POLICE CIVIL LIABILITY: DANGEROUS CROSSROADS AHEAD

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I. CONSTITUTIONAL DYNAMICS

A. Overview

B. Need to maintain firm legal footing

C. Use of force implications

County of Los Angeles v. Mendez, 137 S.Ct. 1539, 1547 n.2 (2017) ("*once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation") ***Caution:*** Without deciding the issue, the Supreme Court recognized that because *Graham v. Connor* "commands that an officer's use of force be assessed for reasonableness under the 'totality of the circumstances,'" that could potentially allow for consideration of "unreasonable police conduct *prior* to the use of force that foreseeably created the need to use it." (emphasis added)

Glenn-Robinson v. Acker, 140 N.C. App. 606, 625, 538 S.E.2d 601, 615 (2000) (whenever the police do "not have probable cause to arrest . . . any use of force becomes at least a technical assault and battery")

II. DEALING WITH MOTORISTS

A. Driver's obligations

1. Does state law require driver's license be *displayed* or *produced*?

2. State law determines extent of driver's required cooperation during DUI checkpoint.

   Rinaldo v. State, 787 So.2d 208, 212 (Fla.App. 2001) ("a driver who is lawfully stopped for a DUI checkpoint is under a legal obligation to respond to an officer's requests for certain information and documents, and the driver's refusal to respond to these requests may constitute the misdemeanor offense of obstructing or opposing an officer")

B. Dealing with passengers

1. Passengers may be detained without reasonable suspicion

   Arizona v. Johnson, 555 U.S. 323, 327 (2009) (all vehicle occupants may be lawfully detained for the duration of a traffic stop)

   Brendlin v. California, 551 U.S. 249, 263 (2007) (a passenger is seized, just as the driver is, "from the moment [a car stopped by the police comes] to a halt on the side of the road")

2. All occupants may be required to exit or remain seated at the officer's discretion

Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977) ("once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures")

Maryland v. Wilson, 519 U.S. 408 (1997) ("an officer making a traffic stop may order passengers to get out of the car pending completion of the stop")

U.S. v. Moorefield, 111 F.3d 10, 13 (3rd Cir. 1997) ("Just as the Court in *Wilson* found ordering a passenger out of the car to be a minimal intrusion on personal liberty, we find the imposition of having to remain in the car with raised hands equally minimal.")

Coffey v. Morris, 401 F.Supp.2d 542, 546 (W.D.Va. 2005) ("It is reasonable under the Fourth Amendment for an officer to order a passenger to remain in an automobile due to the generalized concerns for officer safety discussed in *Wilson*, and the need for officers to exercise control during a traffic stop.")

a. Failure to comply may be an arrestable offense

Figg v. Schroeder, 312 F.3d 625, 637 (4th Cir. 2002) (upholding driver's arrest for obstruction where she "disobeyed an order to remain in or to return to her automobile")

Turner v. State, 274 Ga.App. 731, 733, 618 S.E.2d 607, 609 (2005) (evidence showing that driver "repeatedly exited his vehicle against the officer's orders to remain seated in the vehicle was sufficient to sustain his conviction for misdemeanor obstruction")

U.S. v. Bass, 82 F.3d 811, 812 (8th Cir. 1996) (affirming motorist's conviction for interfering with park ranger's performance of duties by refusing "to remain at the rear of his vehicle in order to assure the Ranger's personal safety" during traffic stop)

3. Passengers may be asked for identification without reasonable suspicion

U.S. v. Pack, 612 F.3d 341, 351 (5th Cir. 2010) ("it was permissible to ask a passenger like Pack to identify himself and to run computer checks on his driver's license and background")

U.S. v. Soriano-Jarquin, 492 F.3d 495, 500 (4th Cir. 2007) ("Just as the officer may ask for the identification of the driver of a lawfully stopped vehicle, [citation], so he may request identification of the passengers also lawfully stopped.")

4. Recognize distinction between *asking* for I.D. and *requiring* it

Johnson v. Thibodaux City, 887 F.3d 726, 734 (5th Cir. 2018) (police officers "were not permitted to continue [the vehicle passenger's] detention solely to obtain identification" without "'reasonable suspicion, supported by articulable facts'" that the passenger was involved in criminal activity)

State v. Debrossard, 2015 WL 1278401 at *5 (Ohio App. 2015) ("vehicle passengers are not required to carry ID or to produce it when requested by law enforcement")

State v. Friend, 768 S.E.2d 146, 148 (N.C.App. 2014) (the refusal of a vehicle passenger to provide I.D. so he could be cited for a seatbelt violation "constitute[d] resistance, delay, or obstruction within the meaning of N.C. Gen.Stat. § 14–223")

Turley v. Commonwealth, 399 S.W.3d 412, 422 n.7 (Ky. 2013) ("To the extent that this passage implies that a police officer may routinely request the passengers of a detained vehicle in a routine traffic stop to produce their identification for purposes of a warrant check, as explained herein, it is an incorrect statement of the law.")

U.S. v. Rodgers, 656 F.3d 1023, 1030 n.7 (9th Cir. 2011) ("the Fourth Amendment does not permit the search of a car for a passenger's identification where state law does not require passengers to carry identification")

Stufflebeam v. Harris, 521 F.3d 884, 886 (8th Cir. 2008) (finding unlawful the arrest of a passenger "for refusing to identify himself when he is not suspected of other criminal activity and his identification is not needed to protect officer safety or to resolve whatever reasonable suspicions prompted the officer to initiate an on-going traffic stop or *Terry* stop")

Commonwealth v. Goewey, 452 Mass. 399, 407, 894 N.E.2d 1128, 1135 (Mass. 2008) (agreeing with trial court "that the defendant, as a passenger, was not required to carry a current driver's license or, for that matter, any identification at all")

III. DEALING WITH THE PUBLIC

A. Three categories of contacts with bystanders/witnesses

1. Contacts initiated by police seeking information

2. Contacts initiated by bystanders seeking information or to provide information

3. Contacts initiated by bystanders seeking to provoke police overreaction

B. Contacts initiated by police seeking information

1. Approaching and questioning bystanders

a. Refusal to answer questions

Kaufman v. Higgs, 697 F.3d 1297 (10th Cir. 2012) (police lacked probable cause to arrest vehicle owner for obstruction based upon his refusal during consensual encounter to tell them who was driving his car when it was involved in hit-and-run)

Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 187 (2004) ("the Fourth Amendment itself cannot require a suspect to answer questions")

Harris v. State, 314 Ga.App. 816, 821, 726 S.E.2d 455, 459 (2012) ("The audio recording establishes that the officers made clear at the time of the arrest that it was for refusing to answer questions about the child. The officers presented Harris with a choice between answering their questions or being arrested for obstruction. Harris was arrested for peaceably asserting his constitutional rights as he understood those rights. That cannot be obstruction.")

State v. Brandstetter, 908 P.2d 578, 581 (Idaho Ct. App. 1995) (holding that an individual has no "affirmative obligation to answer" questions posed by an officer during the course of an investigation)

Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969) (it is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer")

58 Am. Jur. 2d *Obstructing Justice* § 57 ("A mere refusal to answer questions cannot be the basis of an arrest for obstruction of a police officer.")

b. Refusal to identify

i. When demanding I.D., remember that failure to identify oneself is a crime only where: 1) there is a valid detention; *and* 2) state law has a "stop and identify" statute

Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) ("Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke suspicion. . . . Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling

the officer's suspicions. *But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released*.") (emphasis added)

Florida v. Bostick, 501 U.S. 429, 437 (1991) ("refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure")

U.S. v. Christian, 356 F.3d 1103, 1106-07 (9th Cir. 2004) ("While failure to identify oneself cannot, on its own, justify an arrest, nothing in our case law prohibits officers from asking for, or even demanding, a suspect's identification.")

In re Chase C., 243 Cal.App.4th 107, 120 (2015) ("preceding a booking interview, the Fifth Amendment renders a suspect 'free to refuse to identify himself or to answer questions' without violating section 148")

Martinelli v. City of Beaumont, 820 F.2d 1491, 1494 (9th Cir. 1987) ("the use of Section 148 to arrest a person for refusing to identify herself during a lawful *Terry* stop violates the Fourth Amendment's proscription against unreasonable searches and seizures")

In re Gregory S., 112 Cal.App.3d 764, 779 (1980) ("We find no authority to support the court's legal conclusion that a person who merely refuses to identify himself or to answer questions in a context similar to that before us [*i.e.*, investigative detention] thereby violates Penal Code section 148 or otherwise furnishes ground for arrest.")

Compare, People v. Loudermilk, 195 Cal.App.3d 996, 1002 (1987) (failure of a person to identify himself "may by itself be considered suspect and together with surrounding events may create probable cause to arrest")

Turner v. Driver, 848 F.3d 678, 695 (5th Cir. 2017) (extended detention of person filming police department who refused to identify himself became a *de facto* arrest which was unlawful because "the police cannot arrest an individual solely for refusing to provide identification")

Davidson v. City of Stafford, 848 F.3d 384, 392 (5th Cir. 2017) (arrest for refusal to identify during investigative detention was unlawful)

Compare, Mikkalson v. City of South St. Paul, 2016 WL 4186935 at *7 (D.Minn. 2016) (law was not clearly established that officer investigating recent burglary "could not demand that [suspect]

turn over his driver's license under a threat of arrest and briefly detain [him] in order to ascertain his identity")

Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 189 (2004) (upholding arrest for failure to identify only because "the initial stop was based on reasonable suspicion" and state law specifically required the production of identification during an investigative detention)

State v. Hoffman, 35 Wash.App. 13, 17, 664 P.2d 1259, 1261 (1983) (a "refusal to give identification . . . cannot constitutionally serve as a basis for an arrest")

Williams v. City of Mount Vernon, 428 F.Supp. 2d 146, 157 (S.D. N.Y. 2006) ("'ignoring an officer's request for identification is not a crime, nor does that act supply any such element'" of the offense of obstructing an officer under NY law)

Marrs v. Tuckey, 362 F.Supp.2d 927, 939 (E.D.Mich. 2005) (because "'the Fourth Amendment itself cannot require a suspect to answer questions,' [citation], and any such obligation instead must derive from some independent legal source, . . . an arrest of an individual who refuses to identify herself cannot be justified as based upon the requisite probable cause to believe that the individual has engaged or is about to engage in criminal activity")

Burkes v. State, 719 So.2d 29, 30 (Fla.App. 1998) ("An individual may properly refuse to give his name or otherwise identify himself to law enforcement . . . prior to a lawful arrest. [citation] However, after a lawful arrest, an individual is compelled to provide his identity.")

Henes v. Morrissey, 194 Wis.2d 338, 354, 533 N.W.2d 802, 808 (1995) ("we will not adopt a *per se* rule . . . that after being lawfully detained, a suspect can be arrested for obstruction for refusing to identify himself or herself")

Pontiac v. Baldwin, 163 Mich.App. 147, 152, 413 N.W.2d 689, 692 (1987) ("Because a person cannot be compelled to answer questions posed by a police officer [citations], that person cannot be prosecuted for obstructing a police officer should he refuse to answer questions during a *Terry* stop.")

Compare, *Koch v. City of Del City*, 660 F.3d 1228, 1243 (10th Cir. 2011) (finding no legal precedent "clearly establishing a right under the Fourth Amendment to refuse to answer an officer's questions during a *Terry* stop")

ii. Fingerprint alternative

Hayes v. Florida, 470 U.S. 811, 816-17 (1985) ("a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause," is constitutionally permissible provided that "there is reasonable suspicion that the suspect has committed a criminal act, . . . there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and . . . the procedure is carried out with dispatch")

2. Detention of bystanders for interview as witnesses

Hayes v. Florida, 470 U.S. 811, 816 (1985) ("the [constitutional] line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes"); *see also Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (same)

Lincoln v. Barnes, 855 F.3d 297, 304 (5th Cir. 2017) ("As a general matter, the detention of a witness that is indistinguishable from custodial interrogation requires no less probable cause than a traditional arrest.")

U.S. v. Mendoza-Trujillo, 46 F.Supp.3d 1204 (D.Utah 2014) ("police officers not only lacked probable cause, but also lacked the lower threshold of reasonable suspicion to detain" someone by transporting him to a police station for questioning where the person "was not a suspect in a crime" but was rather "viewed as a victim")

Maxwell v. County of San Diego, 708 F.3d 1075, 1084 (9th Cir. 2013) (denying qualified immunity to deputies who detained gunshot victim's parents for questioning as witnesses because the deputies "were on notice that they could not detain, separate, and interrogate the Maxwells for hours")

Perkins v. Click, 148 F.Supp.2d 1177, 1184 (D.N.M. 2001) (denying qualified immunity to sheriff who detained homicide witness in patrol car and had her transported to sheriff's office for questioning because "any reasonable sheriff would have recognized that the arrest of a potential witness, simply because she is a potential witness, violates the most basic rights provided by the Fourth Amendment")

Orozco v. County of Yolo, 814 F.Supp. 885, 893 (E.D.Cal. 1993) ("No case has been found approving the seizure and detention of a *witness* absent a warrant. Police have less authority to detain those who have witnessed a crime than to detain those suspected of committing a crime under the Fourth Amendment.") (summary judgment granted for plaintiff)

C. Contacts initiated by bystanders seeking information or to provide information

Woods v. Carroll County, Miss., 2009 WL 1619955 at *4 (2009) (officer could not lawfully order resident and guests watching a disturbance down the street while peaceably assembled in resident's front yard to go inside the house)

Wilson v. Kittoe, 337 F.3d 392, 402 (4th Cir. 2003) ("While it may be inconvenient to a police officer for a neighbor to stand nearby and watch from his driveway as the officer works, inconvenience cannot, taken alone, justify an arrest under the Obstruction Statute.")

D. Contacts initiated by others seeking to provoke police overreaction

1. Profanity towards the police

Lewis v. City of New Orleans, 415 U.S. 130, 133, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty" was unconstitutional since it "punishe[d] only spoken words" and was not limited in scope to fighting words that "'by their very utterance inflict injury or tend to incite an immediate breach of the peace'")

a. <u>*Caution*</u>: Beware of antiquated state statutes criminalizing cursing in public

Harrison v. Deane, 426 Fed.Appx. 175, 179 (4th Cir. 2011) (officer entitled to qualified immunity for arresting plaintiff under Virginia statute prohibiting profanity after plaintiff called male police officer a "bitch" because the law was not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws")

Turner v. State, 274 Ga.App. 731, 734, 618 S.E.2d 607, 609 (2005) (justifying detention of passing motorist who yelled "you bastards" at officer engaged in traffic stop given officer's "good faith" albeit mistaken belief the cursing amounted to "disorderly conduct")

Knowles v. State, 340 Ga.App. 274, 283, 797 S.E.2d 197, 204 (2017) (motorist who "raised his voice and cursed at a police officer during a traffic stop" could not be charged with disorderly conduct)

Brooks v. NC Department of Correction, 984 F.Supp. 940, 955 (E.D.N.C. 1997) (the notion that "citizens may not be punished for vulgar or offensive speech unless they use words that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace'" has been extended by the Supreme Court "to speech directed at police officers, which must be more than 'obscene or opprobrious,' and which must do more than 'interrupt ... any policeman in the execution of his duty' to be constitutionally sanctionable")

Houston v. Hill, 482 U.S. 451, 462-63 (1987) ("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.")

Thurairajah v. City of Fort Smith, 925 F.3d 979, 982 (8th Cir. 2019) (state trooper violated motorist's "clearly established constitutional rights" in stopping and arresting motorist for disorderly conduct after motorist shouted "fuck you" while driving past trooper on traffic stop)

Payne v. Pauley, 337 F.3d 767, 776 (7th Cir. 2003) ("In fact, the First Amendment protects even profanity-laden speech directed at police officers.")

Greene v. Barber, 310 F.3d 889, 897 (6th Cir. 2002) ("an arrest undertaken at least in part as retaliation for a constitutionally protected insult to the officer's dignity would be impermissible unless it could be shown that the officer would have made the arrest even in the absence of any retaliatory motive")

State v. E.J.J., 183 Wn.2d 497, 502, 354 P.3d 815, 817 (2015) (overturning conviction for cursing at officers because "a conviction for obstruction may not be based solely on an individual's speech because the speech itself is constitutionally protected")

Cruise-Gulyas v. Minard, 918 F.3d 494, 497 (6th Cir. 2019) ("Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment.")

Swartz v. Insogna, 704 F.3d 105, 110-11 (2nd Cir. 2013) ("This ancient gesture of insult is not the basis for a *reasonable* suspicion of a traffic violation or impending criminal activity. . . . Indeed, such a gesture alone cannot establish probable cause to believe a disorderly conduct violation has occurred.")

Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990) (flipping off the police is protected speech under the First Amendment)

Buffkins v. City of Omaha, 922 F.2d 465, 473 (8th Cir. 1991) (invalidating disorderly conduct arrest for telling police "have a nice day, asshole")

United States v. Poocha, 259 F.3d 1077, 1082 (9th Cir. 2001) (protester could be charged with obstruction for failure to disperse when ordered to do so but could not be charged with disorderly conduct for responding to order with "fuck you")

McCurdy v. Montgomery County, 240 F.3d 512, 520 (6th Cir. 2001) (reversing grant of qualified immunity to officer arresting plaintiff for public intoxication after plaintiff cussed at officer since it was "well-established" the plaintiff "had a constitutional right to challenge verbally" the officer's decision to approach him)

Mackinney v. Nielsen, 69 F.3d 1002, 1007 (9th Cir. 1995) ("Even when crass and inarticulate, verbal challenges to the police are protected. Officer Nielsen should have known that *Mackinney's* verbal protests could not support an arrest under [state law]. It was unreasonable of him to think otherwise.")

b. <u>*Caution*</u>: Avoid "retaliatory" arrests even where probable cause exists

Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019) (a plaintiff pursuing a First Amendment retaliatory arrest claim must generally prove the absence of probable cause for the arrest unless the plaintiff presents "objective evidence" that he was arrested in retaliation for protected speech)

Ford v. City of Yakima, 706 F.3d 1188, 1196 (9th Cir. 2013) (finding sufficient evidence of retaliatory arrest where officer told plaintiff he would likely have received just a citation or a warning for his traffic violation had he not cussed at officer and "your mouth and your attitude talked you into jail, yes it did")

2. The ten word question every officer must anticipate

3. Filming police activity from a safe location is permissible *out in public*

U.S. v. Grace, 461 U.S. 171, 179 (1983) ("Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities [protected by the First Amendment] and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.")

California Penal Code § 148(g): "The fact that a person takes a photograph or makes an audio or video recording of a public officer or peace officer, while the officer is in a public place or the person taking the photograph or making the recording is in a place he or she has the right to be, does not constitute . . . reasonable suspicion to detain the person or probable cause to arrest the person."

Askins v. U.S. Dept. of Homeland Security, 899 F.3d 1035, 1047 n.3 (9th Cir. 2018) (expressing doubt as to whether Customs/Border Patrol officers legally arrested man under 41 C.F.R. § 102-74.420(a) for filming searches of persons at Port of Entry without permission and finding it "puzzl[ing] as to how these guidelines apply to members of the public, whether media or not, who take photographs outside of port of entry facilities from streets and sidewalks accessible to the general public, whether those streets and sidewalks are on or off the port of entry")

Fields v. City of Philadelphia, 862 F.3d 353, 356 (3rd Cir. 2017) ("Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.")

Turner v. Driver, 848 F.3d 678, 690 (5th Cir. 2017) ("We agree with every circuit that has ruled on this question: Each has concluded that the First Amendment protects the right to record the police.")

Crawford v. Geiger, 996 F.Supp.2d 603, 615 (N.D.Ohio 2014) ("there is a First Amendment right to openly film police officers carrying out their duties")

Crago v. Leonard, K No. 0877, 2014 WL 3849954 at *5 (E.D.Cal. 2014) ("Plaintiff alleges that she was merely recording the search of her residence and that defendant stopped her by taking away her laptop and deleting her recording. . . . If true, this violated plaintiff's First Amendment right to film police officers in the course of carrying out their official duties.")

ACLU v. Alvarez, 679 F.3d 583, 599-600 (7th Cir. 2012) (holding that an Illinois eavesdropping statute did not protect police officers from a civilian openly recording them with a cell phone)

Martin v. Gross, ___ F.Supp.3d ___ (D.Mass. 2019) (holding that state eavesdropping statute is "unconstitutional insofar as it prohibits the secret audio recording of government officials, including law enforcement officers, performing their duties in public spaces")

Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011) (holding there is an "unambiguous[ ]" constitutionally protected right to videotape police carrying out their duties in public)

Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing that citizens have a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct")

Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing plaintiff's videotaping of police officers as a "First Amendment right to film matters of public interest")

Connell v. Town of Hudson, 733 F. Supp. 465, 471-72 (D.N.H. 1990) (denying police officer's request for qualified immunity and upholding the First Amendment right of a news reporter to photograph an accident scene as long as he does not interfere with emergency workers)

McCormick v. City of Lawrence, 271 F. Supp. 2d 1292, 1302-03 (D.Kan. 2003) (police officers were not entitled to qualified immunity for arresting civil rights activists who videotaped them from a nearby sidewalk during a traffic stop while verbally criticizing their conduct because "[c]riticism of public officials is protected by the First Amendment")

Robinson v. Fetterman, 378 F.Supp.2d 534, 541 (E.D.Pa. 2005) (awarding $35,000 in compensatory damages and $6,000 in punitive damages to a citizen whose First Amendment rights were violated when he was arrested and charged with "harassment" for videotaping state troopers conducting truck safety inspections)

Szymecki v. Houck, 353 Fed.Appx. 852 at *1 (4th Cir. 2009) (unpublished *per curiam* opinion that concludes, without discussing facts or law, that the plaintiff's "First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct")

J.A. v. Miranda, 2017 WL 3840026 at *8 (D.Md. 2017) (allowing municipal liability claim to proceed against county over officers allegedly preventing plaintiff from filming brother's arrest even though individual officers entitled to qualified immunity)

Jones v. City of Minneapolis, 2009 WL 2998537 at *5 (D.Minn. 2009) (concluding that the First Amendment protects against the police charging man with petty crimes for exercising his constitutionally protected right to photograph the police in public and complain about their conduct)

a. Filming *inside* government buildings

First Def. Legal Aid v. City of Chicago, 319 F.3d 967, 968 (7th Cir. 2003) ("the interior of a police station is not a public forum [as the] Constitution does not create . . . a right of access to the inside of governmental buildings")

Huminski v. Corsones, 396 F.3d 53, 90 (2nd Cir. 2005) ("We are particularly reluctant to conclude that government property is a public forum 'where the principal function of the property would be disrupted by expressive activity.'")

4. Any right to record the police must yield where necessary to officer safety

Colten v. Kentucky, 407 U.S. 104, 109 (1972) ("refusing to move on after being directed to do so [by a police officer is] not, without more, protected by the First Amendment")

Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) ("The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons.)

ACLU v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012) ("While an officer surely cannot issue a 'move on' order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs. . . . Nothing we have said here immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety.") (emphasis added)

a. RDO arrests

State v. Summrell, 282 N.C. 157, 173, 192 S.E.2d 569, 578 (1972) (recognizing that a warrant charging defendant with resist, delay or obstruct could have also included as a violation of § 14-223 defendant's interference with the police officer's questioning of a witness, "a necessary part of [a] motor vehicle accident investigation")

State v. Burton, 108 N.C.App. 219, 226, 423 S.E.2d 484, 488 (1992) (finding probable cause for RDO arrest where defendant prevented officer from performing his duties during a traffic stop by speaking loudly and refusing to return to his vehicle after three requests)

Culver v. Armstrong, 832 F.3d 1213, 1219 (10th Cir. 2016) (upholding RDO arrest of person who appeared "from the shadows" of "a dark side street in the middle of the night" and began repeatedly questioning officer who was detaining a pursuit suspect and refused to "keep walking" when told to do so)

5. Not everyone is subject to a weapons patdown

a. Cannot perform *Terry* frisk by rote recitation of "officer safety"

Thomas v. Dillard, 818 F.3d 864, 878 (9th Cir. 2016) ("officers may not rely solely on the domestic violence nature of a call to establish reasonable suspicion for a frisk")

b. However, "armed" may satisfy "dangerous" requirement

U.S. v. Robinson, 846 F.3d 694, 700 (4th Cir. 2017) (*en banc*) (allowing *Terry* frisk whenever "the officer reasonably suspect[s] that the person is armed *and therefore dangerous*") (emphasis in original)

6. Lawful seizure of camera or cell phone that has recorded illegal activity

United States v. Place, 462 U.S. 696, 701 (1983) ("Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.")

Belsito Communications, Inc. v. Decker, 845 F.3d 13, 27-28 (1st Cir. 2016) (state trooper entitled to qualified immunity for relying on "exigent circumstances" to seize camera of photographer inside accident scene even though photographer not arrested until following day)

Luong v. City and County of San Francisco Police Dept., 630 Fed.Appx. 691, 693 (9th Cir. 2015) (affirming summary judgment to police for seizure of video

camera that recorded arrest of stabbing suspect given its value as "potential evidence")

U.S. v. Brown, 701 F.3d 120, 126 (4th Cir. 2012) ("When 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search [or seizure] is objectively reasonable under the Fourth Amendment,' police officers are entitled to bypass the warrant requirement. [citation]. The types of exigent circumstances that may justify a warrantless seizure include, *inter alia*, the imminent destruction of evidence.")

Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3rd Cir. 2010) ("we conclude there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera . . . would violate the First Amendment")

Compare, Rice v. Gercar, 77 F.3d 483 (6th Cir. 1996) (unpublished) (police not entitled to qualified immunity for seizing camera used to film force and arrest, finding the plaintiff's "hostile behavior toward the officers" could not by itself lead to the conclusion he "might erase the videotape if it were not seized immediately")

7. Caution: Federal Privacy Protection Act (PPA), 42 U.S.C. § 2000aa-7(a) and 7(b)

Garcia v. Montgomery County, Maryland, 145 F.Supp.3d 492, 498 (D.Md. 2015) (alleged seizure by police of video card from plaintiff's camera filming arrest stated a claim under the PPA since it was "reasonable to believe" plaintiff intended to make the video public)

Morse v. Regents of University of California, Berkeley, 821 F.Supp.2d 1112, 1121 (N.D.Cal. 2011) (supervisory officers could be held personally liable for failure to train subordinates that PPA prohibited seizing camera from journalist after he filmed interaction between campus police and protesters)

Pataky v. City of Phoenix, 2009 WL 4755398 at *9 (D.Ariz. 2009) ("The PPA's protections do not apply when, *inter alia*, the person possessing the materials is a criminal suspect—rather than an innocent third party—and the police have probable cause.")