



# Retaliatory Arrests and the First Amendment: The Chilling Effects of *Hartman v. Moore* on the Freedom of Speech in the Age of Civilian Vigilance

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## ABSTRACT

In the age of civilian vigilance, smartphone technology and social media have enabled individuals to record and share videos of police interactions with citizens at an unprecedented rate, sometimes providing indisputable evidence of police misconduct for the world to see instantly. The probative value and public shock factor of some of these videos have also opened the door to retaliatory arrests. In the 2006 case *Hartman v. Moore*, the U.S. Supreme Court ruled that a plaintiff must show the absence of probable cause to establish a retaliatory prosecution claim. The Court did not hold whether this heightened pleading standard applied to retaliatory arrests, leaving open a circuit split on the issue. I argue that extending the *Hartman* standard to retaliatory arrest claims would create a chilling effect on free speech, particularly in the context of speech opposing or challenging police action. Specifically, extending *Hartman*'s heightened pleading standard to retaliatory arrest claims would chill speech in two ways: (1) it would increase the likelihood of arrests of those who speak out, and (2) it would discourage others from speaking out upon seeing those arrests. These are unacceptable consequences because the freedom of individuals to speak out without the fear of arrest is core to the principles of a free nation.

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## INTRODUCTION

On October 26, 2015, a school resource officer<sup>1</sup> (SRO) violently dragged a female student across the floor, forcibly removing her from her classroom at Spring Valley High School in South Carolina. The officer arrested the student because she refused to leave the classroom after using her cell phone during class.<sup>2</sup> As Niya Kenny, one of her classmates, yelled in horror at the officer's action, Kenny recorded the incident on her cell phone and encouraged her classmates to record as well.<sup>3</sup> Aware of the officer's violent reputation,<sup>4</sup> these classmates immediately video recorded the incident on their cell phones and shared them online; the videos went viral.<sup>5</sup> The officer then removed Kenny from the

1. School resource officers (SRO), who are in-house law enforcement officers, have increased in schools following the Columbine shootings. See Josh Sanburn, *Do Cops in Schools Do More Harm Than Good?*, TIME (Oct. 29, 2015), <http://time.com/4093517/south-carolina-school-police-ben-fields> [https://perma.cc/SX5B-7HUV] ("The shooting at Columbine High School in 1999 led to even more SROs after the federal government provided money for stepped-up security in schools."); *What Is an SRO?*, SCHOOL SAFETY NET, [http://cte.jhu.edu/courses/ssn/sro/ses1\\_act1\\_pag1.shtml](http://cte.jhu.edu/courses/ssn/sro/ses1_act1_pag1.shtml) [https://perma.cc/7HGB-WQBL].
2. Ben Mathis-Lilley, *Classmate Who Taped Spring Valley Incident Says Female Student Was Arrested for Using Phone*, SLATE: THE SLATEST (Oct. 27, 2015, 9:32 AM), [http://www.slate.com/blogs/the\\_slatest/2015/10/27/spring\\_valley\\_arrest\\_video\\_female\\_student\\_used\\_phone\\_before\\_incident\\_classmate.html](http://www.slate.com/blogs/the_slatest/2015/10/27/spring_valley_arrest_video_female_student_used_phone_before_incident_classmate.html) [https://perma.cc/M7GT-TZ6H].
3. See Loren Thomas, *Student Speaks Out Following Spring Valley Incident*, YOUTUBE (Oct. 26, 2015), <https://youtu.be/5yLwGL1Z9AE> [https://perma.cc/84EN-EQN2] (interviewing Kenny regarding her speaking out against the police officer's assault of her classmate and being taken into custody by the police officer); see also CBS This Morning, *S.C. Deputy Barred From High School Campus After Video Surfaces*, YOUTUBE (Oct. 27, 2015), <https://www.youtube.com/watch?v=oixK4amVzEQ> [https://perma.cc/LCJ9-QWQS] (providing news coverage and a clip of the police officer picking up the female student from her desk and dragging her across the room to remove her).
4. Some students had nicknamed the officer, Ben Fields, "Officer Slam." Amy Davidson, *What Niya Kenny Saw*, NEW YORKER (Oct. 30, 2015), <http://www.newyorker.com/news/amy-davidson/what-niya-kenny-saw> [https://perma.cc/WGU4-5LXQ].
5. See Glen Luke Flanagan, *Remember the Spring Valley Video? One Student is About to Go to Court*, STATE (July 17, 2016, 9:34 PM), <http://www.thestate.com/news/local/crime/article/90213792.html> [https://perma.cc/Y7G2-B2KA] (describing how the video of "a deputy yanking a girl from her seat at Spring Valley High School and tossing her went viral online"); Dana Ford et al., *Spring Valley High School Officer Suspended After Violent Classroom Arrest*, CNN (Oct. 27, 2015, 10:12 PM), <http://www.cnn.com/2015/10/27/us/south-carolina-school-arrest-video> [https://perma.cc/CC47-NAC8] (describing the "videos that went viral and sparked widespread outrage"); Cop Block Fresno, CA, *Cop Assaults Student at Spring Valley High School*, YOUTUBE (Oct. 26, 2015), <https://www.youtube.com/watch?v=ECnkuJ43oTo> [https://perma.cc/TC9A-7FFW] (showing that one of the videos of the incident has since attracted 1,106,187 views as of Apr. 21, 2017); see also Brian Lehrer, *A Million Little Murrows: New Media and New Politics*, 17 MEDIA L. & POL'Y 1, 3 & n.6 (2008) (defining "go viral" as referring "to the exponential spread and upsurge in viewers of a popular piece of online content").

classroom, obtained the cell phone she used to record the video,<sup>6</sup> and arrested her for disturbing the school, a misdemeanor.<sup>7</sup> A year later, the local solicitor dropped the charge against Kenny for lack of evidence.<sup>8</sup> In August 2016, the American Civil Liberties Union (ACLU) filed a lawsuit on Kenny's behalf, along with all "elementary and secondary public school students in South Carolina," claiming that the statute that made "Disturbing Schools" a criminal offense was "broad and overly vague."<sup>9</sup>

Under the Fourth Amendment of the U.S. Constitution, the police must have probable cause in order to arrest an individual without a warrant.<sup>10</sup> Probable cause can be found when "facts and circumstances within the police officer's knowledge would lead a reasonable person to believe that the suspect has committed, is committing, or is about to commit a crime" beyond merely the officer's "hunch or suspicion."<sup>11</sup> If the arrested individual suspects an arrest

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6. Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC (Nov. 2016), <http://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149> [https://perma.cc/P7DL-2L6J].
  7. See Julia Craven, *The Girl Who Was Assaulted By a Cop on Camera at Spring Valley High Is Now Facing Charges*, HUFFINGTON POST (Dec. 17, 2015, 7:50 PM), [http://www.huffingtonpost.com/entry/charges-assault-spring-valley-high\\_us\\_56733c14e4b014efe0d4d59c](http://www.huffingtonpost.com/entry/charges-assault-spring-valley-high_us_56733c14e4b014efe0d4d59c) [https://perma.cc/7RQG-85BW] ("Both girls face a misdemeanor charge of disturbing schools and, if found guilty, could be fined up to \$1000 or face 90 days in jail."); Holly Yan & Mariano Castillo, *Attorney Defends Actions of Fired Officer as 'Justified and Lawful'*, CNN (Oct. 29, 2015, 1:08 AM), <http://www.cnn.com/2015/10/28/us/south-carolina-school-arrest-videos> [https://perma.cc/4TCG-A6BT] (describing the two arrests). For a discussion of the incident in the context of disturbing school charges among adolescences across the United States, see Ripley, *supra* note 6 ("From 2000 to 2016, according to South Carolina's data, the disturbing-school charge was filed against students in the state 33,304 times.").
  8. Ripley, *supra* note 6 (reporting the local solicitor "also dismissed the disturbing-school charge against Kenny. 'There is simply not enough evidence to prove each and every element' of the alleged offense, he wrote").
  9. Complaint at 23, *Kenny v. Wilson*, No. 2:16-cv-2794-CWH (D.S.C. 2016), <https://www.aclu.org/legal-document/kenny-v-wilson-complaint> [https://perma.cc/BV94-2NG8]. The complaint states that the statute violates the plaintiffs' due process rights under the Fourteenth Amendment of the U.S. Constitution. *Id.* at 3.
  10. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").
  11. Thomson Reuters, *Probable Cause*, FINDLAW, <http://criminal.findlaw.com/criminal-rights/probable-cause.html> [https://perma.cc/K53Y-UCS4]. The U.S. Supreme Court has held that probable cause is established when "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed." *Stacey v. Emery*, 97 U.S. 642, 645 (1878); see ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION 94 (2d ed. 2013) ("There is no precise definition of probable cause. The classic definition of probable cause, often cited by the Supreme Court, was articulated in *Stacey v. Emery*.").

without probable cause or a “malicious prosecution,” the individual “may seek redress through a civil lawsuit.”<sup>12</sup>

The First Amendment protects individuals’ freedom of speech against government action.<sup>13</sup> Kenny spoke up against the conduct of the officer, who is a state actor, and suffered for her advocacy. Although the ACLU decided to challenge the Disturbing Schools statute,<sup>14</sup> courts have agreed that victims can file lawsuits against the government to allege retaliatory actions motivated by the exercise of the First Amendment. The Tenth Circuit stated: “Although retaliation is not expressly discussed in the First Amendment, it may be actionable inasmuch as governmental retaliation tends to chill citizens’ exercise of their constitutional rights.”<sup>15</sup> A plaintiff may file civil actions alleging retaliatory actions against state or municipal officials under § 1983 of the Civil Rights Act,<sup>16</sup> or against federal officials<sup>17</sup> under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>18</sup>

12. Reuters, *supra* note 11.

13. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

14. See *Kenny v. Wilson*, ACLU (Nov. 29, 2016), <https://www.aclu.org/cases/kenny-v-wilson> [<https://perma.cc/8B58-L5W9>]; Robin Shulman, *A South Carolina Student Was Arrested for ‘Disturbing a School’ When She Challenged Police Abuse, So We Sued*, ACLU (Aug. 11, 2016, 12:15 PM), <https://www.aclu.org/blog/speak-freely/south-carolina-student-was-arrested-disturbing-school-when-she-challenged-police> [<https://perma.cc/Q85U-6PU2>].

15. *Perez v. Ellington*, 421 F.3d 1128, 1131 (10th Cir. 2005). For another example of retaliation that may chill speech, see *Howards v. McLaughlin*, 634 F.3d 1131, 1138 (10th Cir. 2011) (describing how the plaintiff filed a First Amendment retaliatory action claiming that FBI agents arrested him for assault in retaliation for making political comments to the Vice President, in addition to a Fourth Amendment claim, even though “[t]he state prosecutor subsequently dismissed the charges . . . and no federal charges were ever filed”), *rev’d sub nom.* *Reichle v. Howards*, 132 S. Ct. 2088 (2012).

16. § 1983 of the Civil Rights Act states:

Every person who, under color of [state law], . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2012).

17. This Comment will primarily focus on 42 U.S.C. § 1983 claims rather than *Bivens* claims since the arresting officer will typically be a police officer, who is a state, as opposed to a federal, actor. The application of qualified immunity is analogous in both contexts.

18. 403 U.S. 388 (1971). Under *Bivens*, plaintiffs may bring suit against federal officers for violations of their constitutional rights. *Id.* at 395–97. *Bivens* provides the same remedies against federal government officials available for claims against state agents under § 1983. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (“[A] *Bivens* action is the federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983.”). While *Bivens* was concerned with a violation of the Fourth Amendment, the Supreme Court has since interpreted the *Bivens* decision to protect other constitutional rights. See, e.g., *Carlson v. Green*, 446 U.S. 14, 17–18 (1980) (holding an allegation that pled “a violation of the Eighth Amendment’s proscription against infliction of cruel and unusual punishment . . . [gave] rise to a cause of action for damages under *Bivens* . . .”). But see *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (“[The Court’s] more recent decisions have

Courts are divided, however, on how plaintiffs establish retaliatory arrest claims. Specifically, courts disagree whether probable cause for an arrest precludes recovery. To illustrate, suppose that in the Spring Valley incident described above, Niya Kenny had brought a retaliatory arrest claim. She might have argued that she was exercising her First Amendment rights by recording the SRO's treatment of her classmate, and that the officer unlawfully arrested her in retaliation for doing so. But the officer allegedly had probable cause that Kenny committed the misdemeanor offense of "disturbing the school." In some jurisdictions, Kenny could bring her retaliatory arrest claim even if there was probable cause for her arrest—retaliation just has to be one motivating factor. In other jurisdictions, however, the existence of probable cause—here, disturbing the school—would defeat Kenny's claim. She would have the burden to establish that there was no probable cause<sup>19</sup> but rather that only retaliatory intent caused the arrest. Thus, even if the officer arrested Kenny because she was protesting against his arrest of her classmate—a clear retaliatory motive—Kenny could not succeed on her civil rights claim because she could not deny that probable cause for a separate offense existed.

The inability to establish a retaliatory arrest claim will chill Kenny's exercise of free speech in the form of speaking up as well as using her smartphone camera to record potential police brutality. After being arrested once for speaking up, she would likely think twice about speaking up again. Moreover, other students will similarly be deterred from speaking out or using their smartphones to record as a tool to challenge police brutality after witnessing Kenny's arrest and subsequent inability to file a retaliatory arrest claim.

This unfortunate potential result hinges on whether courts extend the Supreme Court's decision in *Hartman v. Moore*<sup>20</sup> from retaliatory prosecution claims to retaliatory arrests. In *Hartman*, the Court determined that probable cause precludes a plaintiff's recovery for retaliatory prosecution claims filed under § 1983 of the Civil Rights Act.<sup>21</sup> Yet, the Court did not comment as to whether

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responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."); *Bush v. Lucas*, 462 U.S. 367 (1983) (finding plaintiff could not bring a *Bivens* suit under the First Amendment where Congress had provided comprehensive remedies under the Civil Service Reform Act). For more discussion on *Bivens* actions, see Joan Steinman, *Backing Off Bivens and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984).

19. I refer to the requirement that a plaintiff must show that there was no probable cause as the "no probable cause rule" throughout this Comment.

20. 547 U.S. 250.

21. *Id.* at 265–66 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.").

this rule should extend beyond claims arising from retaliatory prosecutions to claims arising from retaliatory arrests. I argue that the harmful legal and policy ramifications of extending the no probable cause rule to retaliatory arrest claims should persuade lower courts against extending the *Hartman* decision to retaliatory arrest claims.

Part I discusses the background and evolution of relevant First Amendment retaliatory case law, and outlines the elements of a retaliatory arrest claim, including the absence of probable cause. Part II analyzes the three justifications for extending the no probable cause rule to retaliatory prosecutions in *Hartman v. Moore* to reveal that the no probable cause rule should not extend to retaliatory arrests. Part III argues that the no probable cause rule for retaliatory arrests limits individuals' freedom of speech. This rule will create a chilling effect on speech—that is, it will quell the arrestee's speech at the time of arrest and shield officers from revealing their potentially vindictive motives for the arrest. This would also limit the right to record the police, which some federal courts have recognized as protected under the First Amendment, particularly when used to speak out against police brutality. Part IV examines how the no probable cause rule limits the ability of the public to record the police and keep the police in check via online social media.<sup>22</sup> In the age of civilian vigilance,<sup>23</sup> armed with growing access to smartphones with instant access to cameras and online sharing capabilities, individuals now more than ever can and have organized social protest through tools such as Twitter and Facebook.<sup>24</sup> Part V responds to counterarguments to my proposal to limit the no probable cause rule of *Hartman v. Moore* so that it does not extend to retaliatory arrest claims.

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After *Hartman*, retaliatory prosecution plaintiffs “cannot succeed in the retaliation claim without showing that the Assistant United States Attorney was worse than just an unabashed careerist, and if he can show that the prosecutor had no probable cause, the claim of retaliation will have some vitality.” *Id.* at 265.

22. See Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. PUB. INT. L.J. 243, 289 (2013) (noting that citizens are using cell phone cameras as an “oversight tool that they can reasonably and practicably use to hold governmental actors accountable”).
23. I coin the term “age of civilian vigilance” to refer to the social phenomenon of nonjournalist civilians recording police action by smartphone and other electronic technology, and using those recordings to draw political and legal attention to police action. Though the U.S. Court of Appeals for the First Circuit in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), did not use this term, the court describes how the proliferation of electronic devices like smartphones has made it so that “many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew,” blurring the line between “private citizen and journalist.” *Id.* at 84.
24. See, e.g., John G. Browning, *Democracy Unplugged: Social Media, Regime Change, and Governmental Response in the Arab Spring*, 21 MICH. ST. INT'L L. REV. 63, 63–65 (2013) (highlighting how citizens have used social media platforms to organize protests).

## I. BACKGROUND ON FIRST AMENDMENT RETALIATION CLAIMS

The First Amendment of the Constitution guarantees that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the government for a redress of grievances.”<sup>25</sup> To provide this protection, the Supreme Court has recognized that the First Amendment prohibits government officials from retaliating against individuals for exercising their protected speech and that the right to be free from retaliation is clearly established.<sup>26</sup> If the police take such retaliatory action, a plaintiff can file a First Amendment retaliation claim, a type of constitutional tort, under either § 1983 of the Civil Rights Act or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>27</sup> Qualified immunity protects government officials from liability in constitutional tort cases, such as a First Amendment retaliation case.<sup>28</sup> In reply, a plaintiff can only defeat the government official’s qualified immunity defense by alleging: “[First,] a federal constitutional violation, and [second,] the constitutional right in question was clearly established at the time of the alleged violation.”<sup>29</sup>

### A. Elements of a First Amendment Retaliation Claim

In order to establish a First Amendment retaliation claim, the plaintiffs must establish three elements: (1) speech (“they were engaged in constitutionally protected activity,”), (2) injury (“the defendants’ action caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity”), and (3) causation (“the defendants’ adverse actions were substantially motivated by plaintiffs’ exercise of constitutionally protected

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25. U.S. CONST. amend. I.

26. See *Hartman*, 547 U.S. at 250 (“[T]he First Amendment prohibits governmental officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (“[T]he general rule has long been clearly established . . . [that] the First Amendment bars retaliation for protected speech . . .”). Under the doctrine of qualified immunity, government officials “performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate ‘clearly established’ statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982). The protection applies regardless of whether the government official’s error is a mistake of law, fact, or both. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Butz v. Economou*, 438 U.S. 478, 507 (1978)).

27. 403 U.S. 388 (1971). For an explanation of *Bivens* actions and their applicability to First Amendment claims, see *supra* note 18.

28. See *Derrick*, *supra* note 22, at 246.

29. *Id.* at 246.



conduct”).<sup>30</sup> In response, the defendant may rebut the claim by showing “by a preponderance of the evidence that [the defendant] would have reached the same decision” without the protected activity.<sup>31</sup>

### 1. The Plaintiff Engaged in Protected Speech

Generally, the element of protected speech in a retaliation claim is “usually met” and “rarely decides” retaliatory arrest cases.<sup>32</sup> In a retaliation claim, the plaintiff has engaged in speech such as verbal criticism or challenge of a police officer that he alleges provoked a retaliatory action. Verbal criticism or challenge does not fall under one of the exceptions to the First Amendment protection which include true threats, child pornography, invasion of privacy under tort law, copyright infringement, obscenity, defamation (libel or slander), fighting words, incitement to imminent lawless conduct, harassment, and other recognized civil or criminal violations.<sup>33</sup> Not only does verbal criticism or challenge not fall under an exception to protected speech under the First Amendment, the Supreme Court has affirmatively established that “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”<sup>34</sup> For example, in *City of Houston v. Hill*,<sup>35</sup> the Court found that a city ordinance stating that an individual cannot “in any manner oppose . . . or interrupt any policeman in the execution of his duty” is unconstitutionally overbroad and therefore facially invalid under the First Amendment.<sup>36</sup> The Court found that the ordinance “criminalizes a substantial amount of . . . constitutionally protected speech” and thus provides the police with “unconstitutional enforcement

30. Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002). Though some other circuits articulate the three elements differently, the Fifth Circuit’s articulation is the closest to the generally accepted standard. See John Koerner, Note, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 760 n.35 (2009).

31. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

32. Koerner, *supra* note 30, at 760, 761.

33. STUART BIEGEL, EDUCATION AND THE LAW 97–98 (3d ed. 2012). See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (true threats); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (privacy); *Zacchini v. Scripps-Howard Broad. Corp.*, 433 U.S. 562 (1977) (intellectual property); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Schenck v. United States*, 249 U.S. 47 (1919) (incitement).

34. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (finding that a city ordinance that was “not limited to fighting words nor to obscene or opprobrious language, but prohibits speech that ‘in any matter . . . interrupt[s]’ an officer” was unconstitutionally overbroad (alteration in original) (quoting HOUS., TEX. ORDINANCES § 34-11(a)(1984)).

35. 482 U.S. 451 (1987).

36. *Id.* at 461–62 (quoting HOUS., TEX. ORDINANCES § 34-11(a)).

discretion.”<sup>37</sup> Since verbal criticism or challenge of an officer has been found to be constitutionally protected speech, the defendant will rarely rely on trying to establish that the speech itself was not protected under the First Amendment. Rather, the defendant will more likely look to weaken other elements of a plaintiff’s retaliatory action suit.

Despite the rarity of a challenge to the protected speech element, a defendant could claim in certain circumstances that the plaintiff’s speech in a retaliatory action claim is not protected. The two ways that the defendant may challenge the protected speech element are: contending that the plaintiff’s speech falls under the fighting words exception, or in situations in which the plaintiff’s speech consists of recording the officer, the defendant can try to establish that the act of recording is unprotected speech in that particular jurisdiction.

First, the defendant can try to argue that the plaintiff’s speech is not protected under the First Amendment because it consists of fighting words. Courts have defined “fighting words” as words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace” such as “epithets.”<sup>38</sup> In *Gooding v. Wilson*,<sup>39</sup> “[t]he Supreme Court . . . has reduced the scope of fighting words to include only words which . . . incite an immediate breach of peace” and are “directed at the person of the hearer.”<sup>40</sup> In a retaliatory action claim, a defendant could argue that certain verbal confrontation or challenge “naturally tend[s] to provoke violent resentment” and is directed at the police officer to show that the speech is not protected under the First Amendment.<sup>41</sup>

To illustrate, if the police were making an arrest of an individual in a group of armed protestors, and that individual had shouted to the other protestors to attack the officers, then this might qualify as fighting words. In Kenny’s case, however, she was not armed and merely called out against the officer’s behavior and called out to her classmates to record the violent scene and post it on Snapchat.<sup>42</sup> A court would likely not find that her calling out naturally

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37. *Id.* at 466.

38. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 309–310 (1940)).

39. 405 U.S. 518 (1972).

40. *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1170 (E.D. Wis. 1991) (quoting *Gooding*, 405 U.S. at 524); BIEGEL, *supra* note 33, at 99; *see also Gooding*, 405 U.S. at 528 (finding that a statute that prohibited speech “where there was no likelihood that the person addressed would make an immediate violent response” goes beyond the fighting words doctrine).

41. *UWM Post*, 774 F. Supp. at 1170 (quoting *Gooding*, 405 U.S. at 524).

42. Ripley, *supra* note 6 (describing how “in an unnaturally high voice, Kenny blurted: ‘Ain’t nobody gonna put this shit on Snapchat?’”); *see also* Clif LeBlanc, *No Charges for 2 Girls, Officer in Viral Spring Valley Video Incident*, STATE (Sept. 2, 2016, 4:30 PM),

provoked violent resentment. Moreover, although some of her speech was directed at the officer, the speech involved a matter of public concern (police misconduct), making the First Amendment interests at issue even stronger.<sup>43</sup> Thus, Kenny's speech and the speech of others in similar situations would probably not qualify for the fighting words exception. In addition, there have been no convictions under this exception upheld by the Court since *Chaplinsky*,<sup>44</sup> suggesting the limited extent to which this exception could apply.

Depending on the jurisdiction, a defendant may challenge the protected speech element by arguing that the plaintiff's recording of the officer's action is not protected under the First Amendment. Since the Supreme Court has not yet expressly determined whether the right to record exists under the First Amendment, courts have varied in recognizing the right to record the police.<sup>45</sup> Some lower federal courts have protected the right of an individual to record all state officials, including the police. For example, the First Circuit in *Glik v. Cunniffe*<sup>46</sup> found that the First Amendment protects the "filming of government officials in public spaces,"<sup>47</sup> which falls in line with several other circuit and district court decisions.<sup>48</sup> The Eleventh Circuit in *Smith v. City of Cumming*<sup>49</sup> and the Ninth Circuit in *Fordyce v. City of Seattle*<sup>50</sup> framed the right more broadly as "the right to gather information about what public officials do on

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<http://www.thestate.com/news/local/article99603512.html> [<https://perma.cc/UC7D-2KGV>]. (presenting a video recording of incident).

43. See generally *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (finding that based on the content, form, and context of certain speech, it did not qualify for the fighting words or any other exception to the First Amendment where the speech involved matters of public concern and therefore merited special protection by the First Amendment). The Supreme Court has described speech that merits this special protection as speech on any "matter of political, social, or other concern to the community" or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 453.

44. BIEGEL, *supra* note 33, at 99.

45. Eugene Volokh, *Court: No First Amendment Right to Videorecord Police Unless You Are Challenging the Police at the Time*, WASH. POST: VOLOKH CONSPIRACY (Feb. 23, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/23/no-first-amendment-right-to-videorecord-police-unless-you-are-challenging-the-police-at-the-time> [<https://perma.cc/92EQ-Z5QV>].

46. 655 F.3d 78 (1st Cir. 2011).

47. *Id.* at 83.

48. *Id.* (citing examples including *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Demarest v. Athol/Orange Community Television, Inc.*, 188 F. Supp. 2d 82, 94–95 (D. Mass. 2002); and *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972)).

49. 212 F.3d 1332.

50. 55 F.3d 436.

public property, and specifically, a right to record matters of public interest.”<sup>51</sup> All other Circuits, however, have “avoided the merits and held that the right was not ‘clearly established.’”<sup>52</sup>

The courts’ protection of the right to record under the First Amendment precludes the officer’s use of qualified immunity to dismiss a § 1983 claim. In *Connell v. Town of Hudson*,<sup>53</sup> the district court denied qualified immunity to a police chief who stopped a freelance photographer from taking pictures of a car accident because this recording was protected under the First Amendment.<sup>54</sup> Likewise, the First Circuit in *Iacobucci v. Boulter*<sup>55</sup> determined that the police did not have the authority to arrest a journalist for filming a town meeting and public officers talking in the hallway following the meeting.<sup>56</sup> The First Circuit held that a reasonable officer would not find that the “peaceful”<sup>57</sup> activities of the journalist amounted to engaging in disorderly conduct or disturbing a public assembly.<sup>58</sup> The criminal charge was dismissed, and the court never reached the § 1983 claim for the unlawful arrest.<sup>59</sup> While some prohibitions on recording may be constitutional, arresting an individual for the simple act of recording the police is unconstitutional.

Unlike the First, Ninth, and Eleventh Circuits, a federal trial court recently limited the right to video record the police to certain circumstances.<sup>60</sup> In February 2016, the district court in *Fields v. City of Philadelphia*<sup>61</sup> found that there is no “clearly established constitutional right to videotape the officers without threat of arrest.”<sup>62</sup> The court “decline[d] to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions.”<sup>63</sup> In this case, the two

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51. *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439 (determining that plaintiff was exercising “his First Amendment right to film matters of public interest” which precluded summary judgment on the plaintiff’s § 1983 claim against officer).

52. *Derrick supra* note 22, at 283; see e.g. *Mesa v. City of New York*, 2013 WL 31002, (S.D.N.Y. 2013) (“[N]o Second Circuit case has directly addressed the constitutionality of the recording of officers engaged in official conduct.”).

53. 733 F. Supp. 465 (D.N.H. 1990).

54. *Id.* at 471–72.

55. 193 F.3d 14 (1st Cir. 1999).

56. *Id.* at 25.

57. *Id.*

58. *Id.*

59. *Id.* at 18.

60. *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528 (E.D. Pa. 2016).

61. *Id.*

62. *Id.* at 536 (quoting *True Blue Auctions v. Foster*, 528 Fed. App’x 190, 192 (3d Cir. 2013)).

63. *Id.* at 542. For more on the idea of expressive conduct, see *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”); see also *id.* (“In

plaintiffs' acts of recording were not protected under the First Amendment because while the plaintiffs took pictures of about twenty police officers standing outside a house party,<sup>64</sup> the plaintiffs did not "assert[] anything to anyone. There is also no evidence any of the officers *understood* them as communicating any idea or message."<sup>65</sup> The plaintiffs "never told the police why they were capturing images of the police interacting with people they did not know."<sup>66</sup> The court emphasized that the motives of the plaintiffs' recordings were merely to watch the police officers "in action"<sup>67</sup> and to "capture the images because, at least for one of the citizens, [i]t was an interesting scene."<sup>68</sup> In other words, the court found that the plaintiffs did not record with the purpose to criticize or challenge the police conduct,<sup>69</sup> barring protection under the First Amendment right to record.

Critics of the *Fields* decision argue that the First Amendment protects the right to gather information, even silently, for possible publication "as much as it protects loud gathering of information."<sup>70</sup> Eugene Volokh analogizes this stance to how the First Amendment protects not only the expression of views but also the action of spending money to express those views, even though that action is taken silently without "challenge or criticism."<sup>71</sup> Similarly, the First Amendment protects the right to "associate with others for expressive purposes, for instance by signing a membership form or paying . . . membership dues . . . even . . . [without] challenging or criticizing anyone while associating."<sup>72</sup> Thus, whether or not the right to record the police is protected should not depend on whether that act itself challenges or criticizes the police.

While some federal appellate courts have recognized the right to record under the First Amendment, the lack of consensus among courts opens the way for defendants to argue that their specific situation does not fall under that jurisdiction's definition of protected speech. The Fourth Circuit has neither expressly established nor rejected the right to record the police, so courts in

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deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (alterations in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974))).

64. *Fields*, 166 F. Supp. 3d at 531–32.

65. *Id.* at 535.

66. *Id.* at 531.

67. *Id.*

68. *Id.* (alterations in original) (quoting a statement made by one of the plaintiffs).

69. *Id.* at 537.

70. Volokh, *supra* note 45.

71. *Id.*

72. *Id.*

this jurisdiction would be left to determine whether Kenny's recording of the officer's interaction with her classmate is protected speech.<sup>73</sup> Until circuits come to a consensus or a Supreme Court decision is made on the issue, courts will continue to deal with the right to record on a case-by-case basis.

Overall, in regards to the first element of a plaintiff's retaliatory action claim, the defendant can argue that the plaintiff's speech is not protected either through a defined exception like fighting words or that the right to record does not exist in that jurisdiction.

## 2. The Plaintiff Suffered an Injury

The adverse action in a retaliatory arrest case is the conduct that instigates the plaintiff's arrest. Like the first element of protected speech, establishing injury in an arrest is rarely a deciding factor in a retaliatory arrest case. In a retaliatory action, the plaintiff must show a second element: "the defendant's actions caused [the plaintiff] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity."<sup>74</sup> Cases have established: "An arrest is certainly an injury that would chill a person of ordinary firmness from continuing to engage in protected speech."<sup>75</sup> Rather, the main issue in First Amendment retaliatory arrest cases, and this Comment, is the third element: the causal link between the adverse action and the protected speech.

## 3. The Defendant Took the Adverse Action Because the Plaintiff Exercised Free Speech

Rather than the first or second element, the success of most retaliatory arrest claims relies on whether the plaintiff can establish the third element: causation. A plaintiff must show that the officer's retaliatory motive caused the arrest to establish a *prima facie* case for retaliatory arrest. Even if the plaintiff

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73. See Clay Clavert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 150 (2015) (finding no more than an unpublished Fourth Circuit opinion rejecting that the right to record the police was "clearly established" at the time of the conduct).

74. Anjoli Terhune, Note, *Redressing the Balance: An Examination of the Scope First Amendment Protections, Prosecutorial Discretion and Probable Cause in the Wake of Hartman v. Moore*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 684, 685–86 (2007) (citing *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002)).

75. Koerner, *supra* note 30, at 761 (citing *Hansen v. Williamson*, 440 F. Supp. 2d 663, 677–78 (E.D. Mich. 2006)); see, e.g., *Hansen*, 440 F. Supp. 2d at 677 ("An arrest would likely dissuade 'a person of ordinary firmness' from continuing to engage in protected conduct." (quoting *Bolan v. City of Keego Harbor*, 2002 WL 31545997, at \*4 (E.D. Mich. 2002))).

establishes retaliatory motive, the defendant can still overcome the prima facie case by showing that the defendant would have arrested the plaintiff in the absence of the protected speech.<sup>76</sup>

The standard a plaintiff must satisfy has evolved over time and also varies across circuits. The first major test to determine whether a plaintiff has shown that the retaliatory motive was the cause of the arrest was established in *Mt. Healthy City School District Board of Education v. Doyle*.<sup>77</sup> In *Mt. Healthy*, an untenured teacher who was fired, alleged that his former employer refused to rehire him partly because the teacher had released to a radio station the news of the adoption of a new dress code.<sup>78</sup> The teacher claimed that the refusal to rehire him for exercising his right to speak to the radio station about the new dress code violated his First and Fourteenth Amendment rights.<sup>79</sup> In deciding this case, the Supreme Court articulated that a plaintiff bringing a retaliation claim must show that “his conduct was constitutionally protected and that this conduct was a ‘substantial factor’ or . . . ‘motivating factor’” in the defendant’s adverse action.<sup>80</sup> Under this test, a plaintiff need not show that the retaliatory motive was the most important factor or even the only factor, but that the retaliatory motive was merely a driving factor. In other words, in order to make a retaliation claim, the plaintiff was not required to show that the retaliatory intent was a but-for cause of the defendant’s action.<sup>81</sup>

The Supreme Court found that the lower court should have also determined whether the defendant had “shown by a preponderance of the evidence that it would have reached the same decision [not to rehire the untenured teacher] even in the absence of the protected conduct.”<sup>82</sup> *Mt. Healthy* emphasized that the standard is not merely that the board could have reached the same decision, but that it in fact would have reached the same decision without the protected conduct.<sup>83</sup> Since the defendant in *Mt. Healthy* was untenured, whether or not the board could have decided against rehiring him would be meaningless because “he could have been discharged for no reason whatever.”<sup>84</sup> Rather than

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76. Koerner, *supra* note 30, at 761–62.

77. 429 U.S. 274 (1977).

78. *Id.* at 282–83.

79. *Id.* at 276, 282.

80. *Id.* at 287 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977)). The adverse action in *Mt. Healthy* was the Board of Education’s decision not to rehire the plaintiff. *Id.*

81. Koerner, *supra* note 30, at 763.

82. *Mt. Healthy*, 429 U.S. at 287.

83. *Id.* at 285 (holding that the defendant failed to establish that it would have refused to rehire the plaintiff even if he had not spoken to the radio about the dress code).

84. *Id.* at 283.

focus on whether the adverse action was justified, courts must review whether the action would have occurred in the first place, even without the constitutionally protected speech.

The burden-shifting standard articulated in *Mt. Healthy* became the standard to determine retaliatory purpose in constitutional cases.<sup>85</sup> Courts have since adapted the *Mt. Healthy* rule of causation in various retaliatory contexts.<sup>86</sup> To illustrate, in order to establish a retaliatory arrest claim in the First Amendment context, the Second, Fifth, Eighth, and Eleventh Circuits require a plaintiff to show that the arresting officer lacked probable cause.<sup>87</sup> Other circuits have yet to determine whether a plaintiff must show there was no probable cause in order to establish a retaliatory arrest claim. The Supreme Court has yet to rule on whether the *Mt. Healthy* standard or a blanket no probable cause rule governs First Amendment retaliatory arrest claims.

## B. Evolution of the Probable Cause Rule in Retaliatory Case Law

Motive is difficult to identify for any conduct, especially when defendants are incentivized to hide their motive to avoid liability. The success of a plaintiff's retaliation claim relies on whether she is able to show that a retaliatory motive caused harm to the plaintiff, whether in the form of an arrest, prosecution, or some other adverse action. Overall, the Supreme Court has given little guidance on the pleading standard for all retaliation claims. The Supreme Court's recent decision in *Hartman v. Moore*,<sup>88</sup> however, drew clearer lines for retaliatory prosecution claims by holding plaintiffs must establish the absence of probable cause. The following section tracks the development of the no probable cause rule.

### 1. Pre-*Hartman* Circuit Splits on the Probable Cause Rule for Retaliatory Actions

Prior to *Hartman v. Moore*, the Supreme Court had determined whether lower courts should require plaintiffs to show the absence of probable cause for either retaliatory prosecution or retaliatory arrest claims. Without Supreme

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85. Koerner, *supra* note 30, at 763–64.

86. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 261 (2006) (requiring plaintiffs to show that there was no probable cause for retaliatory prosecutions); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362–63 (1995) (permitting the defendant to be relieved of liability in part had they been aware of the plaintiff's wrongdoing prior to the claim submission).

87. Koerner, *supra* note 30, at 773.

88. 547 U.S. 250 (2006).



Court guidance, the circuit courts split on the question.<sup>89</sup> The Second, Fifth, and Eleventh Circuits held that to succeed on a retaliatory prosecution claim, a plaintiff must prove that there was no probable cause to support the criminal prosecution.<sup>90</sup> These circuits found that “the objectives of law enforcement take primacy over the citizen’s right to avoid retaliation.”<sup>91</sup> On the other hand, the Tenth Circuit and D.C. Circuit did not subject the plaintiff to the no probable cause rule.<sup>92</sup>

Like the uncertainty of requirements for a retaliatory prosecution claim, the circuits had also disagreed as to whether probable cause should preclude a plaintiff’s retaliatory arrest claim.<sup>93</sup> For instance, the Second and Eleventh Circuits held that a court could not find a police officer liable for unconstitutional retaliation if the arrest was supported by probable cause.<sup>94</sup> In these circuits, the plaintiff has the burden of proof to show the arresting officer lacked probable cause.<sup>95</sup> If the underlying criminal charges were supported by probable cause, the government agents would be entitled to qualified immunity. In contrast, the Sixth Circuit reasoned that probable cause was probative in a retaliatory arrest claim, but did not completely bar a plaintiff’s constitutional claim.<sup>96</sup>

## 2. *Hartman v. Moore* Establishes a Higher Pleading Standard for Retaliatory Prosecutions

In 2006, the Supreme Court in *Hartman v. Moore* resolved the circuit split over whether probable cause barred a plaintiff’s retaliatory prosecution claim against a defendant who allegedly violated his First Amendment rights.<sup>97</sup> The Court established that a plaintiff must prove the absence of probable cause in a retaliatory prosecution claim.

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89. See Joseph M. Kelleher, Comment, *Retaliatory Prosecution Claims Under Hartman v. Moore: Law Enforcement’s End-Run Around the First Amendment*, 18 TEMPLE POL. & C.R. L. REV. 315, 317 (2008).

90. *Id.*

91. Keenan v. Tejada, 290 F.3d 252, 261–62 (5th Cir. 2002).

92. See, e.g., Poole v. County of Otero, 271 F.3d 955, 961 (10th Cir. 2001), *abrogated by Hartman*, 547 U.S. 250; Haynesworth v. Miller, 820 F.2d 1245, 1256–57 (D.C. Cir. 1987), *abrogated by Hartman*, 547 U.S. 250.

93. Colin P. Watson, Note, *Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After Hartman*, 107 MICH. L. REV. 111, 114–15 (2008).

94. See, e.g., Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002); Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001).

95. See *Hartman v. Moore*, 547 U.S. 250, 255–56 (2005) (describing the circuit split).

96. Greene v. Barber, 310 F.3d 889, 895–97 (6th Cir. 2002).

97. *Hartman*, 547 U.S. at 250.

In *Hartman*, the plaintiff claimed that the government had prosecuted him and his company in retaliation against plaintiff's protected speech—a campaign for certain technology to be used by the U.S. Postal Service.<sup>98</sup> Despite limited evidence, the Assistant United States Attorney brought criminal charges against Moore and his company.<sup>99</sup> A grand jury indicted Moore, the company, and the company's vice president.<sup>100</sup>

In response, Moore raised several civil actions under *Bivens* against the prosecutor and five postal inspectors, including a retaliatory prosecution claim that alleged the inspectors “engineered his criminal prosecution in retaliation for criticism of the Postal Service” in violation of his First Amendment rights.<sup>101</sup> At the district court level, “the inspectors moved for summary judgment, claiming that because the underlying criminal charges were supported by probable cause they were entitled to qualified immunity.”<sup>102</sup> At the time, the courts of appeals were split as to whether the plaintiff should have the burden of showing evidence of the lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory prosecution suits.<sup>103</sup> The Supreme Court ruled in favor of the state, establishing the no probable cause requirement for retaliatory prosecution claims.<sup>104</sup> The plaintiff did not succeed on his retaliatory prosecution claim against the government because he failed to establish that there was no probable cause. The *Hartman*

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98. Plaintiff William G. Moore, Jr., the chief executive officer of a manufacturer of multiline optical readers, launched a campaign to persuade the U.S. Postal Service to replace single-line optical readers with multiline optical readers to sort mail. *Hartman*, 547 U.S. at 252–53. In the process, Moore criticized single-line scanners by lobbying members of Congress and hiring a public relations firm in defiance of “alleged requests by the Postmaster General to be quiet.” *Id.* at 253. Though the government eventually embraced the multiline readers, it decided not to contract with Moore's firm. *Id.* Further, the Postal Service pursued two investigations of Moore and his firm. *Id.* It alleged: (1) that the public relations firm Moore hired had paid kickbacks to one of the Postal Service's governors for the recommendation of the firm's services, and (2) that Moore's company had improperly participated in the hiring of a new Postmaster General. *Id.* The Supreme Court dismissed the claim against the prosecutor because of prosecutorial immunity, but the Court of Appeals brought the retaliatory-prosecution claim back against the U.S. Postal Service inspectors instead. *Id.*

99. *Id.* at 253–54 (describing “very limited evidence linking Moore and REI to any wrongdoing”). The district court had found “a complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme.” *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (D.D.C. 1989). Specifically, the court found: “All of the unindicted coconspirators who testified expressly stated that they never told Moore . . . about the payments from [the public relations firm] to [the member of the USPS].” *Id.*

100. *Hartman*, 547 U.S. at 254.

101. *Id.*

102. *Id.* at 255.

103. *Id.* See *supra* Part I.B.1 for a discussion of the circuit split on whether a plaintiff must show the absence of probable cause in retaliatory prosecution claims at the time the Supreme Court decided *Hartman*.

104. *Id.* at 265–66.

Court resolved the circuit split on the basis of three main factors: (1) complex causation, (2) evidentiary concerns, and (3) the presumption of prosecutorial regularity.<sup>105</sup>

### 3. Post-*Hartman* Circuit Split: Does *Hartman* Extend Beyond Claims of Retaliatory Prosecutions to Claims of Retaliatory Arrests?

The *Hartman* Court carefully limited the scope of its holding to retaliatory prosecution claims, leaving the question of what rules apply to retaliatory arrest claims open. Instead of clearly defining a rule for situations beyond retaliatory prosecutions, *Hartman* has since left lower courts to interpret whether or not to extend the heightened pleading standard to retaliatory arrests, resulting in a continued circuit split.<sup>106</sup> For example, the Second, Fifth, Eighth, and Eleventh Circuits have applied *Hartman*'s heightened pleading standard to all retaliatory tort cases.<sup>107</sup> In contrast, the Tenth Circuit has not extended *Hartman*'s rule to retaliatory arrest claims.<sup>108</sup>

In *Howards v. McLaughlin*,<sup>109</sup> the Tenth Circuit found that Secret Service agents who arrested a plaintiff who made comments about the Vice President were not immune to the plaintiff's retaliatory arrest suit for violation of the plaintiff's First Amendment rights.<sup>110</sup> The Supreme Court granted the Secret Service agents' Petition for Writ of Certiorari in 2011.<sup>111</sup> But the Court avoided the issue as to whether probable cause barred a civil suit against the government for retaliatory arrest.<sup>112</sup> The Court only held that the officers who arrested the plaintiff were entitled to qualified immunity because no established right to be

105. Koerner, *supra* note 30, at 771. For a discussion of each of the Court's three bases for ruling in favor of the heightened pleading standard for retaliatory prosecutions and an evaluation of whether the three reasons justify extending the heightened pleading standard to retaliatory arrest claims, see *infra* Part II.

106. Koerner, *supra* note 30, at 775 ("[T]he Supreme Court's signal has evoked mixed interpretations among lower courts faced with retaliatory arrest cases. Retaliatory arrest case law is a mess, with some courts siding entirely with *Hartman*, others rejecting *Hartman* outright, and still others having yet to take a position.").

107. Randolph A. Robinson II, Comment, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 DENV. U. L. REV. 499, 505 (2012).

108. *Howards v. McLaughlin*, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd sub nom.* *Reichle v. Howards*, 132 S. Ct. 2088 (2012).

109. *Id.*

110. *Id.* at 1149.

111. Robinson, *supra* note 107, at 517.

112. *Reichle*, 132 S. Ct. at 2090 (holding that "Petitioners are entitled to qualified immunity because, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation" without indicating whether probable cause precludes a First Amendment violation claim).

free from a retaliatory arrest existed at the time of arrest, leaving little guidance on the no probable cause rule for subsequent cases.<sup>113</sup>

The Ninth Circuit did not have any precedent on this issue before *Hartman*, but has since followed the Tenth Circuit and concluded that “a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation.”<sup>114</sup> To complicate the circuit split after *Hartman*, however, the Sixth Circuit’s position on the causation issue remains unclear.<sup>115</sup> While the Sixth Circuit did not require the plaintiff to plead the absence of probable cause before *Hartman*, it later reversed itself by applying the no probable cause rule to all retaliation claims.<sup>116</sup> Then in 2007 and 2011, the Sixth Circuit seemed to move away from the *Hartman* standard again.<sup>117</sup>

Without a Supreme Court ruling on the no probable cause rule for retaliatory arrests, lower courts are left to decide when to apply this strict standard allowing probable cause to bar a plaintiff’s retaliatory arrest claim. In this way, plaintiffs are at risk of not having a mechanism to seek redress if these officers are arresting them in violation of their individual rights.<sup>118</sup>

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113. *Id.*

114. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006).

115. *Compare Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) (applying the *Hartman* rule to a retaliatory arrest claim), *with Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007) (denying immunity to defendant if “no reasonably competent peace officer would have found probable cause”), *and Kennedy v. City of Villa Hills*, 635 F.3d 210, 219 (6th Cir. 2011) (finding at summary judgment that the “evidence suffices to show that the content of [the plaintiff’s] speech may have been a motivating factor for [the officer] to arrest” the plaintiff, subsequently denying qualified immunity to the officer).

116. *Barnes*, 449 F.3d at 720 (“Regardless of the reasoning, it is clear that the *Hartman* rule modifies our holdings in [previous cases] . . . and applies in this case. . . . [T]he defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case. Barnes’s First Amendment retaliation claim accordingly fails as a matter of law, and we reverse the district court’s denial of qualified immunity to the officers on this issue.”).

117. *See Leonard*, 477 F.3d at 355 (“*Hartman* . . . calls into question our cases holding that ‘probable cause is not determinative of the [First Amendment] constitutional question.’ Yet, we need not decide whether *Hartman* adds another element to every First Amendment claim brought pursuant to § 1983 because, when viewed in the light most favorable to the plaintiff, we find that the facts of this case demonstrate an absence of probable cause.” (alteration in original) (citation omitted) (quoting *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002)); *see also Kennedy*, 635 F.3d at 218 n.4 (“The straightforward connection between [the] alleged animus and the arrest that he effectuated suggests that [the plaintiff] may not need to demonstrate a lack of probable cause to succeed on his claim of wrongful arrest.”).

118. *See Robinson*, *supra* note 107, at 521.

## II. *HARTMAN*'S THREE BASES FOR APPLYING THE NO PROBABLE CAUSE RULE TO RETALIATORY PROSECUTIONS DO NOT EXTEND TO RETALIATORY ARRESTS

In the following section, I outline the *Hartman* Court's three bases for ruling in favor of the heightened pleading standard for retaliatory prosecutions and argue none of the three reasons justify extending the heightened pleading standard to retaliatory arrest claims.

### A. The Complex Causation Basis for the Heightened Pleading Standard Does Not Exist in Retaliatory Arrest Claims

In retaliatory prosecution cases like *Hartman v. Moore*,<sup>119</sup> the prosecutor is immune from suit.<sup>120</sup> Thus, "plaintiffs must sue other retaliating officials for inducing the prosecutor to bring suit," thereby creating a complex causation chain.<sup>121</sup> According to the Court, multiple-party causation in a prosecutorial retaliation claim helps to justify a higher pleading standard because there is a need to "prove a chain of causation from animus to injury."<sup>122</sup> In a retaliatory prosecution claim, the causal link is not "merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another."<sup>123</sup> Thus, some bridge must fill in the gap between the "nonprosecuting government agent's motive and the prosecutor's action."<sup>124</sup> In turn, the *Hartman* Court determined that the absence of probable cause would be that connection.<sup>125</sup>

In contrast, complex causation does not exist in the retaliatory arrest context, though there are exceptions.<sup>126</sup> With retaliatory arrests, there are

119. 547 U.S. 250 (2005).

120. See *id.* ("[C]laims against the prosecutor were dismissed in accordance with the absolute immunity for prosecutorial judgment."); *Imbler v. Pachtman*, 424 U.S. 409, 409 (1976) (holding that a state prosecuting attorney "who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to a suit under 42 U.S.C. § 1983 for alleged deprivations of the accused's constitutional rights"); Koerner, *supra* note 30, at 770 n.110.

121. Koerner, *supra* note 30, at 771.

122. *Hartman*, 547 U.S. at 259 (calling the "chain of causation" the "strongest justification for the no-probable-cause requirement").

123. *Id.* at 262.

124. *Id.* at 263.

125. *Id.*

126. See Koerner, *supra* note 30, at 779 (describing exceptional situations where a public officer "pressure[s] or conspire[s] with police officers to arrest the plaintiff in retaliation for protected speech" or where "the defendant officers seek a warrant from a magistrate or an indictment from a grand jury before making the arrest").

generally only two actors present: the arresting officer and individual arrestee.<sup>127</sup> While the prosecutor is protected by absolute immunity in the role of prosecutorial judgment,<sup>128</sup> arresting officers do not benefit from the same protection. Thus, there is no causal gap; the retaliatory arrest is caused by the arresting officer's own retaliatory motive. Following *Hartman*'s first reasoning, because no multiple-party causation problem exists, retaliatory arrests do not merit a heightened pleading standard.

#### B. The Presumption of Prosecutorial Regularity in Retaliatory Prosecution Claims Does Not Apply to Retaliatory Arrest Claims

The Supreme Court in *Hartman* imposed a heightened pleading standard on retaliatory prosecution claims because of the strong "presumption of prosecutorial regularity"<sup>129</sup> that "has long existed in our common law jurisprudence."<sup>130</sup> The Court reasoned: "[T]his presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard. . . ."<sup>131</sup> The plaintiff can only overcome this presumption upon showing the prosecutor would "not have brought the case in the absence of the retaliating official's influence."<sup>132</sup> The Court found that a plaintiff's showing of no probable cause would be sufficient to overcome the strong presumption of prosecutorial regularity.<sup>133</sup>

The Supreme Court in *Hartman* confined its argument for a heightened pleading standard by distinguishing retaliatory prosecution claims from any other type of claim. The Court recognized "that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases" which necessitated "a requirement that no

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127. In other words, in a retaliatory arrest, there is no separate prosecuting authority apart from the arresting officer himself.

128. *Hartman*, 547 U.S. at 250 ("[C]laims against the prosecutor were dismissed in accordance with the absolute immunity for prosecutorial judgment" but the court of appeals had "reinstated the retaliatory-prosecution claim against the [Postal Service] inspectors").

129. Robinson, *supra* note 107, at 504–05.

130. *Id.* at 505.

131. *Hartman*, 547 U.S. at 263.

132. Koerner, *supra* note 30, at 772.

133. *Hartman*, 547 U.S. at 263 ("Some sort of allegation . . . is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity. . . . The connection, to be alleged and shown, is the absence of probable cause."); *id.* at 265 ("But a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspect the presumption of regularity behind the charging decision."); Robinson, *supra* note 107, at 505.

probable cause be alleged and proven.”<sup>134</sup> The Court reasoned: “[T]he complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort,” namely that “showing an absence of probable cause . . . must be pleaded and proven.”<sup>135</sup> In the case of retaliatory arrest claims, the plaintiff does not have to overcome the presumption of prosecutorial regularity because retaliatory arrests lack multiple party causation.<sup>136</sup> The narrow scope of the Court’s reasoning in *Hartman* suggests that the Court did not intend to extend the heightened pleading standard to other types of retaliation claims. Therefore, the justification based on the strong presumption of prosecutorial regularity does not extend to retaliatory arrest claims. As a result, many lower courts have refused to extend the no probable cause rule to retaliatory arrest claims.<sup>137</sup>

On the other hand, some courts have interpreted *Hartman* broadly to include retaliatory actions beyond prosecutions.<sup>138</sup> For example, in *Williams v. City of Carl Junction*<sup>139</sup>, the Sixth Circuit applied the *Hartman* rule to alleged unlawful municipal citations.<sup>140</sup> The plaintiff in *Williams* claimed that the defendants violated his First Amendment rights because they issued him citations in retaliation for vocally opposing city policies and administration.<sup>141</sup> The court found that the absence of probable cause was probative enough to exhibit animus to justify making it a requirement even though a prosecutor, who was present in *Hartman*, was not involved in this case.<sup>142</sup> Here, the court explained that similar complications in causation exist as in *Hartman* because the plaintiff must show that the mayor “harbored retaliatory animus against him and induced” the police and city administrator to issue or induce another officer to issue the citations to the plaintiff.<sup>143</sup> While the absence of probable cause may be probative in cases like *Williams* where there are multiple actors as in *Hartman*, I argue that the reasoning found in *Williams* does not exist in retaliatory arrest cases involving two actors, the arresting officer and the arrestee who alleges the constitutional

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134. *Hartman*, 547 U.S. at 261.

135. *Id.* at 265, 266.

136. See *supra* Part II.A for discussion on complex causation.

137. See *supra* Part I.B.3 for a discussion on which lower courts have interpreted that *Hartman* did not extend beyond retaliatory prosecution claims to retaliatory arrests claims.

138. See Robinson, *supra* note 107, at 505 n.59 (listing examples of circuits that have interpreted *Hartman* broadly).

139. 480 F.3d 871 (8th Cir. 2007).

140. *Id.* at 876.

141. *Id.* at 873.

142. *Id.* at 876.

143. *Id.*

violation. Thus, the complex causation of *Hartman* does not support extending its holding to retaliatory arrests.

**C. The Availability and Probative Value of Evidence Basis Does Not Extend to Retaliatory Arrest Claims**

The Supreme Court in *Hartman* also articulated an evidentiary reasoning for the no probable cause rule in retaliatory prosecution cases.<sup>144</sup> The Court distinguished retaliatory prosecution cases from other retaliatory cases by the availability of a “distinct body of highly valuable circumstantial evidence [that is] apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge.”<sup>145</sup> The Court reasoned that although a showing of probable cause or the absence of probable cause is “not necessarily dispositive[,] . . . [A] retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor’s decision to go forward are . . . enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor’s decision to bring the charge.”<sup>146</sup>

In addition to the high probative value of the absence of probable cause, the Court reasoned that the no probable cause rule “will usually be cost free by any incremental reckoning.”<sup>147</sup> Since probable cause is likely to be raised by a party during the litigation, “treating it as important enough to be an element will be a way to address the issue of causation without adding time or expense.”<sup>148</sup> Furthermore, evidence of retaliatory motive beyond the absence of probable cause is “likely to be rare and consequently [a] poor guide[] in structuring a cause of action.”<sup>149</sup> In most situations, it would be extremely “unrealistic to expect a prosecutor to reveal his mind” and explicitly express that he sought the indictment of the plaintiff in retaliation for the plaintiff’s action.<sup>150</sup> In turn, the Court reasoned that shifting the burden to the plaintiff to show evidence of the absence of probable cause is sufficient and fair.<sup>151</sup>

The Court in *Hartman* stated that a retaliatory prosecution case “always [entails] a distinct body of highly valuable circumstantial evidence available and

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144. *Hartman v. Moore*, 547 U.S. 250, 260–61 (2005).

145. *Id.* at 261.

146. *Id.* at 265.

147. *Id.*

148. *Id.*

149. *Id.* at 264.

150. *Id.*

151. *Id.* at 260–61.



apt to prove or disprove retaliatory causation.”<sup>152</sup> Despite the probative value of the evidence of probable cause, the Court decided that this reason alone does not justify that a plaintiff in a § 1983 claim must plead and prove no probable cause.<sup>153</sup> Thus, in applying the no probable cause rule to retaliatory arrests, the availability of evidence of probable cause, which may be just as probative in a retaliatory prosecution case,<sup>154</sup> does not alone justify extending the rule in a retaliatory arrest case.

Overall, the *Hartman* Court carefully limited the scope of its holding to retaliatory prosecution claims, leaving the question of what rules apply to retaliatory arrest claims open.

### III. THE NO PROBABLE CAUSE RULE LIMITS THE FREEDOM OF SPEECH

I argue in this Comment that applying the no probable cause rule to retaliatory arrest claims places individuals at a fundamental disadvantage in two ways. First, the no probable cause rule subjects individuals to a higher risk of getting arrested for improper cause. Second, when this standard is compounded over time to result in more improper arrests, individuals themselves will be less likely to exercise their individual right to free speech because the mechanism of redress for alleged improper arrests has been eliminated. I focus on the officer’s disproportionate legal advantage created by qualified immunity, which hinders the very exercise of free speech. Because of this harmful effect, courts should not extend the no probable cause rule articulated in *Hartman* to retaliatory arrests.

#### A. The No Probable Cause Rule Creates a Higher Risk of Improper Arrests

Broadly, the problem in allowing probable cause to bar a plaintiff’s retaliatory arrest claim lies in the causation element of the retaliatory arrest claim. The no probable cause rule inherently presumes there can only be a single cause for an officer to arrest an individual. It precludes the possibility of multiple-factor causation.<sup>155</sup> For example, if a person is arrested for exercising her freedom of speech (such as for protesting against police brutality), but is concurrently

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152. *Id.*

153. *Id.* at 261.

154. See *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (“Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case.”).

155. Multiple-factor causation occurs when there are multiple reasons that contribute to a single action such as an arrest, which is different from multiple-party causation, which occurs when there are multiple people who contribute to a single action, as discussed *supra* in Part II.A.

committing a separate violation (such as jaywalking), the arresting officer is immune from civil liability, even if his true motivation for the arrest was to prevent the dissident from exercising his freedom of speech.<sup>156</sup> A police officer can thus mask a retaliatory motive for an arrest under the heightened pleading standard of the no probable cause rule. The no probable cause rule is too simplified to account for the possibility that a police officer was motivated solely, or at least in part, by animus. Instead, the no probable cause rule creates a de facto presumption for arresting officers analogous to the presumption of prosecutorial regularity described in *Hartman v. Moore*.<sup>157</sup>

To arrest an individual, an officer must have probable cause but the threshold to establish probable cause is not difficult to meet. First, the standard for probable cause requires that the “facts and circumstances within the police officer’s knowledge would lead a reasonable person to believe that the suspect has committed, is committing, or is about to commit a crime.”<sup>158</sup> This requires that the probable cause must be based on more than only a “hunch or suspicion.”<sup>159</sup> Second, an officer can constitutionally arrest an individual for any criminal offense, even if minor. In *Atwater v. City of Lago Vista*<sup>160</sup> the Supreme Court held: “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may . . . arrest the offender.”<sup>161</sup> The low threshold for probable cause and the wide range of offenses to which probable cause can attach opens the door for “[p]olice officers [to] enjoy significant discretion to refrain from arresting a suspect, even when they have probable cause to make the arrest.”<sup>162</sup> For example, police officers may choose not to arrest because of “limited resources,”<sup>163</sup> or “impracticality.”<sup>164</sup> Thus, an arrest—for minor offenses in particular—may depend not merely on whether the individual committed the violation in question, but also on whether the officer decides to arrest at all. This discretion leaves room for

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156. Robinson, *supra* note 107, at 512.

157. 547 U.S. 250 (2005); *see supra* Part II.B.

158. *See supra* note 11 and accompanying text.

159. *See supra* note 11 and accompanying text.

160. 532 U.S. 318 (2001).

161. *Id.* at 354 (holding that an officer made a constitutional arrest where he believed that the plaintiff was not wearing her seatbelt “without balancing costs and benefits or determining whether or not [the plaintiff’s] arrest was in some sense necessary”).

162. Koerner, *supra* note 30, at 785–86.

163. *Id.* at 786 (“In a world of limited resources, a police officer cannot arrest every suspect.”).

164. *Id.* (“And even when it is possible to make the arrest, an officer might refrain from taking the suspect into custody for several reasons: to honor a victim’s request for leniency, to secure information from an informant, or simply to let an offender go free where an arrest would be impractical.”).

potential motives beyond the identification of the arrestee's allegedly illegal conduct.

Extending the no probable cause rule to retaliatory arrest claims increases the risk of selective retaliatory arrests without recourse for the arrested individuals. One scholar describes a paradigmatic example of this problem to show how "multi-factor causation" can lead to selective arrests by a police officer.<sup>165</sup> He describes the example as involving a large group of protestors who violated a city ordinance by marching without a permit. In his example, while an officer has probable cause to arrest each of the members for violating the city ordinance, a police officer, perhaps because of practical concerns, may decide to only arrest the handful of protestors and selects those who are most vocal.<sup>166</sup> In turn, the example illustrates that the few individuals who are arrested are targeted for their leadership in the protest.<sup>167</sup> In a jurisdiction that recognizes the no probable cause rule for retaliatory arrest claims, none of the protestors would be able to succeed on a retaliatory arrest claim for the violation of their First Amendment right to free speech because the officer had probable cause to arrest (the violation of the city ordinance).<sup>168</sup> Those who were arrested, even if the officer had targeted them for their speech, could not succeed on a retaliatory arrest claim while the protestors who were not arrested would necessarily have no retaliatory arrest claim.

The police have discretion in deciding who to stop and who to arrest. This discretion creates a risk that the police will unfairly target individuals who may be exercising speech that the police officer finds objectionable, similar to the way that police have discretion to stop a car based on a message on a bumper sticker<sup>169</sup> or license plate. Requiring a showing of no probable cause is particularly threatening to the exercise of free speech in situations where individuals are arrested for committing common violations that would ordinarily go largely unchecked. For example, speeding is a common traffic violation and according

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165. Robinson, *supra* note 107, at 512 ("While probable cause is a legal requirement to arrest an individual, in many cases it is not the only factor motivating the arresting officer's decision, thereby creating a multiple-factor causation problem.").

166. *Id.*

167. *See id.* ("Identical probable cause existed for the arrests of all members of the protest, yet the police clearly targeted the four individuals who were the most vocal in their opposition to police brutality.").

168. *Id.* ("Under the *Hartman* heightened pleading standard, the arrested protestors would be barred from bringing a civil action against the police because they cannot plead a lack of probable cause.").

169. Cf. William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 564 (1984) ("[A] police officer's decision to stop a particular car for a license and registration 'spotcheck' because the officer disapproves of the political message of a sticker on the car's bumper surely offends the value that we attach to freedom of expression.").

to a study, “speeding violations are under-enforced.”<sup>170</sup> Although police officers have the legal authority to arrest every individual who is allegedly speeding, because not all violators are arrested, this indicates that police officers have and exercise discretion when deciding who to arrest.<sup>171</sup>

Another scholar recognized: “For minor offenses, releasing a suspect is not simply a legally permissible exercise of police discretion; it is a common practice.”<sup>172</sup> He cites “disorderly conduct or public intoxication” for examples of minor violations that provide grounds for arrest, one of many tools the officer has at his disposal to control a situation.<sup>173</sup> Police officers rarely invoke arrest solely because the offender has “technically violated the statute [because] an arrest is typically used only when other ‘means for controlling the troublesome aspects of some person’s presence are not available.’”<sup>174</sup> The studies suggest instead that “some factor has led the officer to conclude that the exceptional solution of an arrest was needed.”<sup>175</sup>

If the police officer pulled an individual over for driving just slightly above the speed limit—for example, only five miles over the speed limit, a technical violation that most people would expect the police officer would not generally enforce—it is more likely the officer had some improper motive, such as a desire to suppress the speaker’s viewpoint.<sup>176</sup> As a result, in these situations, the

170. This study was conducted by Transportation Alternatives, a non-profit organization, based on 2012 data. Although this study was in New York, I cite this source to illustrate the example of a common violation that is largely unenforced to illustrate that because not all violations are enforced, then police officers exercise some discretion in deciding who to arrest. TRANSPORTATION ALTERNATIVES, THE ENFORCEMENT GAP: HOW THE NYPD IGNORES WHAT’S KILLING NEW YORKERS 5 (2013), [https://www.transalt.org/sites/default/files/news/reports/2013/The\\_Enforcement\\_Gap.pdf](https://www.transalt.org/sites/default/files/news/reports/2013/The_Enforcement_Gap.pdf) [<https://perma.cc/6DHZ-X5NF>]; see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that a police officer can arrest an individual for a minor traffic violation).

171. See *Can I Be Arrested for a Speeding Traffic Violation?*, TRAFFICVIOLATIONLAWFIRMS, <http://www.trafficviolationlawfirms.com/resources/traffic-tickets/speed-violations/can-i-be-arrested-for-a-speeding-traffic-viol> [<https://perma.cc/Y2B6-ZJNY>] (noting that in some jurisdictions, speeding can result in arrests); cf. *Atwater*, 532 U.S. at 318 (finding that police can constitutionally arrest an individual for a minor traffic violation where the officer had probable cause despite violating a state statute that makes a misdemeanor punishable only by a fine).

172. Koerner, *supra* note 30, at 787.

173. *Id.* (“Studies of police behavior suggest that when it comes to minor offenses—such as disorderly conduct or public intoxication—a police officer views an arrest as ‘one resource among many that he may use to deal with disorder . . .’” (quoting JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 31 (2d ed. 1978)).

174. *Id.* (quoting Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 23 AM. SOC. REV. 699, 710 (1967)).

175. *Id.* at 788.

176. On the other hand, if the officer pulls a person over for driving twenty miles over the speed limit, the inference of improper motive is weaker. In the case of an officer pulling someone over for

retaliatory motive of the arrest emerges more clearly than if the violation is ordinarily rigidly enforced. Under a no probable cause rule, the plaintiff would be unsuccessful in a retaliatory arrest claim because the probable cause of the minor traffic violation could be shown. The no probable cause rule would disproportionately harm individuals who are arrested with probable cause of a routinely unenforced violation, even though such an arrest provides a strong inference of a retaliatory motive.

Furthermore, the arresting officer's decision to arrest is often protected by qualified immunity so long as he can cite that an individual committed any potential violation.<sup>177</sup> Qualified immunity protects a defendant government official from civil suit "only when in light of clearly established law and the information the official possesses, it was objectively reasonable for [the official] to think that his actions were lawful."<sup>178</sup> In fact, "[q]ualified immunity is so defendant-friendly that the Eighth Circuit has observed that '[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'"<sup>179</sup> In addition, judges have the further incentive to enter "summary judgment based on qualified immunity to protect well-meaning defendant officers from harassing litigation and help courts to avoid the prospect of resource-sapping trials."<sup>180</sup> Coupled with qualified immunity, the no probable cause rule puts the plaintiff at a significant disadvantage when legitimate violations occur. If there was probable cause for any separate violation, the officer knows he will either be entirely immune from suit or that the plaintiff will be unable to meet the heightened pleading standard imposed via the no probable cause rule. The arrestee thus lacks legal recourse to challenge an arrest allegedly conducted in retaliation by a police officer. This favorable treatment of the state over the private individual in itself would encourage officers to conduct more arrests because of the lower risk of repercussions for improper arrests.

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driving twenty miles over the speed limits rather than five miles over the speed limit, it is more likely that the officer had legitimate motivations for the arrest, such as to promote public safety. Even in this more egregious speeding example—20 miles over the speed limit rather than merely five miles over the speed limit—however, the no probable cause rule would still give police too much discretion to decide who to arrest among those committing the same crime.

177. See Watson, *supra* note 93, at 129 ("Judges can control the courts' dockets and protect government agents from those retaliatory-arrest claims that are filed by utilizing several procedural tools, including summary judgment based on qualified immunity.").

178. Hill v. City of New York, 45 F.3d 653, 663 (1995).

179. Watson, *supra* note 93, at 130 (internal alteration in original) (quoting Smithson v. Aldrich, 235 F.3d 1058, 1061 (8th Cir. 2000)).

180. *Id.*

### B. The No Probable Cause Rule Will Chill Speech at the Core of the First Amendment

Courts are more likely to find laws and policies that chill legitimate speech unconstitutional, especially where that speech promotes the values at the core of the First Amendment.

The no probable cause rule will chill speech. The heightened risk of arrest discourages an individual from speaking out for fear that she may incite a federal officer to arrest her. As more wrongly conducted arrests go unrecognized under the no probable cause rule over time, individuals will see they lack redress if they are arrested for their protected speech and be discouraged from exercising their free speech rights.

The lack of accountability of improper arrests under a no probable cause rule also raises the risk that an individual will be arrested when choosing to speak out in radical ways against the police officer or the government, and lowers the confidence the public has in police officers and the government. As one scholar argued, allowing probable cause to effectively shield officers from punishment if they hinder an individual's exercise of free speech with an arrest "directly erode[s] the public confidence in the very people who are sworn to protect us."<sup>181</sup>

Furthermore, protecting free speech is fundamental to the formation of democracy and so should be protected for reasons even beyond public confidence in the country. Overall, the "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."<sup>182</sup> The type of speech that would incite an arrest is precisely the type of speech that should be protected under the First Amendment, and should not be discouraged. The no probable cause rule in the context of retaliatory arrest claims would fail to protect the very individuals police officers are tasked to protect.

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181. Robinson, *supra* note 107, at 521.

182. City of Houston v. Hill, 482 U.S. 451, 462–63 (1987).

### C. The No Probable Cause Rule Will Limit the Citizen's Right to Record Police

To the extent that the First Amendment protects the right to record police in certain jurisdictions,<sup>183</sup> the no probable cause rule limits the First Amendment right to record by creating a higher risk of arrest and chilling speech.

First, the no probable cause rule creates a higher risk of arrest for people who exercise their right to record the police. In the previously discussed example of the selective arrests within a group of a hundred protestors marching illegally without a permit,<sup>184</sup> consider a second scenario where police target protestors who are video recording the police interaction with protestors. Because of the use of their devices, police can easily identify a set of individuals to arrest. While all one hundred protestors are violating the ordinance requiring a permit and thus subject to arrest with probable cause, the police can choose to only arrest individuals who are video recording in order to stop the video recording itself, a paradigmatic retaliatory arrest. In turn, those who exercise their right to record the police by video recording the police are more likely subject to arrest by the nature of their video recording amidst other protestors who are not video recording. Prominent examples of this situation are the arrests made of individuals recording actions in the Dakota Access Pipeline protests, which drew thousands of supporters to the protest camps.<sup>185</sup> The Standing Rock Sioux Tribe, whose water source would be harmed by the proposed oil pipeline, strongly opposed Transfer Energy Partners' plans to build the oil pipeline. While the Tribe has opposed the pipeline since 2014, by 2016, the opposition became a national and international movement, driven by indigenous peoples and joined by others like environmentalists.<sup>186</sup> This type of large-scale crowd and protest is prone to selective

183. See discussion regarding the circuit split on recognizing the right to record the police in *supra* Part I.A.1. The First Circuit, Eleventh Circuit, and Ninth Circuit have recognized the right to record, however, the remaining circuits have not ruled on the merits. See *supra* Part I.A.1.

184. See *supra* Part III.A for details on the protestor example.

185. See Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, Is Razed*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/standing-rock-protest-dakota-access-pipeline.html> (stating that “thousands had lived” at the protest camp); see also Mayra Cuevas et al., *Dakota Access Pipeline Protest Site Is Cleared*, CNN (Feb. 23, 2017, 7:09 PM), <http://www.cnn.com/2017/02/22/us/dakota-access-pipeline-evacuation-order> [<https://perma.cc/996H-DAT4>] (estimating that at its peak up to 10,000 people were at the protest camp).

186. Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux> [<https://perma.cc/U5SS-4ZC7>] (providing a general overview of the Dakota Access Pipeline protests); see also *Take Action*, STAND WITH STANDING ROCK, <http://standwithstandingrock.net/take-action>

arrests. For example, one of the most widely-publicized arrests was that of journalist Amy Goodman, host of the news program Democracy Now!. Police arrested her as she reported on “a violent clash between protestors and security guards” in September 2016.<sup>187</sup> Specifically, her coverage entailed filming of “security guards working for the Dakota Access Pipeline company using dogs and pepper spray to attack protestors. [The coverage] went viral and was rebroadcast on many [media] outlets.”<sup>188</sup> Goodman was charged with criminal trespass and at one point, Goodman’s lawyer told the media that there was an additional planned riot charge.<sup>189</sup> In a statement, Goodman called her arrest and charge “an unacceptable violation of freedom of the press.”<sup>190</sup> She called the charges “simply a threat to all journalists around the country” to not report on the situation in North Dakota.<sup>191</sup> She implied that the police attempt to stop her from reporting by arresting her would lead to a chilling effect on journalists’ work under the First Amendment. Goodman, and many others recording police actions and broadcasting to the world, face a higher risk of arrest by exercising their right to record the police. From the police’s perspective, they cannot arrest every individual for which they would have probable cause for criminal trespass. Therefore, the police will focus their resources to arrest key individuals that are creating the highest impact. Theoretically, the facts of Goodman’s situation provide an arguably strong case that the police had arrested her for her recording and reporting, thereby arresting her in retaliation for exercising her right to record and report under the First Amendment. In a jurisdiction that recognizes

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[<https://perma.cc/68YZ-NRKJ>] (stating that over 450,000 supported their fight against the pipeline).

187. See Erin McCann, *Judge Rejects Riot Charge Against Amy Goodman of ‘Democracy Now’ Over Pipeline Protest*, N.Y. TIMES (Oct. 17, 2016), <http://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html>; see also *Breaking: Arrest Warrant Issued for Amy Goodman in North Dakota After Covering Pipeline Protest*, DEMOCRACY NOW! (Sept. 10, 2016) [hereinafter *Arrest Warrant Issued*], [https://www.democracynow.org/2016/9/10/breaking\\_arrest\\_warrant\\_issued\\_for\\_amy](https://www.democracynow.org/2016/9/10/breaking_arrest_warrant_issued_for_amy) [<https://perma.cc/B5PR-KQ83>]; Sue Skalicky & Monica Davey, *Tension Between Police and Standing Rock Protestors Reaches Boiling Point*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/dakota-access-pipeline-protest.html> [<https://perma.cc/W8YJ-KYXC>] (reporting that tensions between protestors and the police intensified in late October 2016).
188. *Arrest Warrant Issued*, *supra* note 187. The media outlets included “CBS, NBC, NPR, CNN, MSNBC and Huffington Post.” *Id.*
189. The riot and the criminal trespass charges, both misdemeanors, were later dropped. James MacPherson & Blake Nicholson, *Judge Drops Charge Against ‘Democracy Now’ Reporter*, AP NEWS: THE BIG STORY (Oct. 17, 2016, 5:34 PM), <http://bigstory.ap.org/article/d93ae834a2814a838b6eabe5872586d7/democracy-now-reporter-plead-not-guilty-riot-charge> [<https://perma.cc/9UDS-H29>].
190. *Arrest Warrant Issued*, *supra* note 187.
191. McCann, *supra* note 187.



the no probable cause rule, however, the police officers can point to any violation—for example, criminal trespass or disturbing the peace—as probable cause for the arrest of the video recording protestors to rebut a § 1983 claim brought by the arrested plaintiff. Goodman, like others in her position, would be unlikely to establish a retaliatory arrest claim even when the facts were as strong as they were for Goodman. In turn, the arresting officer would thereby be protected at the expense of the arrested individual in a jurisdiction that recognized the absence of probable cause as an element in a retaliatory arrest claim.

Second, as more people are arrested for exercising their right to record the police without subsequent legal remedy under a retaliatory arrest claim, other individuals will be discouraged from recording. Recording the police is a way to gather information, which is protected by the First Amendment.<sup>192</sup> It is also an important tool to persuade others to call for changes in police practices.<sup>193</sup> The justifications for protecting free speech, such as maintaining a free state in lieu of a police state as well as democratic self-governance also justify the right to record the police.<sup>194</sup> Because of the significant First Amendment interests present in expression that is critical of the police, courts should not require plaintiffs to prove no probable cause in order to file a § 1983 claim for an alleged retaliatory arrest for the exercise of their right to record the police.

#### IV. THE NO PROBABLE CAUSE RULE LIMITS THE PUBLIC'S ABILITY TO KEEP THE POLICE IN CHECK VIA ONLINE SOCIAL MEDIA

In the past twenty-five years, digital technology has advanced and the widespread use of cell phones has facilitated “a dramatic rise in photo, audio, and video journalism by ordinary citizens” and the increased recording and publishing of interactions between citizens and police officers.<sup>195</sup> The district court in *Fields v. City of Philadelphia*<sup>196</sup> recognized that “rapidly developing instant image sharing technology”<sup>197</sup> has enabled this new phenomenon. Digital social networking sites have further allowed these photos and videos to “go viral,”<sup>198</sup>

192. Volokh, *supra* note 45 (“[T]he First Amendment protects silent gathering of information (at least by recording in public) for possible future publication as much as it protects loud gathering of information.”).

193. See *infra* Part IV for more discussion on this point.

194. See *supra* Part III.B for discussion of justifications of protecting free speech.

195. Kimberly McCullough, Comment, *Changing the Culture of Unconstitutional Interference: A Proposal for Nationwide Implementation of a Model Policy and Training Procedures Protecting the Right to Photograph and Record On-Duty Police*, 18 LEWIS & CLARK L. REV. 543, 547 (2014).

196. 166 F. Supp. 3d 528 (E.D. Pa. 2016).

197. *Id.* at 531.

198. See *supra* note 4 for a definition of “going viral.”

attracting a surge of viewers online and often forming a basis for demands for change in police enforcement.<sup>199</sup> In this Part, I argue that the no probable cause rule will limit and discourage individuals from raising awareness and keeping the police in check using these powerful tools of digital recordings and online social media.

#### A. The Use of Video Recording for Public Vigilance of Police Action

Under current law, the freedom of speech protects captured images in movies and pictures.<sup>200</sup> Emerging technologies have made “captured images part of our cultural and political discourse.”<sup>201</sup> In turn, the Supreme Court in many instances has not required that a captured image, including films<sup>202</sup> and images in those films, have an “illusively specific message” in order to be protected.<sup>203</sup> Rather, the Court invalidated restrictions on images displayed in public and on certain types of images on photography or video.<sup>204</sup>

Citizens and copwatch organizations have used video recordings with audio to demonstrate police misconduct,<sup>205</sup> and the Supreme Court has even relied on a police chase video recording as “incontrovertible evidence” of § 1983 actions against police officers.<sup>206</sup> Most recently, citizen audio recordings and videos have played an important role in several high-profile police brutality cases and the broader social justice movement. For example, in July 2014, a police officer attempted to arrest an unarmed black man, Eric Garner, using a prohibited chokehold that caused Garner to die. A friend of Garner used his cell phone to

199. McCullough, *supra* note 195 (describing a “widespread use of image sharing and social networking websites” that, among other technological advances, have enabled people to “document and publish interactions with law enforcement to give voice to victims of police abuses . . . [Thus, these sites] provide a solid and effective foundation for demands for change where it is needed”).

200. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 373–74 (2011).

201. *Id.* at 373.

202. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (reversing a previous ruling that the First Amendment does not protect movies and reasoning that “motion pictures are a significant medium for the communication of ideas”).

203. Kreimer, *supra* note 200, at 373.

204. *Id.* at 374 (citing several examples of prohibitions on images that the Court has found unconstitutional); see e.g., *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (holding a statute that only allowed publication of federal currency if “the message being conveyed . . . is newsworthy or educational” was unconstitutional under the First Amendment because it entailed content discrimination); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (finding that a city ordinance prohibiting “all films containing any uncovered buttocks or breasts” was unconstitutional because it was too broad).

205. Derrick, *supra* note 22, at 257.

206. *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 374–76 (2007)).

video record Garner's death.<sup>207</sup> The video, which depicted Garner's last three words, "I can't breathe," became a "rallying cry for street protestors in the wake of a spate of police-involved deaths."<sup>208</sup> In August 2014, police in Ferguson, Missouri killed Michael Brown by shooting him multiple times.<sup>209</sup> An audio recording of the shooting taken by a neighbor captured the police shooting, which was aired on CNN.<sup>210</sup> Then, in November 2014, a security camera at a park in Cleveland captured the fatal police shooting of Tamir Rice, a young boy who was playing with an airsoft gun.<sup>211</sup> In 2015, a twenty-three-year-old bystander named Feiden Santana used his cell phone to video record a police officer, Michael Slager, shooting an unarmed black man, Walter Scott, eight times as Scott tried to run away from the officer.<sup>212</sup> The officer had claimed that he shot Scott after a traffic stop because he thought that Scott had the officer's Taser in his hand and the officer "feared for his life."<sup>213</sup> The video recording, which was shown to jurors at the officer's murder trial, confirmed that "Scott did not have the officer's Taser when he was shot," and after Scott had been shot to

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207. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/6U4E-EUTT>] ("[A] cellphone camera held by a friend of Mr. Garner recorded the struggle that would soon be seen by millions."); Amanda Hess, *Justice Through a Lens*, SLATE (Apr. 9, 2015, 10:07 AM), [http://www.slate.com/articles/technology/users/2015/04/copwatch\\_mobile\\_justice\\_and\\_other\\_apps\\_for\\_citizens\\_filming\\_police\\_encounters.html](http://www.slate.com/articles/technology/users/2015/04/copwatch_mobile_justice_and_other_apps_for_citizens_filming_police_encounters.html) [<https://perma.cc/B6JB-LH3A>].
  208. See Evans Perez & Shimon Prokupecz, *Feds at Odds Over Charges in Eric Garner Case*, CNN (Jun. 2, 2016, 4:57PM), <http://www.cnn.com/2016/06/02/politics/feds-eric-garner-charges-odds> [<https://perma.cc/AL5R-VUSM>] (featuring video of the police officer's chokehold of Eric Garner).
  209. Abby Phillip, *Audio Recording Allegedly Captures at Least 10 Shots Fired in Michael Brown Killing*, WASH. POST (Aug. 26, 2014), [https://www.washingtonpost.com/news/post-nation/wp/2014/08/26/audio-recording-allegedly-captures-at-least-10-shots-fired-in-michael-brown-killing/?utm\\_term=.66907567fb45](https://www.washingtonpost.com/news/post-nation/wp/2014/08/26/audio-recording-allegedly-captures-at-least-10-shots-fired-in-michael-brown-killing/?utm_term=.66907567fb45) [<https://perma.cc/6HQZ-25YR>].
  210. *Id.* ("According to an attorney for an unidentified man who lives in an apartment building near the site of the shooting, the recording captures as many as 11 shots fired in the Aug. 9 incident."); see also Hess, *supra* note 207.
  211. Ryllie Danylko, *Cleveland Police Officer Fatally Shoots 12-Year-Old Tamir Rice: The Big Story*, CLEVELAND.COM (Nov. 24, 2014, 5:32 PM), [http://www.cleveland.com/metro/index.ssf/2014/11/cleveland\\_police\\_officer\\_fatal.html](http://www.cleveland.com/metro/index.ssf/2014/11/cleveland_police_officer_fatal.html) [<https://perma.cc/Y5YL-8BPP>]; see also Hess, *supra* note 207.
  212. Feiden Santana, the man who recorded the shooting of Walter Scott, also testified at trial. Sam Tyson & Lara Rolo, *Jurors Hear From Officer, Man Who Recorded Walter Scott Shooting in Friday Testimony*, ABC NEWS (Nov. 4, 2016), <http://abcnews4.com/news/walter-scott-shooting/second-day-of-testimony-to-begin-in-michael-slager-murder-trial> [<https://perma.cc/PK3Y-8639>]; see also Hess, *supra* note 199.
  213. See Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<https://perma.cc/NQ2D-ZN4G>].

the ground, the officer “dropped his Taser next to [Scott’s] body.”<sup>214</sup> In June 2015, another video went viral on YouTube that showed a police officer violently “yanking a 14-year-old bikini-clad girl to the ground” outside a pool party in McKinney, Texas.<sup>215</sup> The officer, Eric Casebolt, resigned from his position in the police department.<sup>216</sup> These are just some of many examples demonstrating the public’s recent powerful reliance on cellphone audio and video recordings to remain vigilant about potential police misconduct and serve as evidence in trial.

Launched in January 2014, CopWatch is a mobile application that enables individuals to record police action and automatically upload the content to YouTube.<sup>217</sup> The ACLU has fashioned a similar mobile application called Mobile Justice to facilitate a citizen’s exercise of her First Amendment right to record potential misconduct by police officers or other public officials.<sup>218</sup> The free application enables users to record law enforcement, upload the videos to the ACLU, and write incident reports of potential civil rights violations for the ACLU to review.<sup>219</sup>

Both CopWatch and the ACLU’s Mobile Justice application remind users of their rights such as the “right to film, photograph or record law enforcement while they are engaged in law enforcement activity.”<sup>220</sup> In addition, the Mobile Justice application cautions users against committing minor infractions such as

214. Alan Blinder, *Breaking Silence, Officer Testifies About Killing of Walter Scott*, N.Y. TIMES (Nov. 29, 2016), <https://www.nytimes.com/2016/11/29/us/charleston-walter-scott-michael-slager-trial.html> (“Not long after the shooting, Mr. Slager dropped his Taser next to Mr. Scott’s body, a decision he could not easily explain . . . but one that prosecutors view as proof that he was trying to plant evidence to cover up a murder.”).

215. Ashley Fantz et al., *Texas Pool Party Chaos: ‘Out of Control’ Police Officer Resigns*, CNN (June 9, 2015, 10:33 PM), <http://www.cnn.com/2015/06/09/us/mckinney-texas-pool-party-video> [<https://perma.cc/6F3G-63L6>].

216. *Id.*

217. Hess, *supra* note 207.

218. See *ACLU Apps to Record Police Conduct*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/feature/aclu-apps-record-police-conduct> [<https://perma.cc/69YG-Z4PX>] (describing how users can operate the Mobile Justice App); *Mobile Justice—California*, ITUNES, <https://itunes.apple.com/app/id979642692> [<https://perma.cc/Y7H2-AKWU>] (offering the California-specific version of the ACLU’s mobile application).

219. The incident reports are “akin to legal intake forms,” in which the ACLU is allowed to “share and publicize general facts documented in the reports [but not] any identifying information.” ACLU, *Frequently Asked Questions*, MOBILE JUSTICE CA, <https://www.mobilejusticeca.org/faq> [<https://perma.cc/7BGH-WL53>] (answering questions on the California version of the mobile application). The application is available in California and seventeen other states and Washington, DC. *Id.*; see also *ACLU Apps to Record Police Conduct*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/feature/aclu-apps-record-police-conduct> [<https://perma.cc/69YG-Z4PX>] (listing jurisdictions where the Mobile Justice application is available).

220. See, e.g., *Mobile Justice—California*, *supra* note 218 (warning Mobile Justice—California users not to violate laws while using the application).

jaywalking or trespassing, and to “[r]emain a safe distance from any law enforcement encounter . . . so that you do not physically interfere with the activity.”<sup>221</sup> CopWatch advises users to keep “10 feet between themselves and the incident, and never to walk within striking distance of a police officer.”<sup>222</sup> For added safety, the ACLU advises users to “announce that they are reaching for a phone, and attempting to access the app to record the exchange.”<sup>223</sup>

Organizations like the ACLU and CopWatch have recognized that there is a movement toward citizen recording. Although the total number of users is not available online, since March 27, 2016, the Mobile Justice—California application has received 621 reviews<sup>224</sup> on the Android version of the application and 142 reviews on the Apple version of the application.<sup>225</sup> The flurry of users who have downloaded the mobile application and posted positive reviews indicate that there is an interest in using this type of recording tool to remain vigilant about police action. In addition, ACLU states that it “will review videos if the corresponding incident report indicates that a serious civil rights violation has occurred.”<sup>226</sup> Host organizations like the ACLU rely on people to be vigilant in using their cell phone cameras to collect data as evidence for civil rights claims. If the no probable cause rule is recognized in all jurisdictions, it would not only chill the exercise of the right to record, but also hinder civil rights advocates in their efforts to use videos as evidence in excessive force cases in the United States.

## B. The Powerful Role of Leaders in Social Media for Public Vigilance of Police Action

Public vigilance, which provides a “contemporaneous review in the forum of public opinion,” is key to restraining the potential abuse of judicial power in a criminal trial.<sup>227</sup> As the court in *Gentile v. State Bar of Nevada*<sup>228</sup> stated: “Without publicity, all other checks are insufficient: in comparison of publicity, all other

221. *Id.*

222. Hess, *supra* note 207 (internal quotation omitted).

223. *ACLU of California Releases Tool to Hold Law Enforcement Accountable*, AM. CIVIL LIBERTIES UNION (Apr. 30, 2015), <https://www.aclunc.org/news/aclu-california-releases-tool-hold-law-enforcement-accountable> (describing general functions and user warnings for the MobileJustice application).

224. *See Mobile Justice—California*, GOOGLE PLAY, <https://play.google.com/store/apps/details?id=org.aclu.mobile.justice.ca&hl=en> (listing 621 reviews of the mobile application as of April, 12, 2017).

225. *See Mobile Justice—California*, *supra* note 218 (listing 142 reviews as of April 12, 2017).

226. ACLU, *supra* note 219.

227. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

228. 501 U.S. 1030.

checks are of small account.”<sup>229</sup> Increasingly, individuals have become the eyes and ears of the public to keep the police accountable for their actions.<sup>230</sup> Over 200 civilian review boards have emerged from across the country to monitor or account for police conduct,<sup>231</sup> and individuals have also remained vigilant of police conduct through online social media.

Founded in 2012 with the hashtag #BlackLivesMatter in response to the death of Trayvon Martin, the Black Lives Matter movement is a key example of how individuals can mobilize through the use of social media to form a powerful nationwide protest against police brutality and racial inequality.<sup>232</sup> For example, Ferguson protestors used Twitter, Facebook, and Tumblr to “spread the word about planned protest locations” and to collect donations and supplies for the protestors.<sup>233</sup> Two organizers reached over 20,000 followers each with their updates on the Ferguson protests.<sup>234</sup> Though there is no single leader of the movement, leaders have emerged through their influence on social media. These influencers are able to harness social media to “start a trending hashtag or a rally in the streets with a single tweet.”<sup>235</sup> For example, in response to the not guilty verdict of George Zimmerman in the murder of Trayvon Martin, Charlene Carruthers, an organizer with over 14,700 followers on Twitter, brought together a group of people which decided to hold a series of digital town halls and release a videotaped statement to the Martin family.<sup>236</sup>

Vocal activists like Carruthers are more likely to be subjected to a retaliatory arrest in a jurisdiction that recognizes the no probable cause rule for retaliatory arrest claims. As discussed in Part III above, the no probable cause rule creates a higher risk of selective arrests and will chill the speech of leaders like Carruthers.

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229. *Id.* (quoting *Oliver*, 333 U.S. at 271).

230. See Derrick, *supra* note 22, at 289.

231. Martin Kaste, *Police Are Learning To Accept Civilian Oversight, But Distrust Lingers*, NPR (Feb. 21, 2015, 10:18 AM), <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers> (“Today there are more than 200 civilian oversight entities around the country, though their powers to investigate and punish officers vary.”). The creation of a civilian review board, unsurprisingly, often faces resistance from the police.

232. See Sara Sidner & Mallory Simon, *The Rise of Black Lives Matter: Trying to Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015, 8:28 AM), <http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution> [<https://perma.cc/L3V4-QEFL>].

233. Rubina Madan Fillion, *How Ferguson Protesters Use Social Media to Organize*, WALL ST. J.: DISPATCH (Nov. 24, 2014, 5:54 PM), <http://blogs.wsj.com/dispatch/2014/11/24/how-ferguson-protesters-use-social-media-to-organize>.

234. *Id.*

235. Brandon Griggs et al., *The Disruptors*, CNN, (Aug. 2015), <http://www.cnn.com/interactive/2015/08/us/disruptors> [<https://perma.cc/SF8J-GJ3L>].

236. *Id.*; see Charlene Carruthers (@CharleneCac), TWITTER, [https://twitter.com/CharleneCac?ref\\_src=twsrc%5Etfw](https://twitter.com/CharleneCac?ref_src=twsrc%5Etfw) [<https://perma.cc/QN4A-2GJ9>].

For example, if Carruthers is one among hundreds of protestors on the streets without a permit, a police officer can recognize her as the online facilitator and a prominent advocate. He can then single her out and arrest her for her online advocacy under the guise of the probable cause of protesting without a permit.<sup>237</sup> Once she is at the police station, the police may drop the charges.<sup>238</sup>

Although she is not charged, she could still file a retaliatory arrest claim for the allegedly unlawful arrest in violation of her First Amendment rights. Yet, once she has been arrested, she has already stopped protesting, stopped leading the protest of others, and suffered the loss of her time and resources. Her free speech has been chilled. If the jurisdiction she files in recognizes the no probable cause rule for retaliatory arrest claims, probable cause would preclude her civil rights claim.<sup>239</sup> In turn, the arrest of leaders for their outspoken speech online could lead to a chilling effect on other potential vocal activists online, discouraging them from speaking out because of the potential lack of remedy if they are arrested in retaliation for their speech.

A recent example illustrates what selective arrests would look like. In October 2016, while on a Facebook video livestream, Shailene Woodley, a well-known actress and activist, was arrested for criminal trespass while leaving a protest of the construction of the Dakota Access Pipeline.<sup>240</sup> In the two-hour live stream video,<sup>241</sup> Woodley appeared to be singled out from hundreds of other protestors at the same site.<sup>242</sup> Woodley asked the officers “why she’s being arrested and not the other protestors.”<sup>243</sup> She asked: “Is it because I’m famous? Is

237. This description is based on a hypothetical described in Watson, *supra* note 93, at 112–13 (describing the arrest of a well-known government critic for drunk driving after the arresting officer realized who the driver was), and builds on the protesting without a permit example by Robinson, *supra* note 107, at 512.

238. *See id.*

239. In addition, criminal defendants may waive their right to bring a civil rights lawsuit such as a § 1983 claim in order to dismiss the criminal charge in “plea-bargaining and release-dismissal agreements.” *See* Derrick, *supra* note 22, at 256 & n.66. In some cases, the defendant, even if released without charge, cannot file a retaliatory arrest claim under § 1983 because he has waived that right. As a result, the unfair process of the arrest and lack of remedy deters citizens from recording and leads to a “chilling effect on citizen oversight of law enforcement.” *Id.* at 256.

240. Libby Hill, *Shailene Woodley Arrested While Peacefully Protesting Dakota Access Pipeline in North Dakota*, L.A. TIMES (Oct. 10, 2016, 12:35 PM), <http://www.latimes.com/entertainment/gossip/la-et-mg-shailene-woodley-arrested-dapl-20161010-snap-htmlstory.html> [https://perma.cc/F7JF-E88K] (providing a full livestream video available along with summary). Also, see *supra* Part III.C and accompanying footnotes for a general background on the Dakota Access pipeline protests and a discussion on how Amy Goodman, a journalist, was similarly arrested for criminal trespass for her reporting.

241. Hill, *supra* note 240.

242. *Id.*

243. *Id.*

it because people know who I am?” Two of the three officers that were assigned to arrest her said, “You were identified.”<sup>244</sup>

North Dakota, where Woodley’s arrest took place, is part of the Eighth Circuit, which applies the no probable cause rule to retaliatory arrest claims.<sup>245</sup> Thus, should Woodley file a retaliatory arrest claim, the government could prevail so long as it provides evidence establishing probable cause of criminal trespass, even if Woodley has evidence of retaliatory motive. Despite the arrest, she was able to record the police treatment of her with the assistance of her mother. Using a live Facebook video, she broadcasted that video to her wide audience.<sup>246</sup> Still, Woodley’s arrest, along with the arrests of twenty-six others for criminal trespassing at that protest,<sup>247</sup> would likely deter others from protesting or going near the protests. On a broader scale, the continued crack-down on high-profile individuals like Woodley who record and post on social media—and leaders of social movements who do the same—risks chilling the exercise of free speech via the use of video recording and online social media.

## V. CRITICISMS OF REMOVING THE NO PROBABLE CAUSE RULE

### A. Removing the No Probable Cause Rule Will Lead to Too Many Frivolous Civil Rights Actions and Place a Burden on the Courts

Some critics have argued that eliminating the no probable cause rule in retaliatory action claims will allow § 1983 and *Bivens* claims to become too readily available to plaintiffs and open the door to frivolous retaliation claims.<sup>248</sup> These critics argue that relying on the plaintiff’s allegation of animus to find a cause of action for a retaliatory prosecution would be too subjective.<sup>249</sup> Despite this concern, the Supreme Court in *Hartman* explained that statistics have shown

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244. *Id.*

245. *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014) (finding that a public transit officer was “entitled to qualified immunity on [a] retaliatory arrest claim because [he] had at least arguable probable cause for the arrest”); *see also supra* Part I.A.3 (providing a discussion on the split among circuit courts on the absence of the probable cause requirement).

246. As of April 21, 2017, her video captioned “The riot police are arriving” has 4.9 million views on Facebook. Shailene Woodley, FACEBOOK (Oct. 10, 2016), <https://www.facebook.com/ShaileneWoodley/videos/624178791076838> [<https://perma.cc/T45B-DVCW>].

247. Hill, *supra* note 240.

248. *See Hartman v. Moore*, 547 U.S. 250, 257 (2006).

249. *Id.* (“A plaintiff can afflict a public officer with disruption and expense by alleging nothing more, in practical terms, than action with retaliatory animus, a subjective condition too easy to claim and too hard to defend against.” (citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004))).



that there is little foundation for the fear that lifting the no probable cause rule would unduly burden federal courts.<sup>250</sup> Over the past twenty-five years, the Federal Courts of Appeals have seen fewer than two dozen actions for retaliatory prosecutions under *Bivens* or § 1983. Additionally, there is “no disproportion of those cases in Circuits that do not require showing an absence of probable cause.”<sup>251</sup> “[S]tatistics demonstrate that the volume of retaliatory-arrest actions is relatively unremarkable,” so it would be unlikely that the number of claims would rise to a level to become frivolous and a burden on the court.<sup>252</sup>

Moreover, retaliatory arrest claims require less intensive fact-finding than retaliatory prosecution claims because retaliatory arrests typically involve only two parties—the arresting officer and the plaintiff—and also require less intensive litigation than retaliatory prosecutorial claims. In comparison, retaliatory prosecution claims involve a third party: the prosecuting authority.<sup>253</sup> As a result of simpler fact-finding processes, the threat of a high burden on the courts becomes less persuasive in the case of retaliatory arrest claims.

Finally, frivolous claims by plaintiffs are unlikely given the initial costs of filing a retaliatory arrest claim and the high cost of continuing litigation. In contrast, there is no financial deterrent against police officers arresting an individual in retaliation against their exercising free speech. In reality, police often drop charges after they have taken control of the situation by conducting the arrest; they have little to lose when they drop frivolous charges. But an arrestee suffers physical, mental, and financial losses from an arrest even if the charges are later dropped.<sup>254</sup> Thus, the danger lies not in potential for frivolous claims, but in the potential for frivolous arrests by the officer.

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250. *Id.* at 258 (“Nor is there much leverage in the fear that without a filter to screen out claims federal prosecutors and federal courts will be unduly put upon by the volume of litigation.”).

251. *Id.* at 259.

252. Watson, *supra* note 93, at 128.

253. See *supra* Part II.A. for discussion of multiple-party causation in retaliatory prosecution claims, as exemplified in *Hartman v. Moore*, 547 U.S. 250.

254. Some jurisdictions charge arrestees booking fees and fines even if charges are dismissed later, a phenomena that has become part of growing efforts by counties to raise revenue across the U.S. See, e.g., Adam Liptak, *Charged a Fee for Getting Arrested, Whether Guilty or Not*, N.Y. TIMES (Dec. 26, 2016), <https://www.nytimes.com/2016/12/26/us/politics/charged-a-fee-for-getting-arrested-whether-guilty-or-not.html> (describing how a county collected a booking fee from an individual arrested for disorderly conduct even though he was released two days later and charges were dismissed). Growing more common, even though jail time may not be the punishment for the crime charged, the failure to pay a fine has resulted in jail time for those unable to afford the fines in the first place, disproportionately incarcerating the poor. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

The state may argue that if it is easier to plead a retaliatory arrest, then this might chill officers from making some legitimate arrests. For instance, if an individual was swerving in and out of traffic and running red lights, providing probable cause for a DUI, then the officer could ordinarily conduct a lawful arrest. But if the individual also had a bumper sticker protesting law enforcement or the officer recognized the person as a political dissenter,<sup>255</sup> the officer might refuse to conduct that lawful arrest in fear of being sued for a retaliatory arrest. The fear of a flood of frivolous suits is unfounded, however, as stated above, and so any deterrent effect on legitimate arrests would be minimal. In addition, while arrestees subjected to the no probable cause rule are essentially left without legal protection, police officers without the benefit of the no probable cause rule still have sufficient protection. In a legal landscape removing the no probable rule, the burden would instead shift to the police officer, rather than the arrestee, to show that he would have arrested the driver regardless of his speech.<sup>256</sup> Under this standard, the officer in the scenario described above would likely be able to demonstrate that he would have arrested a person exhibiting signs of drunk driving even if that person was not a known critic of the police.

Overall, declining to extend the no probable cause rule to retaliatory arrest claims would not lead to overburdening the court with frivolous claims and would instead help reduce frivolous arrests by police officers.

#### **B. Individual Citizens Are Not Aware of the Legal Remedies Available for Potentially Unlawful Arrests for Exercising Free Speech Rights**

I argue in this Comment that the no probable cause rule will create a chilling effect on speech, which logically requires that individuals are aware of the pleading standard for a retaliatory arrest claim. If they have the knowledge that they will likely fail on a retaliatory arrest claim in a no probable cause rule jurisdiction, then they will decide not to exercise their free speech. Along these lines, critics of my proposal will argue that if individuals are not aware that the no probable cause rule exists, then the heightened pleading standard would not discourage them from exercising their free speech rights.

The claim of the lack of legal knowledge is a common counterargument to proposed legal solutions, given that the public outside the legal community, and even people within the legal community, may not pay attention to changes in

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255. See *supra* note 237.

256. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274–287 (1977) (shifting burden to the state actor to show that “it would have reached the same decision . . . in the absence of the protected conduct”).

legal rules, let alone act upon the latest changes. But news outlets and social media are already playing an important role in drawing the attention of the general public to legal issues of which they would otherwise be unaware. The media has recently been eager to cover alleged retaliatory arrests and the legal remedies available, particularly for violent arrests or arrests disproportionate to the alleged crime. The implications of the no probable cause rule are particularly relevant amidst the recent violent police arrests of individuals that have spurred a social justice movement in the United States. Thus, despite the potential lack of legal knowledge among the general public, media outlets, bloggers, and individuals can and will likely communicate the impact of pressing issues such as the no probable cause rule in retaliatory arrest cases.

### CONCLUSION

In the age of civilian vigilance, smartphone technology and social media have enabled individuals to keep the police in check by raising awareness of potential civil rights violations otherwise overlooked by the public. Legal remedies must keep pace with the rise of unlawful arrests across the country. Extending the no probable cause rule established in *Hartman v. Moore*<sup>257</sup> to retaliatory arrest claims will create a chilling effect on the freedom of speech. The justifications that grounded the Supreme Court's decision in *Hartman* do not extend to the retaliatory arrest context. Therefore, this heightened pleading standard should not extend to retaliatory arrests for both legal and policy reasons.

Moreover, the ramifications of extending the decision in *Hartman v. Moore* to retaliatory arrest claims could have devastating effects on how police treat dissenters. It provides an avenue for police officers to engage in retaliatory arrests of individuals who protest against police brutality without legal repercussion. For example, if students had not recorded the violent police arrest of the Spring Valley High School female student on their smartphones and shared it with news outlets and online social media, the public would likely not have responded with such outrage. The media coverage enabled by students with recording devices made a single classroom incident turn into a nationwide outcry for justice.<sup>258</sup>

The Fourth Circuit, where Spring Valley High School is located, has not yet expressly ruled on the no probable cause rule for retaliatory arrests. If the heightened pleading standard applied to a retaliatory arrest filed by someone like Niya Kenny, the student who recorded the video and protested against the

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257. 547 U.S. 250 (2006).

258. See LeBlanc, *supra* note 42 (describing how the case, "because of students' videos, shook the Midlands and focused national attention on the role of school resources officers").

officer's violent actions, it would likely fail because the police officer named "disturbing the school" as a probable cause for arrest. After being arrested, Kenny withdrew from her school because she felt "humiliated and fearful of returning to school."<sup>259</sup> This fear that resulted from the incident is a type of chilling effect that would discourage her from not only speaking up in class, but has a further detrimental effect in discouraging her from attending school at all. Her mother had also "advised against returning to a place where she could be arrested for no reason."<sup>260</sup> The no probable cause rule puts students at risk for being arrested for retaliatory purposes.<sup>261</sup> In turn, even if charges are dropped later,<sup>262</sup> students like Kenny will be more fearful of speaking up against police brutality.<sup>263</sup> Students will think twice about taking out their smartphones to record misconduct in fear of a retaliatory arrest without legal recourse, chilling a powerful means of raising civilian vigilance.

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259. Erik Eckholm, *South Carolina Law on Disrupting School Faces Legal Challenge*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/12/us/south-carolina-schools.html>. Although Kenny dropped out of Spring Valley High School a few days after her arrest because she was scared to return to a school, she still pursued her G.E.D. elsewhere and received her diploma in June 2016. Complaint, *supra* note 9, at 4; Shulman, *supra* note 14. During the interim between the incident and her completion of the G.E.D. program, the ACLU worked with Kenny to launch her suit against the state, which likely empowered Kenny to continue her education. Like the ACLU suit, potential plaintiffs in civil actions in general rely on legal remedies to fight injustice and get back on their feet.

260. Eckholm, *supra* note 259.

261. In *Kenny v. Wilson*, the case in which the ACLU challenges the disturbing the school statute itself, the plaintiffs argue that the statute puts students at the risk of arrest or juvenile referral. Complaint, *supra* note 9, at 23. Since Kenny was seventeen at the time of arrest, she was charged as an adult. Under the statute at issue, "[s]tudents through age 16 are charged under the law as juveniles, their cases handled in family court." Eckholm, *supra* note 259.

262. In September 2016, the Fifth Circuit solicitor Dan Johnson announced that charges with disrupting school will be dropped against Kenny and the female student who was dragged across the classroom by the school resource officer. LeBlanc, *supra* note 42.

263. Students, like Kenny, who experience backlash by police for speaking up against police brutality may be driven to even drop out of school, jeopardizing their own education and safety. See ACLU, THE RIGHT TO REMAIN A STUDENT: HOW CALIFORNIA SCHOOL POLICIES FAIL TO PROTECT AND SERVE 14 (2016), [https://www.aclusocal.org/sites/default/files/20161019-the\\_right\\_to\\_remain\\_a\\_student-aclu\\_california\\_0.pdf](https://www.aclusocal.org/sites/default/files/20161019-the_right_to_remain_a_student-aclu_california_0.pdf) [<https://perma.cc/99XJ-YTEZ>] ("Analysis of a nationally representative dataset shows that an arrest doubles a high school student's odds of dropout, and subsequent court involvement doubles those odds again, even when controlling for variables such as parental poverty, grade retention, and middle school GPA.").

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