2008/06/the_war_on_phot.html (June 5, 2008 6:44 AM EST).

⁶⁸ Schneier, *supra* note 73.

⁶⁹ Oriana Zill, *The U.S. Embassy Bombings Trial – A Summary*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/bombings.html>.

1. The Right to Photograph People in Public Places

As a general rule, photographers have a right to take picture of others in public places.⁷⁰ This is the case even if the subject of the photograph has not authorized the picture. “[T]he courts consistently have upheld the rights of photographers to take unauthorized photographs of others in or from public places.”⁷¹ 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.⁷²

Thus, tort law assumes that when a person leaves the confines of their home, they implicitly consent to being photographed.⁷³ However, both tort and criminal law

⁷⁰See Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1089 (1998) (noting the law’s general assumption that “a person who leaves the confines of a private location implicitly consents to being photographed”).

⁷¹ See *Durant v. State*, 188 P.3d 192, 195 (Okla.Crim.App. 2008); see also Note, *supra* note 77, 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)).

⁷² William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 391-92 (1960).

⁷³ Note, *supra* note 77, at 1089.

recognize exceptions to this general rule and place limits on the methods photographers may use to obtain photographs of people.⁷⁴

Four distinct torts exist to 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.⁷⁵ For the most part, these torts will not apply to photography in public places. Intrusion upon seclusion usually will not apply since a plaintiff has no reasonable expectation of "seclusion" or "solitude" in public places.⁷⁶ An example of when this tort would apply is if a sudden gust of wind blows a woman's skirt over her head and a photographer immediately begins snapping pictures.⁷⁷ Since this area of the woman's body is not exhibited to public gaze, it is an invasion of her privacy to photograph it.⁷⁸ Likewise, a photographer may not use a high-powered lens to stand

⁷⁴ *Id.* (noting the existence of various privacy torts as well as criminal statutes such as harassment).

⁷⁵ RESTATEMENT (SECOND) OF TORTS 652A-652E

⁷⁶ *See* RESTATEMENT (SECOND) OF TORTS 652B; *see, also e.g.,* Y.G. v. Jewish hosp. of St. Louis, 795 S.W.2d 488 (1990) (noting that dissemination of an event that occurred in public view is nor a private matter, and generally stated, there can be no invasion of privacy in giving further publicity to a matter which is already public).

⁷⁷ *See* RESTATEMENT (SECOND) OF TORTS 652B.

⁷⁸ *Id.*

on a public sidewalk and photograph the inside of a person's bedroom through a crack in the blinds.⁷⁹

Nor will public disclosure of private facts normally be applicable to photography in public places, since facts in this case are not "private."⁸⁰ The Restatement Second of Torts states, "[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant's newspaper."⁸¹

Publicity placing a person in a false light will only apply to a photographer taking pictures of a person in a public place if the photographer knowingly or recklessly uses that photograph to place that person before the public in a highly offensive false light.⁸² For example, a child ten years old is knocked down and injured without any negligence on her part by a negligently driven automobile. A person takes a picture of the child lying in the street with her face showing. If this person later publishes an article on the negligence of children and uses the picture of the child, with the caption, "They Ask to Be Killed," this is an invasion of the child's privacy.⁸³

Appropriation of name or likeness of another will apply to photography in public places only when a photographer takes a picture of the plaintiff and "[a]ppropriates to his

⁷⁹ *Id.*

⁸⁰ *See* RESTATEMENT (SECOND) OF TORTS 652D.

⁸¹ *Id.*

⁸² *See* RESTATEMENT (SECOND) OF TORTS 652E.

⁸³ *Id.*

own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness.”⁸⁴ For example, person A takes a picture of person B, an actress known for her beautiful figure, while she is standing on a public sidewalk. Person A publishes the photograph in a newspaper under the caption, “Keep That Sylph-Like Figure by Eating more of A's Rye and Whole Wheat Bread.” Person A has invaded person B's privacy.⁸⁵

In addition to these limits, several states have civil and criminal statutes prohibiting harassment.⁸⁶ California defines harassment as “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.”⁸⁷ New York's harassment statute states 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.⁸⁸ 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. In most states, photographers must remain a certain minimum

⁸⁴ See RESTATEMENT (SECOND) OF TORTS 652C.

⁸⁵ *Id.*

⁸⁶ Note, *supra* note 76, at 1089 (noting that laws prohibiting harassment exist in several states).

⁸⁷ Note, *supra* note 76, at 1089

⁸⁸ *Id.*

distance from accidents and police investigations.⁸⁹ Courts have routinely upheld these limitations on the grounds that police need room to do their job, and a mob of photographers and flashes will almost certainly impede their progress.⁹⁰ Law enforcement officials have charged photographers allegedly not complying with these limits under broadly worded criminal statutes such as “failure to obey police orders” or “obstruction of justice.”⁹¹

Likewise, courts have upheld city ordinances that place time limits on taking pictures in any public place. Courts have also upheld prohibitions on taking pictures in areas that impede traffic.⁹² In *Siegman v. District of Columbia*, the court upheld a police regulation of the District of Columbia mandating that “[N]o 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.”⁹³ However,

⁸⁹ See, e.g., N.Y. McKinney’s Penal Law § 195.05.

⁹⁰ See, e.g., *State v. Lashinsky*, 404 A.2d 1121, 1122 (N.J. 1979) (holding that the “[a]ction of an officer in ordering photographer to withdraw from immediate scene of accident was plain and reasonable in objective terms because an actual interference in performance of his work did occur as result of conduct of photographer”); *Decker v. Campus*, 981 F.Supp. 851 (S.D.N.Y. 1997) (“[U]nder New York law, where fact of physical interference with official function is clear as a matter of law, officer’s decision to arrest individual for obstructing governmental administration is generally reasonable”).

⁹¹ See, e.g., *Lashinsky*, 404 A.2d at 1122; *Decker*, 981 F.Supp. at 851.

⁹² See e.g., *Siegman v. District of Columbia*, 48 A.2d 764 (D.C.App. 1946).

⁹³ *Id.*

these types of regulations must be narrowly tailored to prevent imposing restrictions on photographers greater than those necessary to prevent impeding traffic.⁹⁴ For example, in *Connell v. Town of Hudson*, the court held 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.⁹⁵

In sum, a photographer's right to take pictures of people in public places is fairly unlimited under existing law.⁹⁶ "People" includes all people – children, security guards, police officers, people committing crime, people being arrested, celebrities, etc.⁹⁷ Tort law assumes that when a person leaves their home, they implicitly consent to being photographed.⁹⁸ The four torts protecting individuals' privacy interests usually require some type of clearly intrusive or obviously inappropriate behavior on behalf of the photographer.⁹⁹ This is also the case with civil and criminal harassment. Lastly, photographers are prohibited from getting too close to accident scenes or investigations

⁹⁴ See, e.g., *Connell v. Town of Hudson*, 733 F.Supp. 465, 469 (D.N.H. 1990)

⁹⁵ *Id.*

⁹⁶ See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 391-92 (1960).

⁹⁷ See Bert Krages, Esq., LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES, 26 (Michelle Perkins ed., Amherst Media 2007) (2005).

⁹⁸ Note, *supra* note 76, at 1089.

⁹⁹ See RESTATEMENT (SECOND) OF TORTS 652A-E.

when photographing police, victims, or arrestees, or they run the risk of being charged pursuant to criminal statutes such as obstruction of justice.¹⁰⁰

2. The Right to Photograph Structures Visible From Public Places

Courts have consistently upheld the right to photograph buildings visible from public places.¹⁰¹ In 1990, Congress passed the Architectural Works Copyright Protection Act, establishing a new category of copyright protection for works of architecture.¹⁰² However, Congress specifically limited the protection afforded architectural works with an amendment protecting the right to photograph buildings visible from a public place.¹⁰³

The amendment states:

¹⁰⁰ See, e.g., *State v. Lashinsky*, 404 A.2d 1121, 1122 (N.J. 1979)

¹⁰¹ See, e.g., *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 970 C.A.4 (Va. 1999) (“[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 (D.Puerto Rico. 2007) (noting that The Architectural Works Copyright Protection Act allows taking and publishing, without the architect’s consent, of photographs of buildings located in or visible from public places).

¹⁰² The Architectural Works Copyright Protection Act, 17 U.S.C.A. 102(a)(8) (1999).

¹⁰³ See 17 U.S.C.A. 120(a)

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.¹⁰⁴

In copyright suits involving the right to photograph buildings, courts have taken this amendment seriously, typically ruling in favor of photographers.¹⁰⁵

“Buildings” includes both residential and commercial buildings.¹⁰⁶ Bridges, industrial facilities, public utilities, transportation facilities (e.g. airports), and almost all other structures visible from public places fall within this definition.¹⁰⁷ A few exceptions exist. Commanders of military installations can prohibit photographs of specific areas when they deem it necessary to protect national security.¹⁰⁸ The U.S. Department of Energy can also prohibit photography of designated nuclear facilities although the

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.,* Leicester v. Warner Bros., 232 F.3d 1212, 1228-29 (Cal. 2000) (“[I]n 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”).

¹⁰⁶ *See* Bert Krages, Esq., LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES, 2-20 (Michelle Perkins ed., Amherst Media 2007) (2005).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

publicly visible areas of nuclear facilities are usually not designated as such.¹⁰⁹ Outside of these narrow exceptions, the right to photograph buildings and other structures is virtually unlimited under existing law.

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.¹¹⁰ Property owners have no right to prohibit others from photographing their property from other locations.¹¹¹ Property owners do have a right to prohibit photography occurring *on* their property, even if it is open to the public.¹¹² In areas such as shopping malls, private museums, amusement parks and restaurants, train stations and airports, if no signs are posted prohibiting photography, it is probably safe to assume that it is allowed.¹¹³ In this case, photographers are free to take pictures of people or things on the property, subject only to the limitations described in Subsection A(i) (e.g. privacy torts, harassment, obstruction of justice for interfering with an investigation, accident, arrest,

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.,* R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 C.A.4 (Va. 1999) (“[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”)

¹¹¹ *Id.*

¹¹² *See* Bert Krages, Esq., LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES, 18 (Michelle Perkins ed., Amherst Media 2007) (2005).

¹¹³ *Id.*

etc).¹¹⁴ If no signs are posted, property owners or operators may still request that one stop taking pictures.¹¹⁵ If a photographer ignores these requests, he or she may be subject to trespass. Property owners are not however permitted to confiscate one's camera or film.¹¹⁶

C. OBSERVATIONS

After examining the existing legal framework surrounding photography rights, a few things become apparent. First, there are very few actual limits on the right to take pictures in public. 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.¹¹⁷ Third, no post-9/11 laws specifically prohibit the right to take pictures in public.¹¹⁸ With such few "on the books"

¹¹⁴ See *supra* text accompanying notes 73-106

¹¹⁵ See Krages, *supra* note 118, at 18-20.

¹¹⁶ *Id.* ("[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 . . .").

¹¹⁷ See *Id.* at 25 ("Despite the importance that society places on personal privacy, the law imposes relatively few restrictions on photographing people.")

¹¹⁸ See Bruce Schneler, *Are Photographers Really a Threat?* THE GUARDIAN, June 5, 2008, <http://www.guardian.co.uk/technology/2008/jun/05/news.terrorism> ("[T]here's nothing in any post-9/11 law the restricts you right to photograph").

limitations, one may inquire how and why photographers (such as those discussed in Section II) are continuously questioned, charged and arrested for taking pictures in public places? In many instances, law enforcement officials assert authority pursuant to: (1) broadly worded criminal statutes that were never intended to apply to photographers under the existing circumstances (2) “national security” or “9/11” laws; or (3) nothing at all (ie: “its just the law” or “taking pictures here is illegal”). Often, charges are eventually dropped and apologies issued, 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 months or years worth of pictures. Dropping charges nor issuing apologies compensates a photographer for the embarrassment and possible harm to his reputation he experiences when a crowd of people see him surrounded by blue lights and shoved into a police car. A photographer whose rights have been abused has very few legal remedies.¹¹⁹ Most of the remedies that are available are either unlikely to hold up in court or totally impractical when the costs of litigation are considered.¹²⁰ The next section explores the remedies available to photographers and explains why each is inadequate.

IV. Remedies for Violations Committed by Law Enforcement Officials in Public Places

A. DECLARATORY RELIEF

The Federal Declaratory Judgment Act provides:

¹¹⁹ See discussion *infra* Part IV.

¹²⁰ *Id.*

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 parties 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.¹²¹

The Uniform Declaratory Judgments Act, which has been adopted with slight modifications in the vast majority of states, provides that “[c]ourts shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed.”¹²²

The effectiveness of declaratory relief as a remedy will be analyzed within the context of three different scenarios. Scenario 1 -- a person is taking pictures in downtown Chicago and is approached by a police officer who tells him that he is not allowed to photograph large buildings, bridges, or subways. Scenario 2 – a journalist witnesses police officers beating and eventually arresting a young male in an alleyway. The journalist immediately begins snapping photographs from a distance. He is told by a police officer on the scene to stop taking pictures or he will be arrested. He continues to take pictures of the incident and is arrested and charged with obstruction of justice and disorderly conduct. Scenario 3 – A photographer is taking pictures of a car accident from the sidewalk across the street. Police charge him with obstruction of justice, confiscate the photographer’s camera and delete all of her pictures. Charges are dropped a day later.

¹²¹ Federal Declaratory Judgment Act, 28 U.S.C.A. 2201 (1993).

¹²² Uniform Declaratory Judgments Act, Gen. Law 1956, 9-30-1 (1959).

In scenario 1, the photographer seeks declaratory judgment that he has the First Amendment right to take photographs in public places of buildings, bridges, etc. The first obstacle the plaintiff will face is showing that the police officer's orders were pursuant to some statute, law or policy. Since virtually no statute or law exists prohibiting photographing buildings, bridges or subways from public property,¹²³ plaintiff will have to point to some policy of the police station to show that the police officer was not simply acting outside of the limits of his authority. If such a policy existed at the time, as a practical matter it would require extensive discovery to prove it. If a plaintiff is able to prove it, he or she still must show that the policy violates, or threatens to violate the plaintiff's constitutional rights at the time of the litigation.¹²⁴ 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

¹²³ See, e.g., *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 970 C.A.4 (Va. 1999) ("[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 (D.Puerto Rico. 2007) (noting that The Architectural Works Copyright Protection Act allows taking and publishing, without the architect's consent, of photographs of buildings located in or visible from public places).

¹²⁴ See *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745 (2009) ("[A] declaratory judgment plaintiff must establish that the 'actual controversy' requirement for a declaratory judgment action was satisfied at the time the complaint was filed; post-filing conduct is not relevant").

constitutionally protected activity.”¹²⁵ “[T]o determine if a claim is sufficiently immediate and real, ‘the 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 part . . .for a completed act’ with those closer to the direct threat more likely to be an actual controversy.”¹²⁶ Scenario 1 is closer to a general threat by officials to enforce those laws that they are charged to administer. The police officer did not threaten to arrest the photographer, or delete her pictures. If she attempted to photograph the buildings again, it is questionable whether she would be prohibited from doing so. The controversy is not yet “immediate” and “real” enough for the plaintiff to receive declaratory relief.¹²⁷

In Scenario 2, the controversy is “immediate” and “real” since the plaintiff has been formally charged with obstruction of justice and disorderly conduct. The plaintiff could seek a declaratory judgment that these statutes are unconstitutionally broad or vague, leaving police with room to charge people for constitutionally protected behavior. It is questionable whether a judge would buy this argument. The police could argue that the statutes are 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

¹²⁵ 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).

¹²⁶ *Id.*

¹²⁷ *See Evans Medical Ltd. V. American Cyanamid Co.*, 980 F.Supp. 132 (1997)

(discussing requirement that threat must be “immediate and real”).

the arrest (which sophisticated cameras make possible), it is the police's word against the journalist's. A judge may be hesitant to shoot down a statute officers "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 charges are dropped, the journalist still has suffered a substantial amount of harm. He has been publicly humiliated by being placed in handcuffs and placed in a police car. Additionally he may have lost the opportunity to cover a breaking news story. Even if a court declares the statute unconstitutional, he still will be responsible for the time commitment and costs associated with litigation. And if the statute is eventually rewritten to define "obstruction of justice" as including 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.

In scenario 3, it is a little less clear whether the controversy is "immediate" and "real." On one hand it seems so because the photographer was formally charged with a crime and police confiscated his camera. On the other hand, charges were dropped. "[D]eclaratory relief is appropriate when and only when one or both parties have pursued a course of conduct that will result in imminent and inevitable litigation unless the issue is resolved by declaratory relief."¹²⁸ However, "[T]he Supreme Court has stated that "[f]ederal declaratory relief is not precluded when no state prosecution is pending [as long as] a federal plaintiff demonstrates a genuine threat of enforcement."¹²⁹ If the journalist attempts to cover an accident in the future (behavior he believes to be protected

¹²⁸ Beauchamp, *supra* note 131 at 3097.

¹²⁹ *Steffel v. Thompson*, 415 U.S. 452, 475 (1974).

by the first amendment) police may charge him again and seize his pictures. Alternatively, he may avoid taking such pictures altogether for fear of legal consequences. If a plaintiff is able to show a genuine threat of enforcement, he may be able to convince a court to declare the statute unconstitutional as applied, thus lowering the chance he will face future charges. However, this does not compensate the journalist for the loss of her news story, or potentially hundreds of 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.¹³⁰ To secure an injunction a plaintiff must meet the Article III “case or controversy” requirement.¹³¹ “[T]he 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.”¹³² “At least when injunctive relief is sought, litigants must adduce a credible threat of recurrent injury.”¹³³

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-

¹³⁰ See *Thompson v. Lantz*, 2008 WL 762465, 1-3 (2008) (discussing injunctions generally).

¹³¹ *Id.*

¹³² *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (1985).

¹³³ *Id.*

known journalist in a city who has covered instances of police misconduct in the past. The plaintiff 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. Plaintiff believes that his First and Fourth Amendment rights were violated and probably will be violated in the future.

Plaintiff would need to show that his First or Fourth Amendment rights were violated.¹³⁴ This requires showing that officers lacked probable cause to arrest him and thus violated his Fourth Amendment rights.¹³⁵ He would also need to show that his behavior did not violate any legitimate laws (ie: he observed distance limitations, etc.) and is protected by the First Amendment. Plaintiff must demonstrate that his arrest and the officers' many threats to arrest him represent a "pattern of police behavior."¹³⁶ Lastly plaintiff must show that he is likely to be threatened, arrested, or both in the future for newsgathering activities protected by the constitution¹³⁷

¹³⁴ See *Worthington v. Kenkel*, 684 N.W.2d 228, 232-35 (2004).

¹³⁵ See *Stewart v. Abraham*, 275 F.3d 220, 228 (Pa. 2001) (discussing injunctions within the context of the fourth amendment).

¹³⁶ See *Thomas v. County of Los Angeles*, 978 F.2d 505 (Cal. 1992) ("Supreme Court requires showing of intentional and pervasive pattern of misconduct in order to enjoin a state agency").

¹³⁷ See *Haney v. Miami-Dade County*, 2004 WL (S.D. Fla. 2994) (Injunction is proper 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).

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 police officer's control over the situation.¹³⁸ 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.¹³⁹ In any case, it represents a fact specific inquiry that can translate into costly and time-consuming litigation. Additionally, injunctive relief, like declaratory relief, is an equitable remedy and does not provide compensatory damages.

C. 42 U.S.C. SECTION 1983 ACTION

42 U.S.C. Section 1983 states:

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 rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.¹⁴⁰

¹³⁸ See *State v. Taylor*, 118 A.2d 36 (1995) (holding defendant guilty for interference with an officer in lawful discharge of his duties while using loud and offensive language).

¹³⁹ See *LaDuke v. Nelson*, 560 F.Supp. 158 (D.C.Wash. 1982); *Allee v. Medrano*, 416 U.S. 802 (1974).

¹⁴⁰ 42 U.S.C.A. § 1983

Section 1983 provides a federal remedy for individuals whose federal constitutional rights are violated by persons acting under the color of state law.¹⁴¹ In most cases, private security guards will not be considered “persons acting under the color of state law” for the purposes of this statute.¹⁴² Exceptions exist and will be covered in Section V- Remedies for Violations by Private Security Guards.¹⁴³

There are three major hurdles that a Section 1983 plaintiff within the photography context must clear: (1) Establishing a constitutional violation (2) the doctrine of qualified immunity, and (3) proving damages. It is noted that since Section 1983 applies only to persons acting under color of state (not federal) law, reference to the First and Fourth Amendment assume incorporation of these amendments into the Fourteenth Amendment through the due process clause. The following section examines these three hurdles using a variety of hypothetical scenarios.

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 and eventually does call the police 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

¹⁴¹ *Id.*

¹⁴² *But see* discussion *infra* Section V (discussing exceptions where security guards were found to be acting under color of state law).

¹⁴³ *Id.*

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.¹⁴⁴ Person A brings a Section 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 loss of all of the pictures on her camera.

As stated above, Section 1983 only applies to persons acting under color of state law, so the person A probably will not be able to name the private security guard as a defendant.¹⁴⁵ Thus, person A is only able to sue the police officers. Since person A was taking pictures for her own purposes with no intention of publication, freedom of the press is probably not applicable. The only other First Amendment right that possibly is implicated is freedom of expression. And since “[i]mages . . . must communicate some idea in order to be protected under the First Amendment,” person A’s claim is unlikely to hold up.¹⁴⁶ 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.¹⁴⁷ Therefore person A must allege something other than a First Amendment violation to recover under Section 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

¹⁴⁴ See Portland incident *supra* Section II (providing the basis for this hypothetical).

¹⁴⁵ See discussion *infra* Section V (discussing exceptions where security guards were found to be acting under color of state law).

¹⁴⁶ *Montefusco v. Nassau County*, 39 F.Supp.2d 231, 241 (E.D.N.Y. 1999).

¹⁴⁷ *Id.* at 243 n.7.

stopping the vehicle and 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 continued to aggressively question him 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), his claim is still questionable. "[C]ourts have not reached a consensus about the shape that a definition [of the press] should take."¹⁴⁸ The Supreme Court has provided little guidance, and the lower court approaches and statutory definitions are inconsistent

¹⁴⁸ Erik Ugland, *Demarcating the Right to Gather News: A sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & POL'Y 113, 136 (2008) ("[A]s Justice White wrote in *Branzburg*, trying to define who is a journalist would 'present practical and conceptual difficulties of a high order'").

and sometimes arbitrary.”¹⁴⁹ It is not totally clear whether a court would consider person B “press” for the purpose of First Amendment protection. Even if person B is “press” courts are torn over the extent to which First Amendment protections extend to the newsgathering process.¹⁵⁰ The Supreme Court has recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated.”¹⁵¹ While most courts agree that newsgathering does “qualify for First Amendment protection,” this protection is qualified. “The First Amendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering.”¹⁵² One can easily 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 “[t]he intentional interception of any oral communication.”

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (“[O]ver 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 . . . [T]hey have also challenged restrictions that intrude too deeply on . . . journalistic expression and investigative zeal . . . [S]ome courts have been sympathetic to these challenges, but many have rejected them, showing little patience or what judges often construe as media demands for ‘special rights’”).

¹⁵¹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

¹⁵² *Boddie v. American Broadcasting Companies, Inc.*, 881 F.2d 267, 271 (Ohio 1989).

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.¹⁵³ In *Com v. Hyde*, the defendant was prosecuted for secretly recording a police investigation during a routine traffic stop.¹⁵⁴ The dissent in the case argued that “[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.”¹⁵⁵

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 questionable whether person B qualifies as press. Second, it is not clear that a court would extend First Amendment protection to newsgathering under the circumstances. Third, even if it did, the presence of state statute prohibiting person B’s behavior will trump any First Amendment protections he may possess.

In the context of photography, a Section 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.”¹⁵⁶ “[A] search ordinarily must be based on individualized suspicion of

¹⁵³ General Laws c. 272 Section 99 C1

¹⁵⁴ *Com. V. Hyde*, 434 Mass. 594, 602 (Mass. 2001).

¹⁵⁵ *Id.* at 606.

¹⁵⁶ U.S. CONST. amend. IV.

wrongdoing.”¹⁵⁷ “[I]n order to prevail on a Section 1983 claim under the Fourth Amendment based on an allegedly unlawful *Terry* stop¹⁵⁸ or unlawful arrest, a plaintiff first must prove that he was seized.”¹⁵⁹ “A police officer may approach an individual and ask an individual questions without intruding on Fourth Amendment rights.”¹⁶⁰ “[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.”¹⁶¹ If a court finds that seizure occurred, plaintiff must show that “reasonable suspicion that criminal activity may be afoot” did not exist. A court will “consider the totality of the circumstances of each case “[t]o see whether the detaining

¹⁵⁷ *Relford v. Lexington-Fayette Urban County Gov.*, 390 F.3d 452, 458 (Ky. 2004).

¹⁵⁸ *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding that “[W]here a police officer observes unusual conduct which leads him reasonable to conclude in light of his experience that criminal activity may be afoot and that 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 eh encounter serve 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”).

¹⁵⁹ *Brown v. City of Oneonta*, 221 F.3d 329, 340 (N.Y. 2000).

¹⁶⁰ *U.S. v. Lee*, 916 F.2d 814, 819 (N.Y. 1990).

¹⁶¹ *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

officer has a particularized and objective basis for suspecting legal wrongdoing.”¹⁶² In order to actually arrest an individual without a warrant, police officers must have probable cause to believe that the individual committed a crime.¹⁶³

In many of the incidents described throughout this paper (which actually occurred or were based on real incidents), a seizure by police officers occurred.¹⁶⁴ In some of the incidents, police arrested persons taking pictures. In others, multiple officers arrived on the scene and questioned those taking pictures for long periods of time. 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.” The closer question will be whether “the detaining officer [had] a particularized and objective basis for suspecting legal wrongdoing.”¹⁶⁵

Taking pictures of tall buildings or major bridges, without more, certainly does not rise to the level of a reasonable suspicion of criminal activity.¹⁶⁶ No law exists prohibiting taking pictures of these structures so the “criminal activity” from the officer’s perspective is presumably the plotting of a terrorist attack. But millions of people take pictures of tall buildings all 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. In the Portland incident described in the first page of this essay, the police had no other

¹⁶² U.S. v. Arvizu, 534 U.S. 266, 273 (2002).

¹⁶³ See U.S. v. McClain, 444 F.3d 556, 562 (Tenn. 2005).

¹⁶⁴ See incidents *supra* Section II.

¹⁶⁵ See Harris v. State, 806 A.2d 119, 129 (Del.Supr. 2002).

¹⁶⁶ See McClain, 444 F.3d, at 562.

facts, yet questioned the two girls for an extended period of time. The police eventually contacted the FBI, describing the girls as “two Middle Eastern-looking teenagers taking pictures near Portland bridges.” A court hearing these facts would likely conclude that the officers lacked reasonable suspicion to seize them.¹⁶⁷

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.¹⁶⁸ In most cases, arresting someone without a warrant or probable cause constitutes an unreasonable seizure in violation of the Fourth Amendment.¹⁶⁹ 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.¹⁷⁰ Making an arrest in the name of “national security” 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? The

¹⁶⁷ 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”).

¹⁶⁸ See McClain, 444 F.3d, at 562.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

answer is probably no. First, it is questionable whether people gathering around the scene of an arrest constitutes a “riot.” Second, it is questionable 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.¹⁷¹

In some cases involving police officers arresting people pursuant to broadly worded statutes, factual disputes and problems of proof may arise. For example, suppose person A is taking pictures on a public sidewalk 30 feet away from a car that is being searched by police for drugs and weapons. Police demand that person A stop taking pictures or be arrested. Person A is convinced he is not breaking any laws and continues to take pictures. Police arrest him for obstruction of justice. The obstruction of justice statute prohibits interfering with police investigations. “Interfering” includes 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 the person A’s word against the word of the police officers. A court likely will show deference to the police officers.¹⁷² It is possible that

¹⁷¹ See Harris, 806 A.2d, at 127-28.

¹⁷² Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 27-28 (1998)(“[D]espite the requirement that a police 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

person A could have an expert view the pictures and testify that they were taken from a distance of much more than fifteen feet. 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 Section 1983 plaintiff has a stronger chance of establishing a Fourth, rather than First Amendment violation. However, factual disputes and difficulties in establishing proof will arise. A plaintiff will first have to show that he was at least “detained.” He will need to show that either (1) no reasonable suspicion existed for the detention; or (2) the police encounter became a “seizure.” If the detention was not pursuant to any statute or regulation, proving the absence of reasonable suspicion will not be problematic. If the detention was pursuant to a something more than for example “national security purposes,” showing no reasonable suspicion existed is more difficult. Reasonable suspicion is a low standard and courts often show deference to police officers.¹⁷³ Showing that a detention morphed into a seizure may involve factually intensive inquiries and disputes. If an arrest does take place (thus requiring a showing of probable cause versus reasonable suspicion) it will often be the photographer’s word against the word of the officer. Fact intensive inquiries such as these can be time consuming and expensive when considering that establishing a constitutional violation is only the first of a few hurdles one must jump through to ultimately succeed in a Section 1983 suit.

this requirement. The practical effect of of this deference is the assimilation of police officers’ subjective beliefs, biases, hunches, and prejudices into law.”)

¹⁷³ *Id.*

Qualified Immunity

Law enforcement officials, both federal and state, have qualified immunity and are not liable for violations of constitutional rights committed in “good faith”. “[C]ourts recognize the affirmative defense of qualified immunity, which protects all but the plainly incompetent or those who knowingly violate the law.”¹⁷⁴ “[O]nce 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 clearly established at the time of the violation.”¹⁷⁵ The following section will focus on the second prong in this analysis.¹⁷⁶

The inquiry as to whether the law was “clearly established” is one that focuses on factual correspondence between the alleged actions and case law. Officers lose qualified immunity when the unlawfulness was “apparent”¹⁷⁷ and when there was not a “legitimate question”¹⁷⁸ as to the lawfulness of the conduct. Officials may lose their immunity even if “the very action in question” had not been declared unlawful.¹⁷⁹ Courts are split on what type of authority may render a right “clearly established.” Some courts have stated that

¹⁷⁴ *Smith v. Kenny*, 2009 WL 2431949, 6 (D.N.M. 2009).

¹⁷⁵ *Id.* at 7.

¹⁷⁶ *See* previous section (“Establishing a Constitutional Violation”) for discussion of the first prong.

¹⁷⁷ *Anderson v. Creighton*, 486 U.S. 635, 639-40 (1987).

¹⁷⁸ *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12 (1985).

¹⁷⁹ *Anderson*, 486 U.S. at 639-640.

decisions by only the Supreme Court, a court of appeals, or a state’s highest court may indicate that a right is clearly established.¹⁸⁰ Additionally some courts have held that a constitutional provision that requires a balancing of interests is generally not a clearly established right.¹⁸¹ The Tenth 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.¹⁸²

A Section 1983 plaintiff’s success in showing a right to be “clearly established at the time of the violation” depends on which right plaintiff alleges and the manner in which plaintiff frames this right. Demonstrating that a right is “clearly established” will be easier when plaintiff alleges a Fourth, rather than a First Amendment violation. Freedom of the press is “clearly established,” but the extent to which the First Amendment protects newsgathering activities is more ambiguous. 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.”¹⁸³ However, the Supreme Court has also noted that, “[T]he amendment 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 persons.”¹⁸⁴ Erik Ugland notes that there is an “[a]bsence of uniformity [among courts]

¹⁸⁰ Courson v. McMillian, 939 F.2d 1479, 1498 n. 32 (Fla. 1991).

¹⁸¹ Benson v. Allphin, 786 F.2d 268, 276 (Ill. 1986).

¹⁸² Elder v. Holloway, 975 F.2d 1388, 1392 (Idaho 1991).

¹⁸³ Branzburg v. Hayes, 408 U.S. at 693 (1972).

¹⁸⁴ *Id.* at 691.

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.”¹⁸⁵ He notes that many courts “[u]niformly shape rights by a negative construction.”¹⁸⁶

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.” Plaintiff will need to establish 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. Courts that have recognized such a right have noted that it is qualified, not absolute, and requires a balancing of interests. Under the Ninth 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.¹⁸⁷ Courts have made it clear that any protections afforded the newsgathering process do not provide a shield from generally liability under criminal statutes. “The First Amendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering.”¹⁸⁸ So even if a court recognized 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.”

¹⁸⁵Ugland, *supra* note 154, at 139.

¹⁸⁶ *Id.* at 143

¹⁸⁷ Benson v. Allphin, 786 F.2d 268, 275 (Ill. 1986).

¹⁸⁸ Boddie v. American Broadcasting Companies, Inc., 881 F.2d 267, 271 (Ohio 1989).

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.”¹⁸⁹ “[W]orks which, taken as a whole, possess serious artistic value are protected [by the First Amendment].”¹⁹⁰ However, generally, “[i]mages . . . must communicate some idea in order to be protected under the First Amendment.”¹⁹¹ The problem is that photographs do not take on any potentially expressive qualities or communicate ideas until after the encounter with police officers. 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. As a whole, courts have been reluctant to extend First Amendment protection to plaintiffs who have claimed that they plan to use photographs they have taken for expressive and transformative purposes.¹⁹²

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. In most cases, balancing of interests is involved. Many courts are hesitant to consider rights

¹⁸⁹ *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989).

¹⁹⁰ *Miller v. California*, 413 U.S. 15, 22-23 (1973).

¹⁹¹ *Montefusco v. Nassau County*, 39 F.Supp.2d 231, 241 (E.D.N.Y. 1999).

¹⁹² *Id.* at 243 fn. 7.

that require case-by-case balancing to be “clearly established.” A Section 1983 plaintiff has a better chance of convincing a court that rights protected under the Fourth Amendment are “clearly established.”

The Fourth Amendment protection against unreasonable searches and seizures is a clearly established law.¹⁹³ “The law is ‘clearly established’ that an arrest without a warrant or probable cause to believe a crime has been committed violates the Fourth Amendment.”¹⁹⁴ Thus, the issue in establishing the second prong of the qualified immunity test generally will be “[w]hether or not the officer made a reasonable mistake as to what the law requires.”¹⁹⁵ “[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 Section 1983.”¹⁹⁶ Probable cause exists when “[t]he 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.”¹⁹⁷ “[R]easonableness is evaluated from the perspective of a government actor at the scene, not with the benefit of hindsight.”¹⁹⁸

¹⁹³ Gale v. Storti, 608 F.Supp.2d 629, 634 (E.D.Pa. 2009).

¹⁹⁴ Herren v. Bowyer, 850 F.2d 1543, 1547 (Ga. 1988).

¹⁹⁵ *Id.*

¹⁹⁶ Hutson v. Felder, 2008 WL 4186893, 3 (E.D.Ky. 2008).

¹⁹⁷ Brinegar v. U.S., 338 U.S. 160, 175-76 (1949).

¹⁹⁸ Graham v. Connor, 490 U.S. 386, 396 (1989).

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. If the arrest is not made pursuant to some underlying offense defined by statute, law or regulation, then an officer cannot have a reasonable belief that an offense has been or is being committed. Probable cause would not exist. Thus, if person A is arrested pursuant to some vague assertion of “national security” or “the 9/11 law,” for taking pictures of bridges or buildings, a court is likely to find that “probable cause is so clearly absent that the officer shed his or her qualified immunity.”¹⁹⁹

In most of the incidents examined in this paper however, people taking pictures of bridges, buildings, national laboratories, etc. are never ultimately arrested. 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.”²⁰⁰ “[R]easonable 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.”²⁰¹ The right to be free from unlawful detention is “clearly established,” for the purposes of getting past qualified immunity.

Assume the facts of the Portland incidents *supra* page 1, where the high school girls were held and questioned by a security guard and then police for photographing oil tankers near bridges. The suspected criminal activity in this case was presumably potential terrorist activity. There only articulable fact an officer could base reasonable

¹⁹⁹ *Id.*

²⁰⁰ *Michigan v. Summers*, 452 U.S. 692, 698 n.7 (1981).

²⁰¹ *Ortega Melendres v. Arpaio*, 598 F.Supp.2d 1025, 1033 (2009).

suspicion on is the fact that it appeared the girls were taking pictures of a bridge. 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.”²⁰² Therefore, in this case, 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 plaintiff is charged under a broadly worded criminal statute. In this case, there will be more factual disputes over what actually happened, and whether the conduct of the plaintiff could reasonably be believed to be criminal under the statute. “[C]onduct unreasonable under the Fourth Amendment [can] still be objectively reasonable for the purpose of qualified immunity.”²⁰³ “[W]here an officer reasonable 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 based on qualified immunity.”²⁰⁴

Thus, where an officer reasonable but mistakenly believes that a journalist’s conduct constitutes disorderly conduct or obstruction of justice, he will not be subject to liability. Such statutes are generally broadly written, covering a wide range of conduct. A Michigan city ordinance makes it unlawful to “[o]bstruct, resist, hinder or oppose an officer.” The Sixth Circuit upheld qualified immunity where an officer arrested a person

²⁰² Scheier v. City of Snohomish, 2008 WL 4812336, 12 (2009).

²⁰³ Tennessee v. Garner, 471 U.S. 1, 29-30 (1985).

²⁰⁴ Anderson v. Creighton, 483 U.S. 635, 636-41 (1987).

pursuant to this ordinance for interrupting him when he was questioning a third party.²⁰⁵ The court also upheld qualified immunity where an officer arrested a person for “refusing to provide identification.”²⁰⁶ In *Washpon v. Parr*, the court upheld qualified immunity where officers arrested and charged plaintiff with disorderly conduct for “[a]llegedly disregarding officers’ instructions to leave the courthouse after setting off a metal detector.” Whether or not the officers have probable cause to arrest plaintiff, the court found that “reasonably competent officers could disagree,” and thus the officer was entitled to qualified immunity.²⁰⁷ Additionally courts have continually upheld qualified immunity where no probable cause existed for the crime the plaintiff was actually arrested for, but where it probable cause existed for some other criminal charge. In *Ware v. James City County*, the court found that “[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.”²⁰⁸ These cases demonstrate the extent to which courts show deference to police officers when considering whether or not to uphold qualified immunity.

In sum, 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.” A plaintiff may be able to overcome qualified immunity if he or she has been charged under a broad criminal statute, and it is

²⁰⁵ King v. Ambs, 519 F.3d 607, 611 (Mich. 2008).

²⁰⁶ Risbridger v. Connelly, 275 F.3d 565, 569 n.3 (Mich. 2002).

²⁰⁷ Washpon v. Parr, 561 F.Supp.2d 394, 403-04 (S.D.N.Y. 2008).

²⁰⁸ Ware v. James City County, Virginia, 2009 WL 2905452, 11

blatantly obvious that officers were utterly incompetent or had self-serving motives (ie: to prevent a photographer from publishing pictures of police misconduct) in arresting him or her. Otherwise, overcoming qualified immunity is difficult. Although Fourth Amendment rights are “clearly established,” police officer are not liable unless they violate such rights unreasonably. Doing so is fairly tough considering that most of the statutes used to charge journalist and photographers are all encompassing and criminalize a broad spectrum of conduct. Added to this are courts that are highly deferential to police officers so to prevent a judgment against a cop who was “just trying to do their job.” Assuming a plaintiff does make it past the nearly impenetrable barrier of qualified immunity, he or she must still prove damages, which under the circumstances can be difficult.

Proving Damages

“[T]he purpose of a damage award under Section 1983 is to compensate persons for injuries that are caused by the deprivation of constitutional rights.” “[C]ompensatory damages may include out-of-pocket loss, impairment of reputation, humiliation, and mental anguish and suffering.”²⁰⁹ Also, “[a] prevailing party in a Section 1983 action should be allowed attorney fees unless special circumstances would render awarding fees unjust.”²¹⁰ In *Carey v. Piphus*, the 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.²¹¹

²⁰⁹ *Elkins v. District of Columbia*, 610 F.Supp.2d 52, 59 (D.D.C., 2009).

²¹⁰ *Thomas v. Cleveland*, 176 Ohio App.3d 401, 407 (Ohio App 8 Dist 2008).

²¹¹ *Carey v. Piphus*, 435 U.S. 247 (1978).

Shortly after, the Court extended *Carey*'s holding to all Section 1983 cases for money damages, regardless of the underlying constitutional deprivation.²¹² Thus, to receive monetary damages, all Section 1983 plaintiffs must prove that they suffered an actual injury.

In the photography context, proving damages can present problems. Suppose person A toured the United States for three weeks, accumulating hundreds of pictures on his memory card. On his last stop, an officer detains him and deletes all of his pictures for "suspected terrorist activity." He successfully brings a Section 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. Likewise, in the case of the girls taking pictures of a bridge in Portland, how should they be compensated for being placed on an FBI terrorist watch list? They may not be able to be compensated for this, and it is unclear how the girls would insure that they were removed from the list.

Suppose a journalist has been researching and writing about police brutality for a city newspaper in an attempt to augment awareness on the issue. He witnesses police brutally beating a man unconscious and begins taking pictures. He believes that this incident, when published, will bring attention to the columns he has written, and make people aware of what he believes to be a growing problem in the city. The police seize his camera, delete the pictures, and arrest him. He succeeds on a 1983 claim but has lost a potential front-page story that would have increased public awareness of the issue and served as a catalyst for reform. Additionally, the story could have secured him a

²¹² U.S. v. Henry, 447 U.S. 299, 309-10 (1980).

promotion or increase in salary. Although he can write about his experience, “a picture is worth a thousand words.”

The first problem person A will face is the nearly impossible task of convincing a judge or jury of an “[e]videntiary link between the defendant’s breach and [his] injury.”²¹³ Some courts apply a tort based approach to causation in Section 1983 cases, asking “[w]hether the defendant should have foreseen that his conduct would result in the plaintiff’s injury”²¹⁴ Applying this approach, a court will likely find that the officer who arrested person A could not have reasonably foreseen the loss person A experienced. The court probably would buy the defendant’s argument that the officer reasonably would not have known person A was a journalist and intended to publish the photos (although it seems obvious that this would be the precise reason the officer deleted the pictures). A court would likely agree with defendant’s categorization of person A’s alleged damages as speculative. As one scholar notes, “[C]ourts have used damage causation to limit liability in Section 1983 claims.”²¹⁵

In sum, Section 1983 plaintiffs within the photography contexts are not likely to get fully compensated for their injuries. A plaintiff may be able to collect for mental anguish and humiliation resulting from being arrested or detained, but showing anything more will be difficult. The nature of photography makes the situation more difficult. The true value of photograph for a journalist is the reaction that photograph elicits upon

²¹³ Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in Section 1983 Wrongful Conviction Claims*, 81 Temp. L. Rev. 689, 714 (2008).

²¹⁴ *Id.* 722.

²¹⁵ *Id.*

publication. It is upon viewing a published picture that people become aware of whatever news or ideas the picture conveys. It is then that a journalist reaps the benefits of his work, both personally and professionally. The true value of pictures is not fully realized until after they are published, but the constitutional violation occurs much before then. Courts are likely to discard any arguments regarding the “potential uses of the photographs” as speculative and attenuated. Additionally courts will find that the defendant could not have reasonably foreseen the damages plaintiff alleges, and thus legal causation is lacking.

Section 1983 Summary

In most cases, Section 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 Section 1983 claims involving violations of First Amendment rights. Courts have been even more hesitant to extend any meaningful First Amendment protections to the newsgathering process, and where it has, the protections are heavily qualified. 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. In many cases, it will amount to the officer’s word against the plaintiff, and courts are generally deferential to officers.

Second, qualified immunity represents a major obstacle to a Section 1983 plaintiff. Police officers are armed with broadly written criminal statutes that can be interpreted to prohibit a wide range of conduct, in addition to the deference of courts. Even if an officer commits a Fourth Amendment violation, as long as the officer was not

completely incompetent in doing so a court will probably find that he “acted reasonable under the circumstances and is thus entitled to qualified immunity.”

Finally, assuming a plaintiff successfully navigates through the maze of 1983 obstacles, she still must prove damages. Scholars have noted that courts use “damage causation” to limit the scope of liability of state officials under Section 1983.²¹⁶ The nature of photography and journalism is not conducive to proving damages. 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 cannot fully appreciate this and compensation will reflect that. Secondly, the value of photographs is realized upon publication, however, courts will consider the time in between the violation and publication and the process of publication itself as enough to render damages speculative. Courts will 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 (2) would be personally and professionally damaged by having his or her pictures deleted. Within the context of violations occurring while photographing police misconduct, this seems ludicrous. Arguably, the violation itself occurred 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 senseless.

Because proving damages involving photographs is inherently difficult, a plaintiff may collect only nominal damages or damages for humiliation and embarrassment

²¹⁶ *Id.* at 709.

resulting from the arrest itself. Nominal damages are significant since they are generally accompanied with attorney fees. 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 Section 1983 action is a lengthy, arduous, and costly process. And 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 fees are provided, litigation is time-consuming. Time spent in the courtroom litigating lengthy factual disputes and proving damages is time not spent at work or with family. At some point, a plaintiff has to ask, is it really worth it if all she will receive is money for the embarrassment or mental distress resulting from the arrest itself? I argue that in most cases, it is not. Section 1983 will not provide a meaningful remedy to most plaintiffs suffering constitutional violations for taking pictures in public places.

D. BIVENS ACTION

In most of the incidents and scenarios examined in this essay, it is state officials or private security guards that commit the alleged constitutional violation. If a federal official violates a person's constitutional rights, a plaintiff cannot recover under Section 1983, and must instead bring a *Bivens* action. "A *Bivens* action is a non-statutory counterpart of a suit brought under Section 1983, and is aimed at federal rather than state officials."²¹⁷ 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

²¹⁷Mahnoey v. National Organization for Woman, 681 F.Supp. 129, 132 (D.Conn. 1987).

constitutional right.²¹⁸ *Bivens* actions apply in limited settings, generally for violations of the Fourth, Fifth, and Eighth Amendments.²¹⁹ The Supreme Court has been reluctant to extend *Bivens* liability to violations of the First Amendment.²²⁰

The requirements for successfully bringing a *Bivens* claim are stringent. A plaintiff must first allege specific facts sufficient to support a violation of a right secured by the Constitution.²²¹ A plaintiff's failure to allege a Constitutional violation is "fatal to their case."²²² A plaintiff must show that his or her constitutional right was violated by

²¹⁸ *Bivens v. Six Unknown named Agents of Federal Bureau of Narcotics*, 403, U.S. 388, 389 (1971). Factors that strongly suggest that a police encounter has become a seizure include: the 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 340 (N.Y. 2000).

²¹⁹ *Davis v. Passman*, 442 US 228 (1979).

²²⁰ *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) ("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*.")

²²¹ *Duxbury Trucking, Inc.*, 2009 WL 1258998, 2 (D.Mass. 2009).

²²² *Mattox v. Forest Park*, 183 F.3d 515, 521 (6th Cir. 1999).

an agent of the United States acting under color of law.²²³ When a “constitutionally recognized interest is adversely affected by the actions of federal employees, the Court [next] goes through 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.²²⁴ If the answer to the first prong is yes, then a new remedy will not be created. If the answer is no, the court will consider “special factors” such as the “adequacy of alternative remedies; difficulty in defining legitimate action by government actors; the importance of protecting the constitutional interest; the demand and cost on the judicial system from creating a mass of new litigation in the area; the difficult in defining a broader doctrine; and the ability of Congress to legislate a remedy.”²²⁵ A successful *Bivens* claim plaintiff may collect money damages from agents of the United States in their individual capacities.

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.

General Obstacles to *Bivens* Recovery

²²³ *Id.*

²²⁴ *Wilkie v. Robbins*, 127 S.Ct. 2588, 2598 (2007).

²²⁵ *Id.* at 2605

Between 1971 and 1989, twelve thousand *Bivens* suits were filed and only thirty resulted in judgments on behalf of the plaintiffs. A number were reversed on appeal and only four judgments were actually paid by the individual federal defendant.²²⁶ These statistics are explained by a number of things.

First, procedurally, plaintiffs in *Bivens* suits are disadvantaged. A *Bivens* plaintiff must plead the alleged constitutional tort with greater specificity than other claims. Additionally, courts have construed jurisdiction, venue, and other preliminary issues in *Bivens* suits so as to favor the individual government defendant.²²⁷ 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.²²⁸ 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 just trying to do his job.²²⁹ Third, juries are less likely to side with plaintiffs in *Bivens* actions because it is more difficult for them to “see” the injury from a constitutional tort, than an injury from a common-law tort involving personal injury.²³⁰ Forth, federal officials have qualified immunity and are not liable for violations of constitutional rights

²²⁶ Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C.L. Rev. 337, 343 (1989)

²²⁷ *Id.* at 345.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 347.

committed in “good faith”.²³¹ Fifth, even if a plaintiff receives a judgment in her favor, it is far from certain that the federal agent will have funds to compensate her. The “deep pockets” of the federal government are not available to *Bivens* plaintiffs.²³²

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 violations. 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 which is “convincing” enough for the Court to refrain from providing a new remedy. “So long as a plaintiff has [an] avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.”²³³ Since Congress has created no statutory scheme addressing first amendment violations in context of photography, a court would likely find that no “convincing” remedy exists. Congress has created a remedy for certain torts committed by federal employees. The Federal Tort Claim Act makes the government “liable for any negligent or wrongful act or omission . . . in the same manner and to the same extent as a private individual under like circumstances.”²³⁴ But the Court has found it to be

²³¹ *Id.*

²³² *Id.*

²³³ *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001).

²³⁴ The Federal Tort Claims Act, 28 U.S.C. Section 1346(b), 2674.

“[c]rystal clear that Congress intended the FTCA and *Bivens* to serve as parallel and complementary sources of liability.”²³⁵ Courts are unlikely to preclude a plaintiff’s *Bivens* claim solely based on the availability of a claim under the FTCA.

Next a plaintiff must get around a plethora of “special factors” that may counsel hesitation before a court will authorize a new kind of federal litigation. Recently, scholars have noted that courts have broadly interpreted the “special factors” to narrow the scope of *Bivens*.²³⁶ Natalie Banta argues that the *Bivens* test has become “[m]ore 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.”²³⁷ The list of “special factors” (established in *Wilkie v. Robbins*) is expansive, leaving courts with virtually unlimited discretion in fashioning reasons to reject *Bivens* claims.²³⁸ 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.”²³⁹

Assuming a plaintiff can allege facts sufficient to support the violation of a constitutional right, demonstrate that no other adequate remedy exists, and navigate

²³⁵ *Correctional*, 534 U.S. at, 69.

²³⁶ 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).

²³⁷ *Id.*

²³⁸ *Wilkie v. Robbins*, 127 S.Ct. 2588, 2598 (2007).

²³⁹ *Id.*

through the maze of “special factors,” he or she must next survive the doctrine of qualified immunity, which is in most *Bivens* cases fatal. As stated earlier, federal employees possess qualified immunity and are not liable for violations of constitutional rights committed in “good faith”. 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. Since qualified immunity in *Bivens* actions is essentially the same doctrine applied in Section 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.

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 are 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. 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. If a court does recognize the action,

qualified immunity presents a nearly impenetrably barrier that judges and juries are more than willing to apply. Even a plaintiff who successfully brings a *Bivens* suit may not be compensated fully. Federal employees do not have the “deep pockets” of the federal government and may not be able to afford the judgment against them. Arguably most important of all, attorney fees are not available in *Bivens* actions. A *Bivens* judgment would have to be quite large to cover both the attorney fees (which will likely be substantial) and any damages plaintiff suffered. As explained within the context of Section 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. Basically, a *Bivens* plaintiff faces all of the obstacles faced by a Section 1983 plaintiff plus more. One scholar notes, “[G]overnmental 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, makes the task of the *Bivens* plaintiff that much more difficult than that of an individual suing under Section 1983.”²⁴⁰ Thus, *Bivens* represents an inadequate remedy that fails to provide a plaintiff with any meaningful chance of recovery against a federal official.

E. FEDERAL TORT CLAIMS ACT (FTCA)

Victims of purposeful wrongdoing committed by federal law enforcement officers may also seek recovery pursuant to the Federal Tort Claims Act (FTCA).²⁴¹ Following *Bivens* in 1971, Congress amended the FTCA in 1974 to address the perceived lack of

²⁴⁰ David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 66 WLLR 313, 367 n. 44 (2009).

²⁴¹ 28 U.S.C.A. 2672-80 (1994).

remedy against the United States for particularly outrageous wrongful acts by law enforcement agents. The 1974 Amendments provides an exception to the exclusion of intentional torts listed in the FTCA. The amended act includes within its scope claims against the United States arising out of the following intentional torts: (1) assault (2) battery (3) false imprisonment (4) false arrest (5) abuse of process, and (6) malicious prosecution based on the “[a]cts or omissions of investigative or law enforcement officers of the United States.”²⁴² “[T]hough this cause of action does not address constitutional violations in theory, in practice it does because most intentional torts committed by federal employees are readily characterizable as constitutional violations as well.”²⁴³

The remedies available to a plaintiff who successfully brings a claim pursuant to the FTCA are similar to remedies available pursuant to state law torts.²⁴⁴ FTCA plaintiffs in the photography context will face many of the same obstacles to recovery faced by Section 1983 and *Bivens* plaintiffs. Proving the value of photographs, or photographic opportunities will be difficult. Additionally, an FTCA claim does not allow for punitive damages nor does it allow a jury trial.²⁴⁵

V. Violations Committed by Security Guards in Privately Owned Places Open to the Public

²⁴² 28 U.S.C.A 2680(h) (1994).

²⁴³ Stefan Sciaraffa, Section 2676 of the FTCA: *Why it Should Not Bar Contemporaneously Filed Bivens Claims*, 24 AM. J. CRIM. L. 147, 148 (1996).

²⁴⁴ See discussion *infra* Section V Part B.

²⁴⁵ Sciaraffa, *supra* note 243, at 176.

As stated earlier, the law governing the right to take photographs in privately owned places open to the public is relatively straightforward. Virtually no limits exist on the right to photograph privately owned structures that are visible from public places. Property owners have no right to prohibit others from photographing their property from other locations. Property owners *do* have a right to prohibit photography occurring *on* their property, even if it is open to the public. In areas such as shopping malls, private museums, amusement parks and restaurants, train stations and airports, if no signs are posted prohibiting photography, it is probably safe to assume that it is allowed. In this case, photographers are free to take pictures of people or things on the property. If no signs are posted, property owners or operators may still request that one stop taking pictures. If a photographer ignores these requests, he or she may be subject to trespass. Property owners are not however permitted to confiscate one's camera or film.

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. If the security guard was acting under color of state law, a plaintiff may bring a Section 1983 claim. 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. Subsection A discusses the requirements for bringing a Section 1983 claim against a private 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 its conduct is “fairly attributable to the state.”²⁴⁶ “[T]he Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test.”²⁴⁷ The Seventh Circuit held that private police officers licensed to make arrests could be state actions under the public function test.²⁴⁸ Under the public function tests, 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.²⁴⁹

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).²⁵⁰ 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.”²⁵¹ If a plaintiff is unable to show that a security guard was a “de facto police

²⁴⁶ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947 (1982).

²⁴⁷ *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003).

²⁴⁸ *Payton v. Rush-Presbyterian*, 184 F.3d 623, 627-30 (7th Cir. 1999).

²⁴⁹ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

²⁵⁰ *Id.*

²⁵¹ *Id.*

officer” and his or her actions are not “fairly attributable to the state,” that plaintiff must resort common law tort claims for compensation.

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 Section 1983 if the security guard was not “acting under the color of state law.” A plaintiff whose rights have been violated must resort to remedies available at state law. Such state tort claims may include but is 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) tortious interference with economic opportunity.²⁵² The remedies available to plaintiff will be whatever remedies state law provides for each cause of action.²⁵³ 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. The girl attempted to take her camera back and the security guard repeatedly shoved her and finally pushed her to the ground. Although the girl may not sue the security guard under Section 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.

²⁵² *Id.*

²⁵³ *Id.*

One scholar notes that “[A]lthough they perform a range of law enforcement-related activities, private security guards are frequently ill-trained, unsupervised, and may themselves have criminal records.”²⁵⁴ She notes that the Chicago Housing Authority police chief estimated that “[t]wenty percent of guards working private security at Chicago Housing Authority in 1996 were active gang members.”²⁵⁵ 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 public.”²⁵⁶ 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. 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 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. Attorneys will likely be unwilling to take such a case on a contingency fee basis because it is unlikely that such claims will be profitable. Thus, in addition to court costs, a

²⁵⁴ Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 177 (2005).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

plaintiff may be forced to pay an attorney on an hourly basis, or bring his or her claims pro se.

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 Section 1983 suit. Although plaintiffs will not have access to the deep pockets of the state and will be responsible for court costs and attorney's fees, plaintiffs will not have to show a constitutional violation nor will they have to navigate around the doctrine of qualified immunity.

VI. Summary of Remedies

When one is damaged by another's negligent, reckless, or intentional actions and turns to the courts for relief, he or she can expect to sacrifice time and money to get compensated. 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. In every step of Section 1983 and *Bivens* litigation there are obstacles that often prove insurmountable. Assuming a plaintiff can convince a court of a constitutional violation (which is hindered by courts' ambiguous stance with respect to newsgathering and photographic expression), he still must clear the qualified immunity hurdle. Courts apply qualified immunity liberally, even where defendant clearly committed the violation in question. With the help of broadly written criminal statutes, courts are able to fit mostly all official conduct into either the "no violation" box or the "yes violation, but officer did so reasonably" box. If an officer behaves so incompetently that he waives qualified immunity, courts may still

use causation to limit damages. Damages within the photography and journalism context are difficult to prove and it is hard if not impossible to put a price tag on photographs and photographic opportunities. Basically, from beginning to end, Section 1983 litigation is packed full of “balancing tests” “special factors” and subjective notions of what is “reasonable under the circumstances.” 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 Section 1983, plus more. 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.” Most significantly, courts have not interpreted the *Bivens* remedy to include attorney fees.

A plaintiff always has the option of seeking injunctive or declaratory relief, but these remedies come with their own set of problems. The most obvious one is that they do not provide money damages. Securing these forms of relief generally requires extensive factual findings of “patterns of police conduct” and “credible threats of recurrent injury.” Officers will defend by alleging misconduct or illegal behavior on behalf of the plaintiff (such as “interfering with an investigation” or “disturbing the peace”). On more than one occasion, courts 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.”²⁵⁷

²⁵⁷ Eve B. Burton, *Where are all the Angry Journalists? The Use of Criminal Statutes and Tactics to Limit Newsgathering*, 16-SUM COMM. LAW. 19 (1998) (“Long ago the Court made it clear that the First Amendment does not ‘invalidate every incidental

Practically speaking, the best chance a 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 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. With few exceptions, federal, state, and local laws do not prohibit such conduct specifically. 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

“[R]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”²⁵⁸ “[I]t has long been understood that rights and remedies are, in many important contexts, functionally inseparable.”²⁵⁹

Oliver Wendell Holmes once stated, “[A] legal duty . . . is nothing but a predication that

burdening of the press that may result from the enforcement of civil and criminal statutes of general applicability”).

²⁵⁸Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 858 (1999).

²⁵⁹*Id.*

if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court – and so of *a legal right*. ‘This or that way’ is, of course, the remedy.”²⁶⁰ Rights are preserved through remedies because remedies provide the chief incentive for people to recognize and respect those rights. Without remedies, federal and state officials, as well as private security guards, will not be deterred from conduct that violates one’s rights. Thus, the right to take photographs in public places will erode. This is troubling for a number of reasons.

“[P]hotographs have tremendous expressive, communicative, and informative value” and “[c]an communicate information in a manner that words alone cannot replicate.”²⁶¹ “[P]hotographs have a swifter and more succinct impact than words, an impact that is instantaneous, visceral, and intense.”²⁶² A single photograph has the power to shape the national consciousness. One scholar notes two particular instances in history that demonstrates this power.²⁶³ The first photograph was taken Huynh Cong Ut, during the Vietnam War. The photograph showed several screaming Vietnamese children fleeing a napalm strike in South Vietnam. “[T]he little girl in the center of the photograph was stark naked and badly burned; she had torn off all of her clothes in a futile attempt to escape the searing effects of napalm.”²⁶⁴ “[T]his photograph became ‘the last major icon’

²⁶⁰ *Id.*

²⁶¹ Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1095-98 (1998).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

of the antiwar movement and ‘probably did more to increase the public revulsion against the war than a hundred hours of televised barbarities.’”²⁶⁵

The second photograph was taken at Kent State University, after the Ohio National Guard opened fire, without warning, on a large crowd of student protesters. The photograph was of “[a] young woman kneeling in incomprehension, anguish, and finally horror over the body of a dead student.” “Newspapers across the nation published this image on their front pages. The 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.”²⁶⁶

Photographs can shape the nation’s conscience and motivate people to act because they reveal the uncensored truth. Mere awareness of this potential promotes accountability. A law enforcement official is less likely to brutally beat an arrestee if his conduct can be caught on film and land on the front page of the Washington Post. Officials are less likely to unlawfully interfere with political rallies if they suspect that most, or even some, people have cameras and are free to photograph their conduct. The most obvious example of police brutality captured on camera is the Rodney King incident that occurred in March 1991. A bystander captured LAPD officers repeatedly striking King with their batons. A portion of the footage was aired by news agencies around the world, causing public outrage over police brutality. In May of this year, a suburban Chicago cop, Christopher Lloyd was caught on video beating a 15-year-old special needs student because he refused to tuck in his shirt. According to the Chicago Tribune, on

²⁶⁵ *Id.*

²⁶⁶ *Id.*

September 14, 2009 (four months later) he allegedly threatened a woman with a knife and then raped her with a pillow over her face. He was charged with rape and incarcerated in Indiana.²⁶⁷

In addition to the communicative and deterrent values of photography, the right to take pictures in public places is vital to expression. Pictures provide people with a powerful way to express ideas. “[O]f all the means of expression, photography is the only one that fixes forever the precise and transitory instant.” “[A] photographer’s ability to take a picture depends upon the freedom of access to the place where the subject is located, as well as the freedom to capture an image at the right time and in the most effective manner.”²⁶⁸ This cannot be accomplished if one must first check to see if police are around. “[P]hotography involves expressive capacity that is inextricably intertwined with the ability to take the photographs themselves.”²⁶⁹ When one’s right to take photographs is hindered (by unlawful police conduct) so too is the photographer’s ability to express him or herself. “[P]hotography as a medium of expression depends on the ability of photographers to capture images without undue government regulation.”²⁷⁰

I argue that the right to take pictures in public places is a vital one. It is essential to a free press and “[a] free press is indispensable to the survival of a democratic

²⁶⁷ Photography is Not a Crime, It’s a First Amendment Right,

<http://carlosmiller.com/2009/10/09/cop-who-beat-student-for-untucked-shirt-jailed-on-rape-charges/#more-8188> (Oct. 9, 2009).

²⁶⁸ See Note, *supra* note 259.

²⁶⁹ *Id.* at 1098

²⁷⁰ *Id.*

society.”²⁷¹ When an official violates this right, he causes damage to the individual as well as society. The survival of this right is in large part dependant on the adequacy of available remedies. Without meaningful remedies, the right to take pictures in public places and thus freedom of press is vulnerable. This vulnerability is especially pronounced today due to the War on Terror and the War on Drugs, which have created an atmosphere conducive to governmental encroachment on civil liberties. The next section proposes solutions for preserving the right to take pictures in public places and ways to prevent further violations. Some of the solutions discussed are preventative while others are more remedial in nature.

X. Possible Solutions

The first way photographers can prevent abuse is to know their rights. Bruce Schneier advocates that “knowing your rights and standing your ground is essential.”²⁷² When confronted by law enforcement officers, people 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. “[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.”²⁷³ Schneier advises photographers, journalists and others to carry cards or pamphlets listing one’s legal rights

²⁷¹ *Id.*

²⁷² Schneier on Security,

http://www.schneier.com/blog/archives/2008/06/the_war_on_phot.html (June 5, 2008 6:44 AM EST).

²⁷³ *Id.*

and obligations. This provides quick access to guidance to photographers confronted by law enforcement officials. Attorney Bert P. Krages also advocates the use of pocket guides and provides one on his website.²⁷⁴ “[Y]ou may make copies and carry them in your wallet, pocket, or camera bag to give you quick access to your rights and obligations concerning confrontations over photography.”²⁷⁵

A misunderstanding of the law surrounding photography certainly contributes to violations and thus having a working knowledge of one’s rights and obligations will help prevent abuse. However, ignorance of the law does not cause the violation of rights. Rather it is law enforcement officials hostile and distrusting of photographers operating within an atmosphere lacking accountability that causes the abuse. Officials’ hostility and distrust is due in part to hysteria and suspicion caused by the war on terror, and also in part to a fear that photographers will expose police misconduct. With the help of broadly worded statutes and deferential courts, officers are free to act on feelings of hostility and distrust without fear of consequences. Solutions to the problem should, among other things, seek to restore accountability into the system so officials will think twice before abusing their authority. Courts are largely at fault for this break down of accountability. Both judges and juries are highly deferential to defendant officers who they often perceive as “just doing their job.”

Courts could not be so deferential without (1) the doctrine of qualified immunity and (2) broadly worded criminal statutes that allow for excessive judicial discretion. To restore accountability, courts will need to begin applying qualified immunity more

²⁷⁴ Pocket guide located at <http://www.krages.com/phoright.htm>.

²⁷⁵ *Id.*

conservatively. One of the reasons courts apply qualified immunity so liberally is because both judges and juries are aware of officers' limited salaries and thus hesitant to hand down a hefty judgment against them. One solution to this problem is for states to agree to indemnify officials found guilty of violations. Indemnifying defendant officials will remove the sympathy element from the equation, and will produce results that more accurately reflect fault. As discussed earlier, defendant officials sometimes prove to be insolvent, so state indemnification of officials would also insure that plaintiffs receiving judgments are fully compensated. On one hand indemnifying officials may diminish accountability even more, considering officials would never have to pay their own judgments. However, if actually convicted, presumably, supervising officials at the police department would discipline the officer and threaten to dismiss him if he continued to abuse his authority. If supervising officials condoned the misconduct of the officer, there will still be another layer of accountability. If the state is forced to pay a large amount of judgments resulting from police misconduct it will have an incentive to adopt measures to remedy the abuse.

The second thing that allows courts to be deferential to defendant officers is broadly worded criminal statutes. Officers and courts interpret these statutes to criminalize a wide range of behavior, much of which is constitutionally protected media activity. These statutes are unconstitutionally vague, broad or both as applied, allowing officers to stifle newsgathering and giving courts the room to find their conduct reasonable. Solutions should focus on remedying or repealing these statutes.

Influencing courts and legislatures to eliminate or amend these statutes will require a coordinated effort on behalf of the organized media. Media organizations need

to react more strongly than they have in the past to abuses of newsgathering and press rights. One scholar, commenting on the media's weak reaction to recent abuses asks, "[W]here are all the angry journalists?"²⁷⁶ She notes that "[T]o date, there has been little political cost to reducing the flow of information, even by improper use of criminal statutes."²⁷⁷ She argues that the organized media and the general public have not demonstrated an appropriate level of outrage at the restriction of press rights.²⁷⁸ She claims that owners of media organizations and senior editors often have chosen not to cover violations of press rights or have given only short mention of such incidents.²⁷⁹

News organizations need to dedicate resources to developing an organized front to combat abuses of newsgathering and press rights. As part of this front, media organizations should invest in able attorneys to defend journalists in all criminal actions resulting from newsgathering, regardless of the costs.²⁸⁰ Attorneys should "[r]einforce with judges, case by case, the strength of Supreme Court precedent regarding access to information, state shield laws, and even state police department regulations that incorporate First Amendment rights."²⁸¹ Attorneys should advocate the innocence of their individual client, but perhaps more importantly, concentrate on arguing that the

²⁷⁶ Eve B. Burton, *Where Are All the Angry Journalists? The Use of Criminal Statutes and Tactics to Limit Newsgathering*, 16-SUM COMM. LAW. 19 (1998).

²⁷⁷ *Id.* at 21-22.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

criminal statutes at issue are unconstitutional as applied. It is important to increase courts' awareness that the organized media is being targeted with statutes such as disorderly conduct and obstruction of justice which are being used by officers to criminalize constitutionally protected behavior. Attacking the statute itself represents an efficient way to combat abuse, because it removes one of the major tools law enforcement officers use to suppress journalists.

One way to strengthen attacks on broad statutes is for the organized media to create a national or state-by-state data bank of information regarding violations of newsgathering and press rights.²⁸² The data bank should document all incidents between journalists and law enforcement officials, whether or not the incident results in formal charges. With this information at their fingertips, counsel for media organizations can make a more convincing a 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. Lobbyists should pressure legislators to draft statutes with a higher degree of specificity in order to prevent officials from applying those statutes to constitutionally protected behavior.

State criminal statutes are not the only tools of law enforcement officers to suppress newsgathering efforts. As discussed earlier, both police officers and private security guards reference "national security laws" or "9/11 laws" to limit the activities of photographers. Media organizations and the public at large need to pressure officials at

²⁸² *Id.*

the federal level to address and remedy the widespread of abuse and newsgathering and press rights. They should urge Congress to draft some form of guidance aimed at ensuring that law enforcement officers do not misuse anti-terrorism legislation or vague notions of “national security” to impede the constitutionally protected activities of the press and photographers. The efforts of journalists and photographers in other countries provide helpful guidance in applying pressure to federal officials. 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.²⁸³ In March 2009, the Home Office invited representatives of the media to “[h]elp draft guidance that will aim to ensure police do not misuse anti-terrorism legislation to unfairly stop photographers.”²⁸⁴ “Counter-terrorism minister Vernon Coaker made the request at a meeting in Parliament in which Amateur Photographer magazine (AP) stressed the need for police to adopt a common-sense approach when dealing with photographers.”²⁸⁵ In addition to efforts by the organized media, hundreds of photographers staged a demonstration outside new

²⁸³ Photographers Meet Home Office Minister Over Rights “Abuse,” AMATEUR

PHOTOGRAPHER, *available at*

http://www.amateurphotographer.co.uk/news/photographers_meet_home_office_minister_over_rights_abuse_news_278619.html.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

Scotland Yard to protest broad anti-terrorism legislation they felt would be used to target the lawful activities of photographers.²⁸⁶

The organized media, grass roots groups, and individual photographers in America should take note of this and make similar efforts to get Congress's attention. The organized media can facilitate this by publishing instances of abuse. Exposing this abuse will increase awareness among the public and serve as a catalyst for grass roots action.

To address abuse by private security guards, the organized media needs to pressure courts and Congress for an expanded Section 1983 definition of "acting under state law."²⁸⁷ Security guards stop, detain and search people just like police. They wear uniforms strikingly similar to those of police and carry weapons that police carry. "[T]he private security industry relies on uniforms to imbue its agents with the public police's implied monopoly on state-sanctioned use of force and coercion . . . [a]s a result, private security personnel are frequently mistaken for public police."²⁸⁸ 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. "[S]ome courts have ruled that special police status alone does not establish color of law and that the imposition of liability [under Section 1983] depends on whether the officers were performing a 'public function' – one traditionally performed for the public good by the state. The Supreme Court has been

²⁸⁶ *Id.*

²⁸⁷ See Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 208-09 (2005).

²⁸⁸ *Id.* at 204.

clear that the scope of public functions is limited, reaching only activities that have been ‘traditionally the exclusive prerogative of the State.’²⁸⁹ 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 in many cases indistinguishable. In addition, attorneys should encourage courts to fashion equitable remedies under Section 1983 in the form of improved training and oversight of security guards.²⁹⁰ Improved training and increased accountability ideally will decrease future abuses by security guards.

XI. Conclusion

The law in the United States places few restrictions on the right to take pictures in public places. 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 distrustful 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. Photographers have unlawfully had their cameras taken, memory cards deleted and their dignity destroyed by police officers and private security guards acting outside of their authority. Worse, 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 fully compensate a plaintiff. In most cases, the chance

²⁸⁹ *Id.* at 208-09.

²⁹⁰ *Id.* at 210.

of recovery is slim and the amount of recoverable damages is uncertain. Considering the time and resources associated with litigation, it will often be impractical for a victim to pursue legal remedies for violations of his or her photography rights.

“[R]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”²⁹¹ 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 cause harm to the individual, but more importantly 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 the organized media as well as grass roots organizations. Both should seek to educate people about their legal rights and increase the public’s awareness of the abuses described in this essay. The organized media needs to dedicate the resources necessary to defend those charged with crimes and pressure the courts and legislatures to make and interpret law in a way that hold officials accountable for their actions. Media attorneys must seek to eliminate barriers to recovery, specifically broadly worded statutes and the liberal application of qualified immunity.

These and other efforts are needed to prevent the continuation of widespread abuse of rights in the realm of photography and newsgathering. Meaningful remedies needed to preserve the right to free press and expression are currently lacking. One

²⁹¹Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 858 (1999).

scholar notes, “[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.”²⁹² If efforts are not made at resolving the current problem, individuals as well as society at large will suffer and freedom of press and expression will indeed be diminished, “one case at a time.”

²⁹² Burton, *supra* note 64, at 20.