POLICING THE PRESS: RETALIATORY ARRESTS OF NEWSGATHERERS AFTER *NIEVES V. BARTLETT*

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Dating back to the Founding, theorists have touted the checking value of the press in exposing government corruption and abuse. Pretextual arrests targeting professional and citizen journalists raise significant First Amendment concerns. Even a brief, "catch-and-release" detainment may altogether prevent a newsgatherer from capturing images or disseminating timely news updates from an event. In this sense, arrests of newsgatherers pose similar concerns as prior restraints—they allow authorities to arbitrarily wield broad censorial power to suppress information before it reaches the marketplace of ideas.

A recent Supreme Court decision could make it more difficult for citizens exercising their First Amendment rights, including newsgatherers, to respond to discriminatory arrests. In Nieves v. Bartlett*, the Court held that, except for certain, atypical arrests, the existence of probable cause will defeat a First Amendment retaliatory arrest civil damages claim brought under 42 U.S.C. § 1983. The ruling threatens the ability of journalists to bring viable civil claims to help deter pretextual arrests, since probable cause for some minor offense will often be easy to articulate. The decision also undermines the practical value of recent circuit court decisions recognizing a First Amendment right of citizens to film police and government activities. This Note seeks to chart a path forward from* Nieves *by proposing judicial and legislative solutions to vindicate the rights of newsgatherers who are arrested while attempting to hold police accountable.*

INTRODUCTION 2276
I. THE FIRST AMENDMENT, NEWSGATHERING, AND THE THREAT OF RETALIATORY ARRESTS 2281
A. The Uncertain Scope of Newsgathering Rights 2282
B. The Lonely Videographer: Judicial Recognition of the Right to Film Police 2284
C. Retaliatory Arrests as Prior Restraints: The Special Harm of Arrests of Newsgatherers 2287

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1. The Case for Retaliatory Arrests as Prior Restraints 2287
2. The Role of Prior Restraints in Fourth Amendment Cases 2290
II. *NIEVES V. BARTLETT*: FOURTH AMENDMENT PRINCIPLES OUTWEIGH FIRST AMENDMENT SPEECH PROTECTIVENESS IN RETALIATORY ARRESTS 2291
A. The Problem of Causality in Retaliatory Arrests..... 2292
1. *Mt. Healthy*'s Burden-Shifting Approach 2293
2. *Hartman*'s No-Probable-Cause Rule..... 2294
B. *Nieves v. Bartlett*: A No-Probable-Cause Rule for Retaliatory Arrests—In Most Cases 2296
1. Factual Background 2296
2. The Majority Opinion 2298
3. Implications for Newsgatherers..... 2299
C. Lingering Questions from *Nieves*..... 2300
1. How Will the "Similarly Situated" Requirement Be Applied? 2300
2. What Types of "Objective" Evidence Can Establish an Atypical Arrest? 2301
3. The Jaywalking Example: Should Minor Offenses Trigger the Atypical Arrest Exception?..... 2301
III. THE PATH FORWARD FROM *NIEVES*: ADDRESSING PRETEXTUAL ARRESTS OF NEWSGATHERERS..... 2302
A. A Commonsense Approach to *Nieves*'s Atypical Arrest Exception 2303
1. A Flexible Similarly Situated Test 2303
a. *Lund v. City of Rockford*: "Common sense must prevail" 2306
2. Highly Discretionary Misdemeanors Should Presumptively Trigger the *Mt. Healthy* Test..... 2308
3. A No-Probable-Cause Exception for When Speech Forms the Basis for Probable Cause..... 2310
B. A "Newsgathering Exception" for Arrests that Function as Prior Restraints..... 2311
C. Legislative Solutions Targeting State Suppression of Newsgathering 2315
CONCLUSION 2317

INTRODUCTION

In the video, a line of police officers advances left-to-right across the screen. Behind the camera is Tara O'Neill, a newspaper reporter in

Bridgeport, Connecticut.[1] For two years, O'Neill had covered the fallout from the fatal police shooting of fifteen-year-old Jayson Negron.[2] She chronicled the community backlash against the Bridgeport Police Department, including allegations of misconduct.[3] In May 2019, O'Neill covered a protest on the anniversary of Negron's death.[4] When police attempted to disperse a group of demonstrators, O'Neill started to film on her phone.[5] In the video posted to Twitter, a police officer orders O'Neill to move as the camera pans toward the ground.[6] O'Neill says she is standing on a public sidewalk and identifies herself as a reporter.[7] The video cuts out. In the wake of this confrontation, O'Neill was arrested and taken to the Bridgeport police station; she was released without charges that night.[8] One of her editors speculated the arrest was "retaliation and intimidation" for her coverage.[9]

That journalists like O'Neill might come into conflict with police should hardly be surprising. Since the Founding, prominent theorists—including the First Amendment's author, James Madison—have touted the

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1. Tara O'Neill (@Tara_ONeill_), Twitter (May 9, 2019, 10:16 PM), https://twitter.com/Tara_ONeill_/status/1126672343437336576 (on file with the *Columbia Law Review*) [hereinafter O'Neill, Arrest Video].

2. See Tara O'Neill, For Bridgeport Reporter, Handcuffs Weren't Supposed to Be Part of the Deal, Conn. Post (May 11, 2019), https://www.ctpost.com/local/ctpost/article/For-Bridgeport-reporter-handcuffs-weren-t-13836844.php [https://perma.cc/U5B8-TSPU] [hereinafter O'Neill, Handcuffs]. Negron was shot four times by police officer James Boulay following a confrontation in which Boulay was allegedly struck by a car, driven by Negron, which had been reported stolen. See Report of the State's Attorney for the Judicial District of Waterbury Concerning the Death of Jayson Negron in the City of Bridgeport on May 9, 2017, Conn. State Div. of Crim. Just., https://portal.ct.gov/DCJ/Whats-News/Reports-on-the-Use-of-Force-by-Peace-Officers/2017—May—Jayson-Negron—Bridgeport#_ftnref1 [https://perma.cc/2FBA-ZUPP] [hereinafter Negron Report] (last visited Sept. 2, 2020). Bridgeport police were criticized for their conduct following the shooting; in particular, police left Negron's body on the pavement for nearly six hours and did not seek medical attention for him, even though a bystander video showed a handcuffed Negron arguably still alive. See Jamiles Lartey, Family of Connecticut Teenager Shot Dead by Police: We Have Been Lied To, Guardian (May 15, 2017), https://www.theguardian.com/us-news/2017/may/15/connecticut-teenager-shot-dead-police [https://perma.cc/863X-424J]. State attorneys ultimately concluded Boulay's use of deadly force was justified. See Negron Report, supra.

3. See Tara O'Neill, Rally to Be Held in Hartford for Jayson Negron, Conn. Post (Nov. 27, 2017), https://www.ctpost.com/local/article/Rally-to-be-held-in-Hartford-for-Jayson-Negron-12383158.php [https://perma.cc/MM7C-HM7X].

4. O'Neill, Handcuffs, supra note 2.

5. Id.

6. O'Neill, Arrest Video, supra note 1.

7. Id.

8. O'Neill, Handcuffs, supra note 2.

9. Christine Dempsey, *Connecticut Post* Reporter Detained While Covering Bridgeport Protest, Hartford Courant (May 10, 2019), https://www.courant.com/breaking-news/hc-br-bridgeport-reporter-detained-covering-protest-20190510-dyjltt4nwzc5ldv2huzflr6u3e-story.html (on file with the *Columbia Law Review*).

"checking value" of the press in exposing government abuse.[10] Predictably, newsgatherers sometimes become targets for state retaliation—a fact underscored by the widespread harassment of journalists at protests following the killing of George Floyd by Minneapolis police in May 2020.[11] Since 2017, more than 150 journalists have been arrested in the United States.[12] This statistic does not account for arrests of ordinary citizens, including in overpoliced communities, who document police activity using cell phone cameras.[13] Though the Fourth Amendment requires that police have probable cause to make an arrest,[14] this threshold is usually easy to meet.[15] And while professional and citizen journalists who are arrested often do not face charges, even "catch-and-release" detainments like O'Neill's may prevent them from covering an event. In this sense, strategic or pretextual arrests of newsgatherers can function like prior restraints—a special class of restrictions that prevent the publication of speech on the basis of its content. Like prior restraints, arrests of journalists allow

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10. See Vincent Blasi, The Checking Value in First Amendment Theory, 2 Am. Bar Found. Rsch. J. 521, 527 (1977) [hereinafter Blasi, Checking Value] ("[T]he most influential free-speech theorists of the eighteenth century—those who drafted the First Amendment and their mentors—placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials."); see also James Madison, The Report of 1800 (1800), reprinted in 17 The Papers of James Madison 303, 342 (David B. Mattern, J. C. A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991) (arguing for a free press because the character of public officials "can only be determined by a free examination thereof, and a free communication among the people thereon").

11. See Marc Tracy & Rachel Abrams, Police Target Journalists as Trump Blames 'Lamestream Media' for Protests, N.Y. Times (June 1, 2020), https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html (on file with the *Columbia Law Review*) (last updated June 12, 2020); see also U.S. Press Freedom Tracker (@uspresstracker), Twitter (Aug. 20, 2020, 1:01 PM), https://twitter.com/uspresstracker/status/1296492518704664580 (on file with the *Columbia Law Review*) [hereinafter U.S. Press Freedom Tracker, 2020 Protest Incidents] (tracking more than 700 incidents of press harassment at protests following George Floyd's killing).

12. Arrest/Criminal Charge, U.S. Press Freedom Tracker, https://pressfreedomtracker.us/arrest-criminal-charge [https://perma.cc/7RQD-TSRM] [hereinafter U.S. Press Freedom Tracker, Arrests] (last visited Sept. 2, 2020) (chronicling fifty-eight arrests of journalists between 2017 and 2019); U.S. Press Freedom Tracker, 2020 Protest Incidents, supra note 11 (noting at least one hundred reported arrests of journalists in the two-and-a-half-months following George Floyd's death).

13. Cf. Jocelyn Simonson, Copwatching, 104 Calif. L. Rev. 391, 394 (2016) (describing the tactic of "copwatching," whereby community members utilize cell phone filming and other techniques to "observe, record, and contest police practices and constitutional norms").

14. U.S. Const. amend. IV ("The right of the people . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").

15. See Cynthia Lee, Probable Cause with Teeth, 88 Geo. Wash. L. Rev. 269, 280 (2020) (discussing the Supreme Court's "very mushy" definition of probable cause and observing that the Court has ruled for the government "on almost every single question involving probable cause").

authorities to arbitrarily wield broad censorial power to suppress news *before* it reaches the marketplace of ideas.[16]

A recent Supreme Court decision could make it more difficult for citizens exercising their First Amendment rights, including newsgatherers, to respond to pretextual arrests. In *Nieves v. Bartlett*, the Court held that, in most instances, the existence of probable cause for a crime will defeat as a matter of law a plaintiff's First Amendment retaliatory arrest claim brought under 42 U.S.C. § 1983.[17] The Court created a "narrow" exception for cases involving atypical arrests—those in which officers "have probable cause to make arrests, but typically exercise their discretion not to do so."[18] *Nieves* did not involve journalists or newsgathering.[19] Nonetheless, the ruling impairs the ability of professional and citizen reporters to bring federal civil claims that may help deter state suppression.[20] The decision also threatens to undermine recent circuit court decisions recognizing a right of citizens to film police and government activities in public.[21] Such a right may mean little if probable cause for any of an ever-expanding litany of criminal statutes will preclude a civil damages claim by those arrested while reporting on police activity.[22]

This Note charts a path forward from *Nieves* to vindicate the rights of professional journalists and citizen video recorders subjected to suspected pretextual arrests.[23] Part I explores the First Amendment's limited protec-

16. See infra section I.C.

17. 139 S. Ct. 1715, 1724–25, 1727 (2019).

18. Id. at 1727.

19. See infra section II.B.1 (describing *Nieves*'s factual background).

20. See David Greene & Karen Gullo, When Police Misuse Their Power to Control News Coverage, They Shouldn't Be Allowed to Use Probable Cause as a Shield Against Claims of First Amendment Violations, Elec. Frontier Found. (Oct. 10, 2018), https://www.eff.org/deeplinks/2018/10/when-police-misuse-their-power-control-news-coverage-they-shouldnt-be-allowed-use [https://perma.cc/W8A4-D2NJ].

21. See Tim Cushing, Supreme Court OKs Retaliatory Arrests for Engaging in Protected Speech, Techdirt (May 30, 2019), https://www.techdirt.com/articles/20190529/19161642299/supreme-court-oks-retaliatory-arrests-engaging-protected-speech.shtml [https://perma.cc/JW53-53SN] ("Whatever momentum has been gained by legal decisions supporting the right of citizens to film police officers has just been undercut.").

22. See Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 726 (2005) (arguing that the "all-encompassing nature" of today's criminal codes "appears little different from a single statute declaring that law enforcement may pull over any car or stop any pedestrian at any time for any reason or, for that matter, no reason at all"); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 509 (2001) ("The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments.").

23. Of course, arrests are not the only tactic police may use to suppress newsgathering activity. At protests following the killing of George Floyd, journalists also described systematic efforts by police and federal authorities to target reporters using nonlethal munitions, such as rubber bullets and pepper spray. See, e.g., Jon Allsop, The Police Abuse the Press. Again., Colum. Journalism Rev.: Media Today (June 1, 2020), https://www.cjr.org/the_media_

tions for newsgathering, as well as the recent judicial recognition of the right to film police. Part I also examines the special harms of retaliatory arrests for newsgatherers and argues that such arrests function like prior restraints when undertaken to prevent or delay the spread of news. Part II analyzes and critiques *Nieves*. It describes the challenges of proving improper animus in First Amendment retaliatory arrest cases and examines how those challenges informed the Court's adoption of a no-probable-cause threshold. Finally, Part III proposes judicial and legislative solutions to better balance the First and Fourth Amendment interests at play in retaliatory arrest cases. In particular, it advances a commonsense reading of *Nieves*'s atypical arrest exception that would preserve the ability of courts to adjudicate certain speech-related retaliatory arrest claims where probable cause is present. It also argues that *Nieves*'s general no-probable-cause rule should not apply to retaliatory arrests of journalists and newsgatherers that act as prior restraints.

Nieves has troublesome implications for all citizens, including protestors, who attempt to exercise First Amendment rights under threat of police suppression.[24] The unique institutional role of newsgatherers,[25] however, makes them an especially salient group for examining *Nieves*'s potentially broad consequences. Professional and citizen journalists who fulfill the First Amendment's "checking value"[26] arguably face a higher risk of government retaliation, since it may be in the state's interest to silence

today/the-police-abuses-the-press-again.php [https://perma.cc/P4NE-SM56] (collecting incidents). *Nieves* dealt with only retaliatory arrests, however, and this Note restricts its analysis accordingly.

24. See, e.g., Anne Branigin, The Supreme Court's Latest Ruling Makes It Easier for Cops to Arrest Black Lives Matter Protesters, Root (June 3, 2019), https://www.theroot.com/the-supreme-courts-latest-ruling-makes-it-easier-for-co-1835207570 (on file with the *Columbia Law Review*).

25. This Note uses "newsgatherers" as a catchall term encompassing professional journalists; citizens who gather news—usually via cell phone videos—for possible dissemination; and legal observers who monitor police and government activity, usually on behalf of legal organizations. See, e.g., NLG Legal Observer® Program, Nat'l Laws. Guild, https://www.nlg.org/legalobservers [https://perma.cc/86MK-PT42] (last visited Sept. 2, 2020). Admittedly, this definition is imprecise. When does a previously disengaged bystander who begins filming police on their phone become a "newsgatherer"? The question of who should legally be considered a "journalist" has been a frequent topic of debate. Compare Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege, 91 Minn. L. Rev. 515, 520 (2007) (arguing that a testimonial privilege in trial proceedings "should apply to anyone disseminating information to the public"), with Sonja R. West, Awakening the Press Clause, 58 UCLA L. Rev. 1025, 1057 (2011) [hereinafter West, Awakening the Press Clause] (concluding that a more narrow class of professional journalists should receive special constitutional privileges). This Note adopts a broad definition of newsgatherers in recognition of the increasingly indispensable role that nontraditional "reporters" play in shaping public discourse. See Adam Cohen, The Media that Needs Citizens: The First Amendment and the Fifth Estate, 85 S. Cal. L. Rev. 1, 15–18 (2011) (describing various types of nontraditional newsgatherers).

26. See Blasi, Checking Value, supra note 10, at 528 ("[F]ree expression is valuable in part because of the function it performs in checking the abuse of official power . . . .").

criticism.[27] Moreover, arrests of newsgatherers not only deprive individuals of their liberty but also infringe on the public's interest in learning about the conduct of police and public officials.[28] Thus, while *retaliatory* arrests purportedly punish past acts, detainments of newsgatherers may actually serve as a pretext to thwart *future* speech—the dissemination of news.[29] Courts applying *Nieves* must have the flexibility to guard against state information-suppression efforts long considered anathema to First Amendment law.[30]

I. THE FIRST AMENDMENT, NEWSGATHERING, AND THE THREAT OF RETALIATORY ARRESTS

The First Amendment prohibits government officials from arresting citizens in retaliation for protected speech.[31] Citizens subjected to retaliatory arrests can bring a civil damages claim through 42 U.S.C. § 1983, which creates a cause of action against state or municipal officials who deprive a citizen of "any rights, privileges, or immunities secured by the Constitution and laws."[32] To establish a prima facie claim of First Amendment retaliation, a plaintiff must prove three elements: first, that they were engaged in constitutionally protected First Amendment activity; second, that the defendant caused an injury that would chill an ordinary person from continuing to engage in that activity; and third, that the defendant's actions that caused the injury were "substantially motivated" by the plaintiff's constitutionally protected conduct.[33] Defendants in a § 1983 suit may also assert a defense of qualified immunity, which insulates government officials from civil damages liability unless they violate "clearly

27. See Leigh v. Salazar, 677 F.3d 892, 900 (9th Cir. 2012) ("When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.").

28. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (recognizing a First Amendment right of the public to receive information).

29. Cf. Timothy B. Dyk, Newsgathering, Press Access, and the First Amendment, 44 Stan. L. Rev. 827, 949 (1992) ("[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.").

30. See First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) (noting that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw").

31. Hartman v. Moore, 547 U.S. 250, 256 (2006).

32. 42 U.S.C. § 1983 (2018). Similar claims may also be brought against federal officials, per the Supreme Court's decision in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971).

33. Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002). While circuits have phrased the test differently, the version set forth in *Keenan* is generally considered closest to the 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).

established statutory or constitutional rights of which a reasonable person would have known."[34]

This Part focuses on the first element of the prima facie test stated above by exploring the First Amendment's protections for newsgathering.[35] Section I.A summarizes the limited scope of constitutional safeguards for journalistic newsgathering. Section I.B details the recent recognition in several circuit courts of a constitutional right of citizens to film police activity. Finally, section I.C describes the special harms posed to newsgathering by even brief, "catch-and-release" detainments. This section also advances the argument that, under certain circumstances, pretextual arrests of newsgatherers may be considered prior restraints.

A. *The Uncertain Scope of Newsgathering Rights*

The First Amendment affords near-total immunity from state interference with the *publication* of news; however, when it comes to protections for antecedent newsgathering activities, the Supreme Court has "taken a hands-off approach."[36] While the Justices have stated that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[37] the Court has never defined the scope of newsgathering rights.[38] Nor, despite the Press Clause,[39] has the Court granted journalists constitutional rights not enjoyed by others.[40] In *Branzburg v. Hayes*, the Justices declined to recognize a testimonial privilege for journalists,[41] though the Court allowed that "[o]fficial harassment of the press undertaken not for

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34. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

35. The "injury" element for First Amendment retaliatory arrest claims is generally not challenged—an arrest almost certainly chills one's speech. See Rutan v. Republican Party of Ill., 497 U.S. 62, 76 n.8 (1990) (noting that an act "as trivial as failing to hold a birthday party for a public employee" may support a retaliation claim (internal quotation marks omitted) (quoting Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989)). The third prong of the prima facie test, dealing with the causal factors that motivate an arrest, is addressed in Part II.

36. Sonja R. West, Press Exceptionalism, 127 Harv. L. Rev. 2434, 2436 (2014); see also Lee C. Bollinger, Uninhibited, Robust, and Wide-Open: A Free Press for a New Century 53–54 (2010) ("The extraordinary protection of the free press in the first pillar is what the government has to give up. The lack of a right of newsgathering is what the press gives up in return.").

37. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

38. See ACLU of Ill. v. Alvarez, 679 F.3d 583, 598 (7th Cir. 2012) (observing that the "Supreme Court has not elaborated much on its abstract observation" that the First Amendment protects newsgathering).

39. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, *or of the press* . . . ." (emphasis added)).

40. See Scott Gant, We're All Journalists Now 58 (2007) ("[T]he constitutional protections most important to press freedom are based on the Speech Clause of the First Amendment and apply to all speakers."); West, Awakening the Press Clause, supra note 25, at 1027–28 (noting that the Supreme Court has effectively "dismissed the clause as a constitutional redundancy").

41. *Branzburg*, 408 U.S. at 692.

purposes of law enforcement" would violate the First Amendment.[42] The Court has likewise declined to recognize a right of journalists to access federal prisons[43] or to be free from government searches.[44] Perhaps most important to the retaliatory arrest context, the Court has stated that journalists have no protection from generally applicable laws violated while newsgathering.[45] Such laws "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[46]

Thus, two principles guide the criminal liability of those who violate laws while newsgathering. First, while an "undoubted right to gather news" exists, this right may only be exercised "by means within the law."[47] Second, whatever press rights exist under the First Amendment (including for newsgathering) apply to the "lonely pamphleteer" as much as the professional journalist.[48] Despite O'Neill's protestations to police that she was a journalist, her profession or newsgathering conduct had no bearing on whether it was legally permissible to arrest her.[49]

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42. Id. at 707–08; see also id. at 709–10 (Powell, J., concurring) (reaffirming the majority's position that "no harassment of newsmen will be tolerated").

43. Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974). But see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (recognizing a limited right of access to public trials and proceedings).

44. Zurcher v. Stanford Daily, 436 U.S. 547, 565–66 (1978).

45. Cohen v. Cowles Media Co., 501 U.S. 663, 669–71 (1991) (holding the First Amendment does not preclude a promissory estoppel claim against a newspaper that breached a promise of confidentiality); see also United States v. Matthews, 209 F.3d 338, 344–46 (4th Cir. 2000) (rejecting a First Amendment defense by a journalist to child pornography charges); Food Lion, Inc. v. Cap. Cities/ABC, Inc., 194 F.3d 505, 521 (4th Cir. 1999) (holding that undercover journalists who lied on employment applications may be held liable for torts, including trespass and breach of loyalty); West, Awakening the Press Clause, supra note 25, at 1029 ("[I]f a reporter commits a minor tort such as a technical trespass, a minor deception, or a breach of loyalty[]—all common tools in undercover reporting—no judicial consideration is given to the fact that she was engaged in newsgathering." (footnotes omitted)).

46. *Cohen*, 501 U.S. at 669.

47. Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (internal quotation marks omitted) (quoting *Branzburg*, 408 U.S. at 681–82).

48. *Branzburg*, 408 U.S. at 704; see also Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011) (noting the right to gather news does belong "solely to . . . the news media").

49. See supra note 7 and accompanying text. Some scholars have defended courts' denial of special protections for newsgathering. See, e.g., Randall P. Bezanson, Means and Ends and *Food Lion*: The Tension Between Exemption and Independence in Newsgathering by the Press, 47 Emory L.J. 895, 897 (1998) (arguing that press freedom "consists of independence in publication judgments, not privilege to engage in conduct"). In an age where the line between "journalist" and citizen has been blurred, it may be unrealistic to ask police to treat professional press members differently. See Martin Kaste, Police Struggle to Balance Public Safety with Free Speech During Protests, NPR (Aug. 26, 2017), https://www.npr.org/2017/08/26/546167516/police-struggle-to-balance-public-safety-with-free-speech-during-protests [https://perma.cc/D72F-K8MG] (describing the difficulties police face when deciding how to respond to protests).

The pedestrian constitutional status of those who fulfill the press's "essential role" to "bare the secrets of government and inform the people"[50] has been reinforced in recent years.[51] Mass arrests of journalists have occurred in connection with protests in Ferguson, Missouri;[52] Occupy Wall Street;[53] and President Trump's inauguration.[54] More recently, a watchdog group reported that more than one hundred journalists were arrested at nationwide protests following the police killing of George Floyd.[55] These arrests typically rely on minor charges, such as disorderly conduct, that are easy to allege and that newsgatherers may have a difficult time avoiding if they are to adequately report on possible government abuses.[56] If the bar to § 1983 claims is prohibitively high, newsgatherers may be left without recourse to deter officials who use arrests to suppress news and information.[57]

B. *The Lonely Videographer: Judicial Recognition of the Right to Film Police*

At least one newsgathering right has increasingly been recognized by courts: the right to film police activity. While the Supreme Court has yet to rule on the issue, circuit courts have unanimously held that open video recording of police and government officials in public constitutes protected First Amendment activity, subject to reasonable time, manner, and

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50. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

51. See U.S. Press Freedom Tracker, Arrests, supra note 12.

52. See PEN Am., Press Freedom Under Fire in Ferguson 9 (2014), https://pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf [https://perma.cc/JE2W-TU7M] [hereinafter PEN Am., Ferguson Report].

53. See Brian Stelter, News Organizations Complain About Treatment During Protests, N.Y. Times: Media Decoder (Nov. 21, 2011), https://mediadecoder.blogs.nytimes.com/2011/11/21/news-organizations-complain-about-treatment-during-protests (on file with the *Columbia Law Review*).

54. See Jonah Engel Bromwich, Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom, N.Y. Times (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/business/media/journalists-arrested-trump-inauguration.html (on file with the *Columbia Law Review*).

55. U.S. Press Freedom Tracker, 2020 Protest Incidents, supra note 11. In one dramatic incident, CNN reporter Omar Jimenez was arrested while broadcasting live. Grace Segers, Minneapolis Police Arrest CNN Crew on Live Television, CBS News (May 29, 2020), https://www.cbsnews.com/news/cnn-crew-omar-jimenez-arrested-live-television-minnesota-police [https://perma.cc/9JM9-3NS2]. The rash of attacks on the press earned international condemnation, with one observer calling them "shocking" and another noting that the harassment created a "climate of impunity." Megan Specia, In Turnabout, Global Leaders Urge U.S. to Protect Reporters Amid Unrest, N.Y. Times (June 4, 2020), https://www.nytimes.com/2020/06/04/world/attacks-press-george-floyd.html (on file with the *Columbia Law Review*).

56. See C.R. Div., DOJ, Investigation of the Ferguson Police Department 25 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/UC72-XSD9] [hereinafter DOJ Ferguson Report].

57. This is particularly true for "unfamous" newsgatherers from nontraditional outlets, for whom mistreatment often "goes unremarked upon." Allsop, supra note 23.

place restrictions.[58] The Ninth and Eleventh Circuits were the first to recognize such a right for photographers and videographers.[59] Increasingly, however, courts have been confronted with legal challenges involving *citizen* recordings of police.[60] In the last decade, the First, Third, Fifth, Seventh, and Eleventh Circuits have all ruled that the First Amendment protects ordinary citizens' ability to use cell phones to record public police activity.[61] In effect, the Court's "lonely pamphleteer"[62] has been replaced by a modern analog: the citizen with a cell phone camera.

The ability of citizens to monitor state actors in the performance of their duties serves the checking function of the First Amendment.[63] In recent years, the ubiquity of cell phone cameras has created "constant and costless opportunities to capture images," allowing almost any citizen to hold authorities accountable.[64] The empowerment of nontraditional newsgatherers may also help "fill the gaps" created by the contraction of traditional media organizations—especially local newspapers—over the last twenty years.[65] Indeed, some of the most essential newsgathering acts in recent years have involved citizens filming police brutality.[66]

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58. See Turner v. Driver, 848 F.3d 678, 689–90 (5th Cir. 2017) (collecting cases); Tyler Finn, Note, Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity, 119 Colum. L. Rev. 445, 447 (2019) ("[E]very federal appellate court to address the constitutional question has concluded that the First Amendment protects the right of citizens to document the police.").

59. See 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).

60. See, e.g., Seth F. Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335, 367–68, 394 (2011) ("[O]ne growing source of litigation is the tendency of police officers to arrest photographers on trumped-up charges . . . as a way of preventing the spread of inconvenient truths . . . .").

61. See Toole v. City of Atlanta, 798 F. App'x 381, 387–88 (11th Cir. 2019); Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017); *Turner*, 848 F.3d at 688; ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011). State legislatures have also considered legislation recognizing a right to film police; New York enacted such a law in June 2020. See S. 3253, 243d Leg., Reg. Sess. (N.Y. 2020) (codified at N.Y. Civ. Rights Law § 79-p (McKinney 2020)).

62. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

63. See *Glik*, 655 F.3d at 82–83 (finding that filming the police "not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally"); supra note 10 and accompanying text.

64. Kreimer, supra note 60, at 348; see also Emily Bell, The Unintentional Press, *in* The Free Speech Century 235, 240 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (describing how the proliferation of cell phone cameras and social media platforms have shifted "[b]reaking news, discussion, and opinion . . . away from the former gatekeepers of the press and broadcast media and out onto the social web").

65. Cohen, supra note 25, at 4; see also *Fields*, 862 F.3d at 359–60 (noting that citizen video recording "complements the role of the news media"); Bell, supra note 64, at 240 ("Citizen media have become the bedrock of breaking news.").

66. See, e.g., Audra D.S. Burch & John Eligon, Bystander Videos of George Floyd and Others Are Policing the Police, N.Y. Times (May 26, 2020), https://www.nytimes.com/

A number of courts have recognized the right to film public officials on the grounds that such activities represent protected newsgathering. In *Glik v. Cunniffe*, the First Circuit stated that "[g]athering information about government officials . . . serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"[67] Meanwhile, in *ACLU of Illinois v. Alvarez*, the Seventh Circuit emphasized the inseparability of video newsgathering from publication, since the latter would be "insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected."[68] Meanwhile, the DOJ under President Obama submitted statements of interest in two police recording cases arguing that the First Amendment protects citizens who "gather and disseminate information of public concern, including the conduct of law enforcement officers."[69]

With the exception of the First Circuit in *Glik*, circuits adjudicating cases of first impression on the right to film police have ruled for the defendants on qualified immunity grounds, finding the right was not clearly established.[70] Circuits that have not ruled on the merits of a right to record police—which include the Second, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits—may likewise find that police officers are immune from civil damages liability under § 1983 until such a right has been recognized in that jurisdiction.[71] Nonetheless, the affirmance of a right to record police in these jurisdictions will enhance the ability of future litigants to succeed in their claims, even if initial plaintiffs are thwarted by qualified immunity.[72]

2020/05/26/us/george-floyd-minneapolis-police.html (on file with the *Columbia Law Review*) (last updated May 29, 2020).

67. 655 F.3d at 82 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). The plaintiff in *Glik* was arrested while filming an arrest on the Boston Common. Id. at 79.

68. 679 F.3d 583, 595 (7th Cir. 2012).

69. Statement of Interest of the United States at 5, Sharp v. Balt. Police Dep't, No. CCB–11–2888, 2013 WL 937903 (D. Md. Mar. 1, 2013), 2012 WL 9512053 [hereinafter *Sharp* Statement of Interest of the United States]; see also Statement of Interest of the United States at 6–7, Garcia v. Montgomery County, 145 F. Supp. 3d 492 (D. Md. 2015) (No. TDC-12-3592), https://www.justice.gov/sites/default/files/crt/legacy/2013/03/20/garcia_SOI_3-14-13.pdf [https://perma.cc/5397-H7NT] [hereinafter *Garcia* Statement of Interest of the United States].

70. Finn, supra note 58, at 454–56.

71. For a thorough analysis of courts' approaches to qualified immunity in the context of police filming cases, see id.

72. See Toole v. City of Atlanta, 798 Fed. App'x 381, 388 (11th Cir. 2019) (citing circuit precedent to hold that the right to film police was clearly established).

C. *Retaliatory Arrests as Prior Restraints: The Special Harm of Arrests of Newsgatherers*

Pretextual arrests of newsgatherers function like prior restraints when they prevent the capture and publication of news, images, or videos.[73] Prior restraints, unlike ex post criminal or civil punishments, involve official restrictions of speech that occur *before* publication.[74] They are considered "the most serious and the least tolerable infringement[s]" on the freedom of speech,[75] and their elimination has been called the "chief purpose" of the First Amendment.[76] The Supreme Court has stated that the First Amendment provides "greater protection from prior restraints than from subsequent punishments."[77]

1. *The Case for Retaliatory Arrests as Prior Restraints.* — Traditional prior restraints take two forms: judicial injunctions forbidding speech and administrative licensing systems that require state preclearance of speech.[78] In application, however, the definition of a prior restraint has been less exact. In *Grosjean v. American Press Co.*, the Supreme Court treated a state tax on newspapers as a prior restraint.[79] More recently, the Court in *Citizens United v. FEC* declared that a complex campaign finance scheme imposed "the equivalent" of a prior restraint because "a speaker who wants to avoid threats of criminal liability . . . must ask a governmental agency for prior permission to speak."[80] Similarly, the Fourth Circuit ruled that an organized effort by a sheriff and his deputies to buy all copies of the local newspaper constituted a prior restraint.[81] "What matters," that court wrote, "is that defendants intentionally suppressed the dissemination" of the newspaper, and that they did so "before the critical commentary ever reached the eyes of readers."[82]

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73. See Angela Rulffes, The First Amendment in Times of Crisis: An Analysis of Free Press Issues in Ferguson, Missouri, 68 Syracuse L. Rev. 607, 621–24 (2018) ("The arrest or detention of a journalist who is lawfully exercising his or her First Amendment rights . . . constitutes a prior restraint . . . .").

74. See, e.g., United States v. Quattrone, 402 F.3d 304, 309 (2d Cir. 2005) (citing Alexander v. United States, 509 U.S. 544, 550 (1993)); Thomas I. Emerson, The Doctrine of Prior Restraint, 20 L. & Contemp. Probs. 648, 648 (1955).

75. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); see also N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) ("Any system of prior restraints . . . bear[s] a heavy presumption against its constitutional validity." (internal quotation marks omitted) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))).

76. Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931).

77. *Alexander*, 509 U.S. at 554 (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975)).

78. See id. at 550; Jack M. Balkin, Old-School/New-School Speech Regulation, 127 Harv. L. Rev. 2296, 2314–15 (2014).

79. 297 U.S. 233, 249–51 (1936).

80. 558 U.S. 310, 335–36 (2010).

81. Rossignol v. Voorhaar, 316 F.3d 516, 522 (4th Cir. 2003).

82. Id.

Retaliatory arrests—including brief, "catch-and-release" detainments[83]—likewise do not fit the two classic forms of prior restraint.[84] Like the law enforcement actions described in *Rossignol*, however, arrests of newsgatherers can effectively cut off speech—including images and video of police activity—before it reaches the marketplace of ideas.[85]

Pretextual detainments of newsgatherers also raise normative concerns similar to those that make traditional prior restraints disfavored. Most notably, injunctive and licensing schemes vest large amounts of discretion in unaccountable regulatory agents who are incentivized to restrict speech—which in turn can lead to overbroad censorship decisions.[86] In the arrest context, the phenomenon of overcriminalization has resulted in bloated criminal codes that allow police "immense discretion" to detain citizens "through legal pretexts" that conceal discriminatory enforcement.[87] At protests in particular, it is likely that almost any person present—including a newsgatherer—is "guilty of *some* minor infraction."[88] Thus, while a journalist at a protest may not need to ask "permission" to gather news,[89] they nonetheless rely on a favorable exercise of discretion by police to not arrest or otherwise interfere with the reporting process—even when such interference may serve the state's interest.[90] In short, there is a significant risk—particularly at protests—that police and government

83. See Richard Prince, Ferguson Cops Are Accused of Using the 'Catch and Release' Tactic to Slow Down Journalists, Root (Oct. 15, 2014), https://journalisms.theroot.com/ferguson-cops-are-accused-of-using-the-catch-and-relea-1790885825 (on file with the *Columbia Law Review*) (describing the tactic of briefly detaining journalists to deter and prevent coverage).

84. See Rulffes, supra note 73, at 623 (noting that while arrests of journalists may not be considered prior restraints in a "strict sense," they nonetheless function like prior restraints "as a practical matter").

85. See *Rossignol*, 316 F.3d at 522.

86. See Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 54 (1981) [hereinafter Blasi, Prior Restraint] ("It is possible that injunctive and licensing systems are undesirable simply because they tend in operation to be too fully utilized by regulatory agents . . . .").

87. Luna, supra note 22, at 726.

88. See Frank D. LoMonte, Supreme Court Puts Journalists at Greater Risk When Covering Crime Scenes, Protests, Medium (June 4, 2019), https://medium.com/@UFbrechnercenter/supreme-court-puts-journalists-at-greater-risk-when-covering-crime-scenes-protests-feb70110c553 [https://perma.cc/FT8X-LHZD].

89. See Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 335–36 (2010) (identifying a restriction as prior restraint due to the need to ask the government for "permission" to speak); supra note 80 and accompanying text; see also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (invalidating as a prior restraint a law requiring "that permission to communicate ideas be obtained in advance from state officials").

90. See supra note 27 and accompanying text.

agents may wield their broad authority to use arrests as a censorship tool to prevent news or images from reaching the public.[91]

Retaliatory arrests can also function like traditional prior restraints by reducing the force of a speaker's message through delays or by altering a message's content.[92] A catch-and-release arrest can stall the dissemination of news to a time when its utility has diminished; indeed, the Supreme Court has recognized the "particularly great" damage caused by even temporary delays in the communication of news.[93] In addition, the ephemeral nature of images makes the opportunity cost of arrests especially great for visual newsgatherers. A journalist who cannot film or photograph police activity due to an arrest is irrevocably prevented from capturing a unique set of images that might otherwise hold officials accountable.[94]

Scholars,[95] courts,[96] and the DOJ[97] have argued that *seizures* of cameras or recording equipment are prior restraints. And in *Alvarez*, the Seventh Circuit noted that a regulation targeting video recording "suppresses speech just as effectively as restricting the dissemination of the resulting

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91. See supra notes 52–55 and accompanying text (describing mass arrests of journalists); see also PEN Am., Ferguson Report, supra note 52, at 3 (noting that the volume of arrests of journalists by Ferguson police "suggests that some police officers were deliberately trying to prevent the media from documenting the protests and the police response").

92. See Balkin, supra note 78, at 2316 (noting that delays caused by prior restraints "may undermine the communicative force or value of the message"); Blasi, Prior Restraint, supra note 86, at 64 (explaining that prior restraints "can delay dissemination of the speaker's message to a time when audience interest has waned or opportunities to act upon the speaker's advice have passed").

93. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (noting a prior restraint has an "immediate and irreversible sanction").

94. See Rulffes, supra note 73, at 623 (describing how arresting a journalist "even for a short time" prevents them from "record[ing]and provid[ing] a first-person account" of events during their detainment). A journalist from VICE Media, who along with three colleagues was arrested while covering the protests in Minneapolis following George Floyd's killing, lamented: "What added insult to injury is that we lost a night of coverage . . . . We were not able to cover the protests that night. We were not able to cover the aggression by law enforcement that night, so that's really what kind of stung just as much." VICE Media Reporter Arrested While Covering Minneapolis Protests, U.S. Press Freedom Tracker (May 30, 2020), https://pressfreedomtracker.us/all-incidents/vice-media-reporter-arrested-while-covering-minneapolis-protests [https://perma.cc/U5BE-CSY2]; see also Stelter, supra note 53 (quoting a letter from press advocates stating that the decision not to charge arrested journalists "does not mitigate the fact that their detention prevented them from carrying out their journalistic functions").

95. See, e.g., Conor M. Reardon, Note, Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendments, 63 Duke L.J. 735, 766 (2013); Jacqueline G. Waldman, Note, Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior, 2014 U. Ill. L. Rev. 311, 343.

96. See Garcia v. Montgomery County, 145 F. Supp. 3d 492, 508 (D. Md. 2015); Robinson v. Getterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 637 (D. Minn. 1972).

97. See *Sharp* Statement of Interest of the United States, supra note 69, at 11–12.

recording."[98] Nor is there any "fixed First Amendment line between the act of creating speech and the speech itself."[99] It follows that retaliatory arrests of newsgatherers function like prior restraints when they intentionally interrupt the newsgathering process to halt the timely publication of news and images.[100] Indeed, a few courts have already recognized that arrests, including of persons filming police, may function as prior restraints.[101]

2. *The Role of Prior Restraints in Fourth Amendment Cases.* — Retaliatory arrests implicate both First and Fourth Amendment concerns—a fact Part II explores.[102] In another overlapping First and Fourth Amendment context—seizures of books and films—the Supreme Court has emphasized the need to guard against prior restraints.[103]

In a series of cases beginning in the 1960s, the Supreme Court held that seizures of allegedly obscene materials that function as prior restraints must be preceded by an adversary hearing to determine whether the materials to be seized are indeed obscene (and thus not protected by the First Amendment).[104] In *Marcus v. Search Warrants*, the Court emphasized that the "Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."[105] The Court then held constitutionally impermissible a warrant that authorized the seizure of all "obscene materials" at a periodical distributor's warehouse.[106] Such a warrant was improper, in part, because it afforded too much discretion to officers to determine which allegedly obscene materials could be seized.[107] In *Roaden v. Kentucky*, the Court invalidated on similar grounds the warrantless evidentiary seizure of the lone copy of a film being shown at a theater because the seizure was based "solely on a police officer's conclusions that the film

98. ACLU of Ill. v. Alvarez, 679 F.3d 583, 596 (7th Cir. 2012).

99. Id.

100. See Rulffes, supra note 73, at 625 ("When law enforcement officials arrest a journalist, not only are they seizing the equipment the journalist has on his or her person, they are seizing the individual who plans to publish the material, which effectively quashes the dissemination of information.").

101. See McCormick v. City of Lawrence, 271 F. Supp. 2d 1292, 1303 (D. Kan. 2003) ("[I]t appears that an arrest may constitute a 'prior restraint' in some circumstances." (citing SOB, Inc. v. County of Benton, 317 F.3d 856, 866 (8th Cir. 2003))), amended by 289 F. Supp. 2d 1264 (D. Kan. 2003), aff'd, 130 F. App'x 987 (10th Cir. 2005).

102. See infra notes 117–127 and accompanying text.

103. Reardon, supra note 95, at 752–56.

104. See Roaden v. Kentucky, 413 U.S. 496, 504–05 (1973); Lee Art Theatre v. Virginia, 392 U.S. 636, 637 (1968) (per curiam); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 210 (1964); Marcus v. Search Warrants of Prop., 367 U.S. 717, 731–32 (1961).

105. *Marcus*, 367 U.S. at 729; see also Stanford v. Texas, 379 U.S. 476, 484–85 (1965) (describing the First, Fourth, and Fifth Amendments as "closely related").

106. *Marcus*, 367 U.S. at 722–23.

107. See id. at 731–32 (noting that the warrant in *Marcus* was issued "on the strength of the conclusory assertions of a single police officer" and "gave the broadest discretion to the executing officers").

was obscene."[108] The *Roaden* Court wrote that seizures functioning as prior restraints must meet "a higher hurdle in the evaluation of reasonableness" under the Fourth Amendment.[109]

Conversely, the Court has declined to impose heightened procedural requirements on searches and seizures that do not function as prior restraints.[110] In *Zurcher v. Stanford Daily*, the Court ruled that the Fourth Amendment's warrant requirement offered "sufficient protection" to a student newspaper subjected to a police search for photographs of an alleged assault on police.[111] The Court distinguished *Zurcher* from *Marcus* and its progeny by noting "no realistic threat of prior restraint" existed as a result of the search.[112]

Arrests and property seizures are not analogous. But the *Marcus* line of cases shows that, at least in some Fourth Amendment settings, the Supreme Court has required additional procedural protections to guard against the special harm of prior restraints.

II. *NIEVES V. BARTLETT*: FOURTH AMENDMENT PRINCIPLES OUTWEIGH FIRST AMENDMENT SPEECH PROTECTIVENESS IN RETALIATORY ARRESTS

In *Nieves v. Bartlett*, the Supreme Court held that, in most cases, the existence of probable cause will defeat a First Amendment retaliatory arrest claim as a matter of law.[113] The ruling establishes a high bar for all retaliatory arrest § 1983 claims involving protected First Amendment activity.[114] It poses a unique concern for newsgatherers, since the act of an arrest—regardless of whether charges are filed—impedes newsgathering and dissemination, perhaps irreversibly so.[115] Under an expansive reading of *Nieves*, a reporter who writes critical stories about the state, or a community member who attempts to film police, may be unable to bring a claim in response to a pretextual arrest for a minor offense—even when evi-

108. 413 U.S. at 506.

109. Id. at 504.

110. See New York v. P.J. Video, Inc., 475 U.S. 868, 874–76 (1986) (finding seizure of a film permissible where it did not prevent the film's continued exhibition); Heller v. New York, 413 U.S. 483, 490 (1973) (same); Reardon, supra note 95, at 755–56, 763–64.

111. 436 U.S. 547, 565 (1978).

112. Id. at 567. Notably, the warrant in *Zurcher* was not issued until after the article to which the search was related had already been published. Id. at 551.

113. 139 S. Ct. 1715, 1724–25, 1727 (2019).

114. See Garrett Epps, John Roberts Strikes a Blow Against Free Speech, Atlantic (June 3, 2019), https://www.theatlantic.com/ideas/archive/2019/06/nieves-v-bartlett-john-roberts-protects-police/590881 [https://perma.cc/U5HL-3T8K] (arguing the decision will "make it harder to hold officers to account" for arresting citizens in retaliation for speech); Brian Frazelle, The Supreme Court Just Made It Easier for Police to Arrest You for Filming Them, Slate (May 31, 2019), https://slate.com/news-and-politics/2019/05/supreme-court-nieves-police-abuse-case.html [https://perma.cc/HVX9-GER6] (speculating the majority opinion "could be catastrophic for protestors and the press").

115. See supra section I.C.1.

dence exists of the arresting officer's retaliatory animus.[116] Such a regime threatens to impede the press's checking function and undercut lower court decisions recognizing a right of citizens to film police.

This Part analyzes the *Nieves* opinion and the overlapping First and Fourth Amendment concerns that characterize arrests allegedly made in retaliation for protected speech. Section II.A summarizes the unique challenges of adjudicating retaliatory arrest claims and the divergent approaches taken by lower courts in § 1983 cases prior to *Nieves*. Section II.B breaks down the *Nieves* decision and its implications for newsgathering. Finally, section II.C examines lingering questions from the case and the uncertain scope of *Nieves*'s atypical arrest exception.

A. *The Problem of Causality in Retaliatory Arrests*

An individual bringing a First Amendment retaliatory arrest claim under § 1983 must prove their detainment was caused by a retaliatory animus toward protected speech.[117] The success of a retaliatory arrest claim thus turns on the existence of *subjective* intent—the officer's arrest must be "substantially motivated" by one's protected speech.[118] Arrests, however, are governed by the Fourth Amendment, which only requires probable cause.[119] Probable cause has been defined as the "fair probability . . . of a crime"[120]—a highly malleable standard.[121] Police can arrest citizens for "even a very minor" crime, so long as probable cause is present.[122] Moreover, the Supreme Court has emphasized the probable-cause inquiry is *objective*.[123] It does not matter under the Fourth Amendment if an arrest is motivated by discriminatory intent, since "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[124]

Where retaliatory arrests take place without any probable cause, animus against one's protected speech becomes easier to prove; no permissible grounds have been given for the arrest.[125] A challenge arises for factfinders when both subjective animus and objective probable cause are

116. See infra section II.B.3.

117. See supra note 33 and accompanying text (describing the three-part prima facie test).

118. Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002).

119. U.S. Const. amend. IV; California v. Hodari D., 499 U.S. 621, 624 (1991) (finding an arrest constitutes a "seizure of the person" (citation omitted)).

120. Illinois v. Gates, 462 U.S. 213, 238 (1983).

121. See Andrew Manuel Crespo, Probable Cause Pluralism, 129 Yale L.J. 1276, 1279 (2020) (describing probable cause's definition as "elusive," "hopelessly indeterminate," and "shrouded in mystery" (internal quotation marks omitted) (quoting Craig S. Lerner, The Reasonableness of Probable Cause, 81 Tex. L. Rev. 951, 953, 957 (2003))).

122. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

123. Whren v. United States, 517 U.S. 806, 813 (1996).

124. Id.

125. See Nieves v. Bartlett, 139 S. Ct. 1715, 1724 (2019) (noting that the absence of probable cause will "generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite").

arguably present. Under what circumstances can one conclude that an otherwise permissible arrest was, in fact, caused by improper animus in violation of § 1983?[126] Retaliatory arrest cases thus represent a "constitutional tug of war" between police-friendly Fourth Amendment principles and the speech-protective traditions of the First Amendment.[127]

For years, lower courts struggled to define a consistent pleading standard for First Amendment retaliatory arrest claims.[128] Two distinct approaches emerged: a burden-shifting standard, similar to that set forth in *Mt. Healthy City School District Board of Education v. Doyle*,[129] which never required that plaintiffs plead and show an absence of probable cause; and a bright-line approach, which always required a showing of no probable cause, most clearly reflected in the retaliatory prosecution case *Hartman v. Moore*.[130]

1. Mt. Healthy*'s Burden-Shifting Approach.* — Decided in 1977, *Mt. Healthy* articulated a burden-shifting approach for establishing a prima facie claim for First Amendment retaliation by state employers. The plaintiff, a teacher, was fired after conveying to a radio station the contents of an internal school memorandum.[131] The Supreme Court held that state employees alleging a First Amendment § 1983 violation had to show their protected conduct played a "substantial" or "motivating" factor in the defendant employer's action that caused the injury.[132] Once this occurred, the defendant could still prevail if they showed they would have undertaken the same conduct regardless of the plaintiff's speech.[133] To apply *Mt. Healthy* to arrests, probable cause would not defeat a § 1983 claim if the plaintiff could show retaliatory animus was the but-for cause for the arrest.[134]

At first glance, *Mt. Healthy* maps well onto retaliatory arrests. Police officers do not arrest suspects every time they have probable cause; there

126. See Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1953 (2018) (discussing the challenge of determining causality in retaliatory arrest cases and noting that "it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech").

127. Paige Davidson, Comment, Retaliatory Arrests: Seeking Compromise in a Constitutional Tug of War, 50 U. Pac. L. Rev. 685, 687 (2019).

128. See Koerner, supra note 33, at 758 (noting the "numerous circuit splits" on First Amendment retaliation doctrine).

129. 429 U.S. 274 (1977).

130. 547 U.S. 250 (2006).

131. *Mt. Healthy*, 429 U.S. at 274.

132. Id. at 287 (internal quotation marks omitted) (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 & n.21 (1977)).

133. Id.

134. Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019).

are a number of misdemeanors that police routinely do not enforce.[135] The *Mt. Healthy* test accounts for this by recognizing that the mere presence of probable cause does not eliminate the likelihood that improper animus played a role in an arrest. A number of commentators have argued that courts should apply *Mt. Healthy* to First Amendment retaliatory arrest cases.[136] But only the Sixth, Ninth, and Tenth Circuits previously applied a burden-shifting test like *Mt. Healthy*'s to such claims.[137]

2. Hartman*'s No-Probable-Cause Rule*. — Even after *Mt. Healthy*, a majority of circuits imposed a requirement that individuals bringing First Amendment retaliatory arrest claims prove the absence of probable cause.[138] These decisions relied on Fourth Amendment precedent to hold that the existence of arguable probable cause was sufficient to support a defendant's claim of qualified immunity "even if the offender may be speaking at the time he is arrested."[139]

In 2006, the Supreme Court endorsed a no-probable-cause approach for retaliatory *prosecution* suits. In *Hartman*, the Court held that plaintiffs who bring such claims must plead and show an absence of probable cause for their underlying criminal charges.[140] The Court stressed three factors specific to retaliatory prosecution claims that supported a heightened

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135. See Stuntz, supra note 22, at 509 (describing how, because of the increasingly high volume of criminal statutes, "both lawmaking and adjudication pass into the hands of police and prosecutors"); Davidson, supra note 127, at 686–87 (highlighting jaywalking and driving over the speed limit as offenses that police officers often do not make arrests for).

136. See Katherine Grace Howard, Note, You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause, 51 Ga. L. Rev. 607, 642–44 (2017) (arguing that retaliatory arrest cases bear similarities to employment cases); Koerner, supra note 33, 778–83 (stating that most retaliatory arrest claims do not rise to the level of complex causation and heightened presumption of validity to justify the application of the *Hartman* standard); Linda Zhang, Comment, Retaliatory Arrests and the First Amendment: The Chilling Effects of *Hartman v. Moore* on the Freedom of Speech in the Age of Civilian Vigilance, 64 UCLA L. Rev. 1328, 1348–52 (2017) (same); see also Brief for National Press Photographers Ass'n & 30 Media & Free Speech Organizations as Amici Curiae Supporting Respondents at 20–26, *Nieves*, 139 S. Ct. 1715 (2019) (No. 17-1174), 2018 WL 4929876 (urging the *Nieves* Court to apply *Mt. Healthy* to First Amendment retaliatory arrest claims).

137. See Ford v. City of Yakima, 706 F.3d 1188, 1194 (9th Cir. 2013); Kennedy v. City of Villa Hills, 635 F.3d 210, 219 (6th Cir. 2011); Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011), rev'd sub nom. Reichle v. Howards, 566 U.S. 658 (2012).

138. See, e.g., Benigni v. Smith, 121 F. App'x 164, 165–66 (8th Cir. 2005); Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002); Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th Cir. 1998); Singer v. Fulton Cnty. Sheriff, 63 F.3d 110, 120 (2d Cir. 1995).

139. *Redd*, 140 F.3d at 1383.

140. Hartman v. Moore, 547 U.S. 250, 265–66 (2006). *Hartman* arose out of a longstanding dispute between USPS and the chief executive officer of a private company who had lobbied to have USPS switch to a type of mail scanner manufactured by his company. Id. at 252–53. The USPS subsequently investigated the plaintiff over concerns about an alleged kick-back scheme, and despite "very limited" evidence, an Assistant U.S. Attorney filed charges. Id. at 253–54. The CEO was acquitted after a district court concluded there was a "complete lack of direct evidence." Id. at 254.

pleading requirement.[141] First, such claims present complex causation issues in analyzing prosecutorial decisions: Prosecutors are immune from suit, meaning plaintiffs must show that other retaliating officials induced the prosecutor to bring suit.[142] Second, the Court noted that a lack of probable cause would be highly probative of retaliatory motive, while other evidence of animus would likely be "rare" and a "poor guide[]."[143] Finally, the Court stated the judicial presumption of regularity afforded to prosecutors supported a no-probable-cause standard.[144]

There are several reasons to think that *Hartman*'s no-probable-cause standard is not appropriate for retaliatory arrests. Notably, the complex causal chain present in retaliatory prosecution claims does not exist in arrest cases, for which plaintiffs can bring suit directly against an arresting officer.[145] The Ninth and Tenth Circuits cited such reasoning in declining to extend *Hartman* to retaliatory arrests.[146] Other courts, however, concluded *Hartman* "sweeps broadly" and was applicable to the retaliatory arrest context.[147] Some noted that the application of the no-probable-cause approach to retaliatory arrests would shield police from frivolous claims.[148] Critics, however, have argued that such a pleading standard risks that only completely "baseless arrests" will give rise to civil liability under § 1983.[149]

Consider *Roper v. City of New York*, a Southern District of New York case that involved the arrests of two photographers documenting a Black Lives Matter protest in Times Square.[150] One plaintiff was detained for disorderly conduct, the other for standing in a closed-down street.[151] The photographers argued there was no probable cause because they were unable to comply with officers' dispersal orders—in both cases, the sidewalk and crosswalk were blocked by police activity.[152] But Second Circuit courts at that time applied a *Hartman*-style, no-probable-cause threshold to retalia-

141. See id. at 259–65.

142. Id. at 261–62.

143. Id. at 264–65.

144. See id. at 265.

145. See Koerner, supra note 33, at 778–79; Zhang, supra note 136, at 1348–49.

146. See Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011), rev'd sub nom. Reichle v. Howards, 566 U.S. 658 (2012); Skoog v. County of Clackamas, 469 F.3d 1221, 1234 (9th Cir. 2006).

147. Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007); see also Pegg v. Herrnberger, 845 F.3d 112, 119 (4th Cir. 2017); Allen v. Cisneros, 815 F.3d 239, 244–45 (5th Cir. 2016).

148. See Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002) (concluding that "the objectives of law enforcement take primacy over the citizen's right to avoid retaliation").

149. Nieves v. Bartlett, 139 S. Ct. 1715, 1734 (2019) (Ginsburg, J., concurring in the judgement in part and dissenting in part).

150. No. 15 Civ. 8899 (PAE), 2017 WL 2483813, at *1 (S.D.N.Y. June 7, 2017).

151. Id.

152. Id. at *3.

tory arrest claims.[153] The court ruled that even if the plaintiffs' failures to disperse were excused—thus invalidating probable cause for disorderly conduct charges—there was objective probable cause to arrest the photographers for jaywalking.[154] Under the *Hartman* approach, probable cause for any trivial offense—even one different than that originally cited by the arresting officers—defeats a retaliatory arrest claim.

B. Nieves v. Bartlett*: A No-Probable-Cause Rule for Retaliatory Arrests—In Most Cases*

Twice prior to *Nieves*, the Supreme Court granted certiorari to resolve whether probable cause defeated a First Amendment retaliatory arrest claim under § 1983. Both times, the Court dodged the issue. It decided *Reichle v. Howards* on qualified immunity grounds, holding the First Amendment right to be free from a retaliatory arrest supported by probable cause was not clearly established.[155] Six years later, in *Lozman v. City of Riviera Beach*, the Court found that the case's facts—which involved an alleged "'official municipal policy' of intimidation"—were "far afield from the typical retaliatory arrest claim."[156] It held that in cases involving an official policy motivated by retaliation, *Mt. Healthy* governs and a plaintiff need not prove the absence of probable cause.[157] Ten days after *Lozman* was decided, the Court granted certiorari in *Nieves*.[158]

1. *Factual Background.* — *Nieves* did not involve journalists or newsgathering. The case arose out of an altercation at an outdoor festival in Alaska called Arctic Man—characterized in Chief Justice Roberts's majority opinion as "known for both extreme sports and extreme alcohol consumption."[159] The facts indicated a state trooper, Sergeant Luis Nieves, and a festival attendee, Russell Bartlett, engaged in a verbal altercation.[160] Nieves claimed Bartlett yelled at him "belligerently" and was "highly intoxicated," while Bartlett said Nieves became aggressive after Bartlett refused to speak to him.[161] Minutes later, Bartlett attempted to intervene when he saw

153. See Higginbotham v. Sylvester, 741 F. App'x 28, 30–31 (2d Cir. 2018).

154. *Roper*, 2017 WL 2483813, at *3.

155. 566 U.S. 658, 663–65 (2012). The plaintiff, Steven Howards, was arrested by Secret Service agents after he criticized then–Vice President Dick Cheney during an appearance at a shopping mall. Id. at 660–61. The plaintiff also briefly touched Cheney's shoulder before walking away. Id. at 661.

156. 138 S. Ct. 1945, 1954 (2018) (quoting Monell v. N.Y.C. Dept. of Soc. Servs., 436 U.S. 658, 691 (1978)). The Court cited evidence that city council members colluded to intimidate the plaintiff, who was arrested while trying to speak at an open city meeting. Id. at 1949–50.

157. Id. at 1954–55.

158. Nieves v. Bartlett, 139 S. Ct. 1715 (2019), cert. granted, 138 S. Ct. 2709 (2018) (mem.).

159. Id. at 1720.

160. Id.

161. Id.

another trooper asking a group of minors if they had been drinking.[162] The trooper pushed Bartlett, and Nieves "rushed over" and "immediately initiated an arrest."[163] Bartlett claimed that after he was handcuffed, Nieves told him: "Bet you wish you would have talked to me now."[164]

Bartlett brought suit alleging, inter alia, that his arrest was retaliation for protected speech in violation of § 1983.[165] The district court applied *Hartman* in dismissing Bartlett's § 1983 claim on the grounds that it was precluded by the presence of probable cause for harassment.[166] The Ninth Circuit reversed, citing previous circuit case law that refused to extend *Hartman* to the retaliatory arrest context.[167] It held Bartlett had established a prima facie claim by advancing evidence—Nieves's statements following the arrest—that could enable him to "prove that the officers' desire to chill his speech was a but-for cause of their allegedly unlawful conduct."[168]

Prior to the Supreme Court argument, observers noted the case's potential implications for the press.[169] At oral argument, Justice Alito referenced the "range" of possible retaliatory arrest claims and the gulf between Bartlett's case and one involving an arrest of a journalist.[170] Referring to *Mt. Healthy* and *Hartman*, Justice Alito asked: "So do you have any

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162. Id.

163. Id. at 1721.

164. Id.

165. Bartlett v. Nieves, No. 15-cv-00004, 2016 WL 3702952, at *3, *11 (D. Alaska July 7, 2016).

166. Id. at *5, *11 (citing Alaska Stat. § 11.61.120 (2019)).

167. Bartlett v. Nieves, 712 F. App'x 613, 616 (9th Cir. 2017).

168. Id. (internal quotation marks omitted) (quoting Ford v. City of Yakima, 706 F.3d 1188, 1193 (2013)).

169. See, e.g., Brief for National Press Photographers Ass'n & 30 Media & Free Speech Organizations as Amici Curiae Supporting Respondents, supra note 136, at 1–2 ("This case arises from an arrest . . . at a remote outdoor festival in Alaska, but the question presented . . . may have far-reaching implications for freedom of the press.").

170. Transcript of Oral Argument at 9–10, Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (No. 17-1174), 2018 WL 8581785. Speaking to counsel for Nieves, Justice Alito stated, in relevant part:

> So this—this is a difficult issue . . . because there are a range of cases. And at one end, I think, there is a case that's sort of like this case, where you've got the disorderly person situation . . . .
>
> . . . .
>
> At the other end, you have the case like a journalist has written something critical of the police department and then a couple of days later or a week later, two day—two weeks later, whatever, some period of time, is arrested—is given a citation for driving 30 miles an hour in a 20-mile—25-mile-an-hour zone.
>
> So your rule—what you ask us to do would create a problem in the latter situation. What the other side asks us to do may create a problem in the disorderly person situation.

Id.

way of solving this, other than asking us to decide which . . . of these unattractive rules we should adopt?"[171]

2. *The Majority Opinion.* — Writing for the majority, Chief Justice Roberts first accepted "[a]s a general matter" that retaliatory arrests implicate similar causal complexities as retaliatory prosecution cases.[172] The majority noted that protected speech may be a legitimate consideration in determining whether to arrest; in Bartlett's case, officers perceived him as a threat based in part on "the content and tone of his speech."[173] The opinion also emphasized the evidentiary benefits of a bright-line, no-probable-cause approach. Because objective evidence of probable cause will usually be available, "its absence will . . . generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite."[174] The majority noted that in the Fourth Amendment context, the Court has declined to consider the subjective intent of officers.[175] The Court worried a contrary approach to First Amendment retaliatory arrest claims would expose police to an "overwhelming" risk of civil liability, since "[a]ny inartful turn of phrase . . . could land an officer in years of litigation."[176]

Thus, in most First Amendment retaliatory arrest cases under § 1983, *Hartman* governs, and the *Mt. Healthy* test is only triggered once the plaintiff shows an absence of probable cause.[177] The "constitutional tug of war" was decided: Fourth Amendment interests prevailed.[178]

The majority did, however, create a "narrow" exception for instances in which "officers have probable cause to make arrests, but typically exercise their discretion not to do so."[179] The majority noted the "much wider range" of current misdemeanor statutes that allow for warrantless arrests and the potential for police exploitation thereof.[180] For some crimes where police typically do not arrest, such as jaywalking, mere probable cause "does little to prove or disprove the causal connection between animus and injury."[181] The majority then stated its no-probable-cause rule should not apply when plaintiffs present "objective evidence" they were arrested

171. Id. at 10.

172. *Nieves*, 139 S. Ct. at 1723.

173. Id. at 1724.

174. Id.

175. Id. at 1724–25.

176. Id. at 1725.

177. Id.

178. See supra note 127 and accompanying text.

179. *Nieves*, 139 S. Ct. at 1727.

180. Id. Justice Gorsuch echoed this point in a separate opinion: "[C]riminal laws . . . cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence . . . unpopular ideas, little would be left of our First Amendment liberties . . . ." Id. at 1730 (Gorsuch, J., concurring in part and dissenting in part).

181. Id. at 1727 (majority opinion).

when "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[182] The majority emphasized the evidence supporting this "similarly situated" showing must be objective, adding that the "statements and motivations of the particular arresting officer are 'irrelevant' at this stage."[183] In conclusion, the majority dismissed Bartlett's § 1983 claim, finding probable cause to support the arrest.[184]

In sum, *Nieves* thus creates two routes for establishing a successful claim for a First Amendment retaliatory arrest under § 1983: (1) Plaintiffs who show an absence of probable cause proceed to the *Mt. Healthy* test;[185] and (2) plaintiffs arrested *with* probable cause must first show that the atypical arrest exception applies—only then does *Mt. Healthy* kick in.[186]

3. *Implications for Newsgatherers.* — Three Justices—Gorsuch, Ginsburg, and Sotomayor—dissented from the majority's holding on the relationship of probable cause to a § 1983 First Amendment retaliatory arrest claim.[187] Justices Ginsburg and Sotomayor each worried about the implications of the majority's rule on protected First Amendment activity, including by "press members."[188] Justice Sotomayor gave the example of a "citizen journalist" who trespasses alone on private property while filming a police altercation.[189] Under an expansive reading of the majority's rule, this newsgatherer may be precluded from bringing a retaliatory arrest claim, since they cannot produce evidence of another "similarly situated" individual, trespassing on the same property, who was not arrested.[190] Justice Sotomayor's hypothetical captured the tension between *Nieves* and a right to film police. Such a right may have little value if probable cause for any minor offense defeats a § 1983 claim.[191]

Nonetheless, the majority's no-probable-cause rule appears to entrench Fourth Amendment principles as the lodestar in First Amendment

182. Id.

183. Id. (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).

184. Id. at 1728.

185. Id. at 1725.

186. Id. at 1727.

187. Id. at 1730 (Gorsuch, J., concurring in part and dissenting in part); id. at 1734 (Ginsburg, J., concurring in the judgment in part and dissenting in part); id. at 1735 (Sotomayor, J., dissenting).

188. See id. at 1734–35 (Ginsburg, J., concurring in the judgment in part and dissenting in part) ("I would not use this thin case to state a rule that will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech.").

189. Id. at 1740 (Sotomayor J., dissenting).

190. Id.

191. See LoMonte, supra note 88 (noting that almost everyone at a protest or crowd scene is "guilty of *some* minor infraction" and speculating that *Nieves* could render "the First Amendment right to gather news on the scene of a heavily policed public event . . . nearly impossible to enforce").

retaliatory arrest cases under § 1983.[192] Justice Gorsuch took issue with this approach, since "the *First* Amendment operates independently of the Fourth and provides different protections."[193] He analogized to racially selective enforcement claims, noting that otherwise legal arrests supported by probable cause nonetheless violate the Fourteenth Amendment if the detention is based on race.[194] The same, Justice Gorsuch argued, should be true of the First Amendment.[195] Consider again the facts of *Roper*: There, the court could not consider the motives of the arresting officers, or the fact that the detention restrained photographers from engaging in core First Amendment activity.[196] On its face, the *Nieves* ruling likewise denies lower courts the ability to weigh the gravity of the expressive harm caused by an arrest and instead places such cases on the same plane as Fourth Amendment false arrest claims.

C. *Lingering Questions from* Nieves

The *Nieves* majority opinion—and its "vague" exception—left unanswered questions with which lower courts will likely grapple.[197] This section briefly introduces those questions.

1. *How Will the "Similarly Situated" Requirement Be Applied?* — Under *Nieves*, a plaintiff attempting to invoke the atypical arrest exception must present "objective evidence that he was arrested when otherwise *similarly situated* individuals not engaged in the same sort of protected speech had not been."[198] In support of this requirement, the Court cited *United States v. Armstrong*, a selective prosecution claim brought by a group of Black men charged with conspiring to distribute crack cocaine.[199] Despite providing statistical evidence that Black men were disproportionately prosecuted for the crimes at issue,[200] the *Armstrong* defendants were denied

192. Cf. Michael Coenen, Four Responses to Constitutional Overlap, 28 Wm. & Mary Bill Rts. J. 347, 349, 368–72, 381 (2019) (noting the tension between the Fourth and First Amendments in the retaliatory arrest context and citing the Fourth Amendment as a Constitutional provision that tends to "displace[]" other provisions because the "'specificity' of [its] rule[s] provides sufficient reason for its exclusive application").

193. *Nieves*, 139 S. Ct. at 1731 (Gorsuch, J., concurring in part and dissenting in part).

194. Id.

195. Id at 1732. Justice Gorsuch conceded probable cause may have some probative value, but argued the majority had "no legitimate basis" for its no-probable-cause rule. Id.

196. See supra notes 150–154 and accompanying text.

197. Case Comment, *Nieves v. Bartlett*, 133 Harv. L. Rev. 272, 280–81 (2019) ("Courts are likely to wade through years of litigation to define the contours of the [similarly situated] exception."); see also *Nieves*, 139 S. Ct. at 1741 (Sotomayor, J., dissenting) ("What exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear.").

198. *Nieves*, 139 S. Ct. at 1727 (emphasis added).

199. 517 U.S. 456, 458 (1996).

200. Id. at 459 (describing an affidavit showing that all twenty-four cases closed by an office of the federal public defender in 1991 for conspiracy to distribute crack cocaine involved Black defendants).

discovery because they could not show the government declined to prosecute "similarly situated individuals of a different race."[201] Observers have written that this standard—requiring evidence of persons who engaged in the same illegal activity and lacked the litigants' protected characteristic, but were *not* prosecuted—sets a "virtually impossible" discovery threshold.[202] A journalist operating alone, for example, likely cannot provide a one-for-one comparator. While an *Armstrong*-style similarly situated analysis may be easier to satisfy in protest cases like O'Neill's,[203] the viability of a retaliatory arrest claim should not turn on whether one is surrounded by other individuals at the time of arrest.[204]

2. *What Types of "Objective" Evidence Can Establish an Atypical Arrest?* — The *Nieves* majority declined to elaborate on which kinds of "objective" evidence will be admissible to establish when the atypical arrest exception should apply.[205] In the selective prosecution context, courts have required empirical data showing that other similarly situated individuals were not prosecuted.[206] But other types of "objective" evidence—such as cell phone video or news footage—could theoretically be used to show that individuals similarly situated to a plaintiff were not arrested.[207] Moreover, despite the majority's insistence that the "statements" of arresting officers are "irrelevant" to the threshold inquiry of whether *Nieves*'s atypical arrest exception should apply,[208] it is conceivable that such statements could include objective facts. Consider an announcement by an officer to a crowd of protestors that they are all trespassing. If the only person arrested in that crowd is a journalist, the officer's statement could provide evidence that many similarly situated individuals also violating the law were not arrested.[209]

3. *The Jaywalking Example: Should Minor Offenses Trigger the Atypical Arrest Exception?* — The majority offered jaywalking as an example of an

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201. Id. at 465, 469.

202. Melissa L. Jampol, Note, Goodbye to the Defense of Selective Prosecution, 87 J. Crim. L. & Criminology 932, 932 (1997); see also Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of *Armstrong*, 73 Chi.-Kent L. Rev. 605, 618–19 (1998) (noting that selective prosecution claims will be "effectively impossible" to prove for minor crimes that are not enforced except by selective prosecution).

203. See supra notes 1–9 and accompanying text; see also Mam v. Fullerton, No. 8:11–cv–1242–JST (MLGx), 2013 WL 951401, at *5 (C.D. Cal. Mar. 12, 2013) (denying summary judgment to an arresting officer where the "only difference" between the plaintiff and those around him was that the plaintiff was using a cell phone to record police).

204. See supra notes 189–190 and accompanying text.

205. See Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).

206. See *Armstrong*, 517 U.S. at 470 (rejecting the proffered statistical evidence as being based on "hearsay and reported personal conclusions based on anecdotal evidence").

207. See *Nieves*, 139 S. Ct. at 1740 (Sotomayor, J., dissenting).

208. Id. at 1727 (majority opinion) (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).

209. See id. at 1741 n.7 (Sotomayor, J., dissenting) (speculating that "[m]ore likely, then, the majority means only that statements describing the officer's internal thought processes are irrelevant").

offense for which officers typically exercise their discretion not to make arrests.[210] Because the offense is "endemic" in many places and officers usually do not arrest jaywalkers, "probable cause does little to prove or disprove the causal connection between animus and injury."[211] But it is unclear whether the jaywalking exception is tied to the similarly situated requirement, or exists independent of it. Consider again *Roper*, where probable cause for jaywalking defeated two photographers' retaliatory arrest claims.[212] Should those plaintiffs also have to show comparative evidence that other individuals jaywalking at the same locations were not arrested? Or should certain offenses for which officers almost always "exercise their discretion" presumptively trigger the atypical arrest exception?[213]

III. THE PATH FORWARD FROM *NIEVES*: ADDRESSING PRETEXTUAL ARRESTS OF NEWSGATHERERS

Nieves has been criticized for elevating police discretion over the protection of speech.[214] But the Supreme Court arguably deserves credit for recognizing that a blanket application of *Hartman*'s no-probable-cause standard to retaliatory arrests would be inappropriate, given the breadth of criminal statutes and the potential for pretextual arrests.[215] In most circuits—those that previously extended *Hartman* to retaliatory arrests—*Nieves* marginally improves plaintiffs' possibility of recovery by creating an exception to the no-probable-cause rule.[216] The question now becomes: How will courts apply the *Nieves* majority's atypical arrest exception?

This Part advances suggestions to guide that application. Section III.A argues that lower courts can—and should—apply the atypical arrest exception in a commonsense way, and it suggests three principles to inform that approach. Section III.B goes further, by contending the no-probable-cause rule should not apply to alleged pretextual arrests of newsgatherers that

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210. Id. at 1727 (majority opinion).

211. Id.

212. Roper v. City of New York, No. 15 Civ. 8899 (PAE), 2017 WL 2483813, at *4 (S.D.N.Y. June 7, 2017).

213. Relatedly, there is a question of what geographic "scope" courts should use in making a determination about whether certain offenses are so rarely enforced that the atypical arrest exception should apply. In Jersey City, New Jersey, for example, Black residents were 9.6 times more likely than white residents to be arrested for certain low-level offenses. ACLU of N.J., Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey 4 (2015), https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf [https://perma.cc/EX57-Z72E]. This raises the prospect that residents of communities of color "might not have similar luck in bringing a § 1983 claim," or that those in neighborhoods where crimes are most commonly enforced "will have the least protection from retaliatory arrests." Case Comment, *Nieves v. Bartlett*, supra note 197, at 279.

214. See supra notes 114, 191 and accompanying text.

215. See *Nieves*, 139 S. Ct. at 1727.

216. See supra notes 138–139 and accompanying text.

function as prior restraints by preventing or delaying the dissemination of news. Recognizing that judges may be hesitant to adopt this "newsgathering exception" to *Nieves*, section III.C suggests possible legislative solutions to protect citizen and professional journalists against law enforcement efforts to suppress news reporting.

A. *A Commonsense Approach to* Nieves*'s Atypical Arrest Exception*

This section suggests three principles lower courts should adopt to protect the ability of all citizens (including newsgatherers) to bring viable § 1983 claims for alleged retaliatory arrests. First, it posits that the version of the similarly situated standard established in *Armstrong* for selective prosecution claims is inappropriate for retaliatory arrests. Instead, courts should apply the more flexible test suggested by the Ninth Circuit in *United States v. Sellers*, a selective enforcement case.[217] Second, extremely low-level misdemeanors like jaywalking that rarely result in arrests should presumptively trigger the atypical arrest exception. Third, the no-probable-cause requirement should not apply to a narrow class of cases in which speech itself, absent other physical conduct, provides the basis for probable cause.

1. *A Flexible Similarly Situated Test.* — Courts should not apply the "rigorous" *Armstrong* discovery standard, which was crafted specifically for selective *prosecution* cases, to retaliatory *arrest* claims.[218] Rather, the similarly situated standard for First Amendment retaliatory arrest claims should more closely resemble that recently described by the Ninth Circuit in *Sellers*, an equal protection selective enforcement case, which gives district courts discretion to grant discovery if the arrested party offers some evidence that discriminatory enforcement occurred.[219]

The Court in *Armstrong* held that plaintiffs bringing a racially selective prosecution suit could not achieve discovery without providing empirical evidence that the government knew about—but declined to prosecute—members of a different race who committed the same crime.[220] While the *Nieves* majority cited *Armstrong* in support of its similarly situated language, it did not elaborate on the relationship between *Armstrong* and its atypical arrest exception.[221] Nor did it apply the similarly situated standard to the facts of Bartlett's arrest.[222]

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217. 906 F.3d 848, 855 (9th Cir. 2018) ("While a defendant must have something more than mere speculation to be entitled to discovery, what that something looks like will vary from case to case. The district court should use its discretion—as it does for all discovery matters . . . .").

218. United States v. Armstrong, 517 U.S. 456, 468 (1996).

219. *Sellers*, 906 F.3d at 855.

220. *Armstrong*, 517 U.S. at 465, 469.

221. Nieves v. Bartlett, 139 S. Ct. 1715, 1727–28 (2019).

222. Id.

Several differences between selective prosecution and selective enforcement cases justify deviating from *Armstrong* for retaliatory arrest claims.[223] First, the judicial presumption of regularity that applies to prosecutors—whose charging decisions fall under the "special province" of the executive branch[224]—does not necessarily extend to law enforcement agents.[225] Unlike prosecutors, police regularly testify in court, where their honesty and conduct may be "relentlessly attacked."[226] Nor do law enforcement officers possess the equivalent of a prosecutor's immunity for professional actions; rather, they may be held personally liable for constitutional violations resulting from on-the-job conduct.[227] And while highly complex prosecutorial decisions arguably are "not readily susceptible to the kind of analysis the courts are competent to undertake,"[228] courts regularly adjudicate civil and criminal suits against police.[229]

Second, selective enforcement plaintiffs will rarely, if ever, be able to produce comparative statistics of the sort selective prosecution plaintiffs are required to provide.[230] Selective prosecution litigants can theoretically point to demographic statistics of those arrested and prosecuted for certain crimes. This is not possible for selective enforcement plaintiffs who are asked to prove a negative—individuals who could have been arrested, but were not.[231]

A third reason also counsels against applying *Armstrong* to arrest cases. Plaintiffs hoping to bring a retaliatory arrest claim may not always know which offense provides the basis for probable cause, since police officers are not constitutionally required to state the reasons for an arrest.[232] Recall O'Neill, who was never told what law she purportedly violated.[233] Thus, plaintiffs may not have the notice necessary to gather empirical evidence, even if it were available. Moreover, as *Roper* shows, courts can cite as the

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223. See, e.g., *Sellers*, 906 F.3d at 853–54 (setting forth reasons why claims against law enforcement officers should not be subject to the strict discovery standard used in claims against prosecutors).

224. *Armstrong*, 517 U.S. at 464.

225. *Sellers*, 906 F.3d at 853.

226. United States v. Davis, 793 F.3d 712, 720 (7th Cir. 2015).

227. Id.

228. *Armstrong*, 517 U.S. at 465.

229. See Alison Siegler & William Admussen, Discovering Racial Discrimination by the Police, 115 Nw. U. L. Rev. (forthcoming 2021) (manuscript at 34), https://ssrn.com/abstract=3548829 (on file with the *Columbia Law Review*) (noting that courts "see thousands of civil cases against police officers each year" and "commonly inquire into the arrest process and any procedures the officer may or may not have followed").

230. *Sellers*, 906 F.3d at 854.

231. Id. at 853.

232. See Devenpeck v. Alford, 543 U.S. 146, 155 (2004).

233. See supra notes 1–9 and accompanying text.

objectively reasonable basis for probable cause a different violation than that given to the plaintiff by an arresting officer.[234]

Sellers's flexible similarly situated test offers a more appropriate standard for First Amendment retaliatory arrest claims. That case arose out of a "stash house reverse-sting" operation, in which undercover agents presented a group of targets with a fictitious opportunity to rob a drug stash house, before arresting them for conspiracy to commit the robbery and associated crimes.[235] The defendants presented evidence that the majority of individuals arrested in stash house reverse-sting operations were Black or Hispanic.[236] The district court applied *Armstrong* and denied a motion for obtaining discovery.[237] The Ninth Circuit reversed, ruling that in sting operations in which the issue is selective *enforcement*, defendants "need not proffer" *Armstrong*-style similarly situated evidence to achieve discovery.[238] While litigants must produce "*something* more than mere speculation . . . , what that *something* looks like will vary from case to case."[239] Once some evidence is produced, the district court has broad discretion to grant or deny discovery based on the evidence's strength.[240]

With *Sellers*, the Ninth Circuit joined the Third and Seventh Circuits in holding that *Armstrong*'s onerous discovery standard should not extend to selective enforcement claims—though the Ninth Circuit's threshold for discovery in *Sellers* was the most lenient of the three.[241] The selective enforcement cases considered by these courts all involved stash house reverse-sting operations, which raise particularly salient concerns about racially discriminatory enforcement.[242] Conversely, the Fourth, Eighth,

234. See supra notes 150–154 and accompanying text.

235. *Sellers*, 906 F.3d at 850–51.

236. Id. at 851.

237. Id.

238. Id. at 855.

239. Id.

240. Id.

241. See United States v. Washington, 869 F.3d 193, 221 (3d Cir. 2017) (holding that an arrestee's proffer must contain "reliable statistical evidence, or its equivalent," but need not include evidence of discriminatory intent or that similarly situated individuals were not arrested or investigated); United States v. Davis, 793 F.3d 712, 720–21 (7th Cir. 2015) (en banc) (noting the absence of a presumption of prosecutorial regularity in declining to extend *Armstrong* to selective enforcement claims); see also United States v. Lopez, 415 F. Supp. 3d 422, 426–27 (S.D.N.Y 2019) (declining to follow *Armstrong* and holding that discovery should be granted where a "member of a protected group can show that that group has been singled out for reverse sting operations to a statistically significant extent").

242. See *Sellers*, 906 F.3d at 857 (Nguyen, J., concurring) (calling stash house reverse-sting operations "highly questionable" and noting they raise questions about "race-based targeting").

and Tenth Circuits have applied *Armstrong* in full to selective arrests, creating a circuit split in this area.[243]

Admittedly, *Sellers* may not be a perfect analogue for *Nieves*'s similarly situated exception. The *Sellers* standard appears to be quite broad—if a litigant makes some showing beyond speculation to support an inference of discrimination, the trial court has discretion to grant discovery.[244] This may be more appropriate if the only issue is discovery—a matter over which trial court judges typically exercise significant discretion.[245] But the question with regard to *Nieves*'s atypical arrest exception is not whether discovery should be granted; rather, it is whether the probable cause present is sufficient to defeat the retaliatory arrest claim as a matter of law.[246] Moreover, one could argue a flexible interpretation of the atypical arrest exception may encourage excessive litigation.[247] This latter concern is misguided, however. Once First Amendment § 1983 litigants trigger *Nieves*'s atypical arrest exception, they still must show, per *Mt. Healthy*, that retaliatory animus was the but-for cause for the arrest—a standard that in practice has weeded out meritless claims.[248] Moreover, *Armstrong* has proved an insurmountable bar in selective prosecution cases.[249] If *Armstrong* were extended to retaliatory arrests claims, it would paralyze courts' ability to account for the overcriminalization concerns raised in *Nieves*.[250]

a. Lund v. City of Rockford*: "Common sense must prevail."* — At least one circuit court appears to have adopted a more flexible approach to *Nieves*'s similarly situated inquiry. In *Lund v. City of Rockford*, the Seventh

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243. See United States v. Mason, 774 F.3d 824, 829–30 (4th Cir. 2014); United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003). Justice Gorsuch noted this circuit split in his *Nieves* opinion and encouraged lower courts to develop the majority's similarly situated exception "with sensitivity to the competing arguments about whether and how *Armstrong* might apply [to] arrest[s]." Nieves v. Bartlett, 139 S. Ct. 1715, 1734–35 (2019) (Gorsuch, J., concurring in part and dissenting in part).

244. *Sellers*, 906 F.3d at 855.

245. See *Washington*, 869 F.3d at 220 ("As we have often said, matters of docket control and discovery are committed to broad discretion of the district court.").

246. *Nieves*, 139 S. Ct. at 1727 ("After making the required [objective] showing, the plaintiff's claim may proceed . . . .").

247. See id. at 1725 (speculating that under a more permissive pleading standard, "policing certain events like an unruly protest would pose overwhelming litigation risks"); Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1953 (2018) ("[T]he complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits.").

248. *Nieves*, 139 S. Ct. at 1737 (Sotomayor, J., dissenting) (citing statistics that "only a handful" of First Amendment retaliatory arrest cases have reached trial in more than a decade in the Ninth Circuit, which employed a version of the *Mt. Healthy* test).

249. See supra note 202 and accompanying text.

250. See *Nieves*, 139 S. Ct. at 1727 (noting the ability of modern-day police to conduct warrantless misdemeanor arrests "in a much wider range of situations"); id. at 1730 (Gorsuch, J., concurring in part and dissenting in part) (describing how criminal laws have grown "exuberantly" to cover a variety of previously innocent conduct).

Circuit considered a retaliatory arrest claim by William Lund, a reporter for the *Rockford Scanner*, who claimed he was detained for trying to report on an undercover prostitution sting.[251] After noticing Lund was taking photos of the sting, officers told him to leave the area or else he would be arrested for obstructing the investigation.[252] Before departing, Lund called out "goodbye officers" to the undercover police.[253] Officers arrested Lund after a brief pursuit, during which Lund drove his motorized bicycle the wrong way down a one-way street.[254] The court noted that "at a minimum" officers had probable cause to arrest Lund for this traffic violation.[255]

In analyzing the scope of *Nieves*'s similarity situated exception—and whether it should apply to Lund's claim—the court agreed with the dissenting Justices in *Nieves* that "common sense must prevail."[256] To the Seventh Circuit, this meant a First Amendment retaliatory arrest plaintiff need not necessarily provide comparison-based evidence; rather, courts should "consider each set of facts as it comes to [them]" to probe for "objective proof" of retaliation.[257] The court concluded, however, that Lund "made no attempt to present objective evidence showing that the police rarely make arrests for driving the wrong way on a one-way street, or that other similarly situated persons were not arrested, *and he has not demonstrated retaliation in some other way*."[258]

Notwithstanding the outcome of *Lund*, the Seventh Circuit's approach seems to resemble the *Sellers* standard.[259] In particular, the court's language indicated that some objective showing, outside of arrest data or comparative evidence, could satisfy the similarly situated exception. For example, an arrestee's cell phone video—or police body camera footage—may establish that they alone were arrested for trespassing, when other trespassers near them were not.[260]

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251. Lund v. City of Rockford, 956 F.3d 938, 941–42 (7th Cir. 2020).

252. Id. at 942.

253. Id.

254. Id.

255. Id. at 944. The court stated it need not take a position on whether police had probable cause for obstruction, since Lund was arrested after his "clear violation" of an Illinois vehicular law. Id. at 947. The court also differentiated Lund's vehicular violation from the jaywalking example cited in *Nieves*, since "it is less clear that officers routinely give a pass to persons driving motorized vehicles the wrong way on one-way streets, an action that could have fatal consequences." Id at. 947–48.

256. Id. at 945.

257. Id.

258. Id. at 945–46 (emphasis added).

259. But see id. at 948 (reaffirming that *Nieves*'s no-probable-cause threshold will apply "in all but the most narrow of exceptions" (citing Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019))).

260. See, e.g., *Nieves*, 139 S. Ct. at 1739–40 (Sotomayor, J., dissenting) (describing body-worn police cameras, smartphones, and video recorded by news organizations as potential bodies of "probative evidence").

The fact-specific approach of *Sellers* and *Lund* thus suits retaliatory arrest claims, since it recognizes that the available evidence of discriminatory treatment "will vary from case to case."[261] Future courts should likewise hold that *Nieves*'s atypical arrest exception may be satisfied when plaintiffs provide some objective evidence to support an inference that police would not have arrested another similarly situated individual who was not engaged in the same protected speech activity.

2. *Highly Discretionary Misdemeanors Should Presumptively Trigger the* Mt. Healthy *Test.* — In addition to a relaxed similarly situated standard, certain minor crimes that rarely lead to arrests—like jaywalking—should presumptively satisfy *Nieves*'s atypical arrest exception, leaving courts to apply *Mt. Healthy*'s burden-shifting approach. In such cases, no similarly situated analysis should be necessary, since probable cause for such minor offenses "does little to prove or disprove the causal connection between animus and injury."[262] Violations that fall into this category should include, at a minimum, traffic violations and other "self-evidently minor" crimes.[263] As Justice Sotomayor noted, "It is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass."[264] Moreover, courts should use common sense in determining which "self-evidently minor crimes" fall into this category, rather than relying on street- or neighborhood-level statistics, which may reflect

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261. United States v. Sellers, 906 F.3d 848, 855 (9th Cir. 2018).

262. *Nieves*, 139 S. Ct. at 1727.

263. Id. at 1741 n.8 (Sotomayor, J., dissenting); cf. Arielle W. Tolman & David M. Shapiro, From City Council to the Streets: Protesting Police Misconduct After *Lozman v. City of Riviera Beach*, 13 Charleston L. Rev. 49, 61 (2018) ("In various municipalities . . . it is illegal to wear saggy pants, to cross a street while viewing a cell phone, and to have a barbecue in one's front yard." (citations omitted)).

264. *Nieves*, 139 S. Ct. at 1741. The Southern District of New York recently confronted this exact scenario of a journalist arrested for jaywalking in *Nigro v. City of New York*, No. 19-CV-2369 (JMF), 2020 WL 55033539, at *1 (S.D.N.Y. Sept. 11, 2020). Michael Nigro, a professional photographer, journalist, and filmmaker, was detained at a 2016 protest against then-presidential candidate Donald Trump after he stood in the middle of a street to take photos of police. Id. The court noted that Nigro's § 1983 retaliatory arrest claim "would seem to fall squarely within the *Nieves* exception." Id. at *4. It went on to call the arrest "troubling," adding that it raised the "specter of a police officer singling out a member of the media in retaliation for his First Amendment activity." Id. at *7. However, because the arrest occurred three years before *Nieves*—and its atypical arrest exception was therefore not clearly established—the court concluded that the defendants were protected by qualified immunity. Id.

Some of the court's language arguably indicated that the mere fact that jaywalking formed the basis for probable cause would be sufficient to trigger the *Nieves* exception. The court pointed out that it is "surely the case in most, if not all, of New York City" that jaywalking is both common and rarely results in arrest, and under such circumstances "'it would seem insufficiently protective of First Amendment rights to dismiss' the retaliatory arrest claim." Id. at *7 (quoting *Nieves*, 139 S. Ct. at 1727). The facts indicated, however, that Nigro had stood in middle of the street alongside others, and therefore he could likely also point to similarly situated individuals who had not been arrested. Id. at *1.

discriminatory arrest patterns and result in inconsistent protections under § 1983.[265]

One could argue that courts should go even further. Common experience has shown that certain broadly written laws are frequently invoked in circumstances that raise questions about First Amendment pretext.[266] The DOJ has noted that "discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to . . . retaliate against individuals for exercising their First Amendment rights."[267] Because these broad statutes can be easily invoked to criminalize constitutionally protected conduct, they arguably fall under the category of offenses for which "probable cause does little to prove or disprove the causal connection between animus and injury."[268]

Courts, however, would likely balk at an approach that more closely scrutinizes discretionary misdemeanors simply because their expansive language and high frequency of enforcement raise fears of pretext. For starters, such an approach would conflict with *Whren v. United States*.[269] In that case, which involved an allegedly pretextual traffic stop, the petitioners urged the Court to consider as part of its Fourth Amendment reasonableness inquiry the fact that traffic laws are so numerous that police can "single out almost whomever they wish for a stop."[270] The Court rejected this argument, stating it was "aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."[271] Moreover, misdemeanors like disorderly conduct frequently appear in First Amendment retaliatory arrest claims,[272] and thus including them in a blanket exception would greatly broaden *Nieves*'s "narrow" qualification.[273]

In sum, arrests for minor crimes like jaywalking that almost never lead to arrest should presumptively satisfy the *Nieves* exception. Litigants accused of violating discretionary laws more frequently invoked to support an arrest—like disorderly conduct—could still trigger the atypical arrest

265. See supra note 213.

266. Tolman & Shapiro, supra note 263, at 60–62.

267. *Garcia* Statement of Interest of the United States, supra note 69, at 1–2; see also id. at 2 ("[C]ourts should view such charges skeptically to ensure that individuals' First Amendment rights are protected."); DOJ Ferguson Report, supra note 56, at 25–26 (noting the use of discretionary misdemeanors to arrest individuals exercising their First Amendment rights).

268. *Nieves*, 139 S. Ct. at 1727.

269. 517 U.S. 806 (1996).

270. Id. at 818.

271. Id.

272. See supra note 267 and accompanying text.

273. *Nieves*, 139 S. Ct. at 1727.

exception by making the "similarly situated" showing that section III.A.1 describes.

3. *A No-Probable-Cause Exception for When Speech Forms the Basis for Probable Cause.* — In a relatively small subset of retaliatory arrest cases where speech—not conduct—provides the sole source for probable cause, courts should not be bound by *Nieves* and instead should apply *Mt. Healthy*. Such an approach could be triggered, for example, in cases involving allegations of online harassment or the illegal publication of certain types of information.[274]

At least two reasons support a conclusion that probable cause should not defeat a § 1983 claim for these speech-as-conduct crimes. First, the *Nieves* majority's rationale for a no-probable-cause threshold assumed two distinct causal elements in a retaliatory arrest case: illegal conduct and protected speech.[275] But when speech itself provides the basis for probable cause, these causal factors are not distinct. The Sixth Circuit made this point in *Novak v. City of Parma*, which involved a plaintiff who was arrested for creating a fake Facebook account designed to mimic that of the local police department.[276] The Sixth Circuit noted in dicta that *Nieves* was based on a concern that "factfinder[s] will not be able to disentangle whether the officer arrested [the plaintiff] because of what he did or because of what he said."[277] But in a case like *Novak*, speech and conduct are inseparable.[278] This might not make the analysis into the role of animus less complex, since speech can provide a legitimate basis for arrest.[279] It does, however, undercut the evidentiary value (and the practicality) of a no-probable-cause showing, because the speech that provided probable cause is also the source of the alleged retaliatory motive.[280]

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274. See, e.g., Citizen Journalist Arrested for Publishing Information Before Local Police, U.S. Press Freedom Tracker (Jan. 16, 2018), https://pressfreedomtracker.us/all-incidents/citizen-journalist-arrested-after-publishing-information-local-police [https://perma.cc/48T7-JRVE] [hereinafter Texas Journalist Arrested] (describing the arrest of a citizen journalist who violated a state law prohibiting the dissemination of certain nonpublic information).

275. *Nieves*, 139 S. Ct. at 1723–24.

276. 932 F.3d 421, 425 (6th Cir. 2019). The plaintiff was charged with violating an Ohio law that makes it a crime to "knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations." Ohio Rev. Code Ann. § 2909.04(B) (2019); *Novak*, 932 F.3d at 425. Because the arrest took place before *Nieves*, the court ruled that the officers were protected by qualified immunity. Id. at 429–30. But the court nonetheless discussed the implications of *Nieves* on future cases that may involve similar facts as *Novak*. See id. at 430–32.

277. *Novak*, 932 F.3d at 431.

278. Id.

279. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . .").

280. *Novak*, 932 F.3d at 431.

Second, the Sixth Circuit noted that arrests based solely on speech are "prime ground for the pretext the Supreme Court [w]as worried about" in *Nieves*.[281] In Texas, for example, a citizen journalist was charged with felony "misuse of official information" after she published information that had not yet been officially released about a Border Patrol agent who committed suicide.[282] In another case, Sherriff Joe Arpaio allegedly ordered a nighttime raid to arrest publishers of an Arizona newspaper that printed articles about Arpaio's real estate holdings and his investigation of the newspaper.[283] Arpaio and his codefendants asserted as a basis for probable cause a law prohibiting the unauthorized disclosure of matters relating to grand jury proceedings.[284] These cases illustrate the risk that officers may use such statutes to target speech based on its content.

Nieves's no-probable-cause rule is both impractical and insufficiently protective in First Amendment retaliatory arrest suits where speech provides the basis for probable cause. In such cases, courts should apply the *Mt. Healthy* burden-shifting approach.

B. *A "Newsgathering Exception" for Arrests that Function as Prior Restraints*

In cases where alleged retaliatory arrests of professional and citizen journalists function as prior restraints—that is, where the arrest prevents or delays the capture and possible dissemination of news and images—the no-probable-cause rule of *Nieves* should not apply, and courts should resort to the more speech-protective *Mt. Healthy* standard. Such a "newsgathering exception" would vindicate the normative concerns that have made prior restraints the most disfavored form of First Amendment infringements.[285] This approach is also arguably supported by case law involving prior restraints and the Fourth Amendment.[286]

As an initial matter, this argument assumes a foundational premise: Pretextual arrests of newsgatherers might be considered prior restraints.[287] This is not an obvious conclusion, since arrests of journalists or those filming police do not fit the two classic forms of prior restraint—administrative orders and judicial injunctions.[288] While courts have not limited themselves to these two actions in identifying prior restraints, such flexibility has spawned criticism. Professor John Calvin Jeffries, Jr. has argued that

281. Id.

282. See Texas Journalist Arrested, supra note 274. The law makes it a crime to solicit or receive nonpublic information from a public official with the intent to obtain a benefit or harm another person. Tex. Penal Code § 39.06(c) (2020).

283. Lacey v. Maricopa County, 693 F.3d 896, 907–10 (9th Cir. 2012).

284. Id. at 918–19. The Court found no basis for probable cause because the grand jury subpoenas the newspaper wrote about had not been validly issued. Id.

285. See supra notes 73–77 and accompanying text.

286. See supra notes 102–112 and accompanying text.

287. See Rulffes, supra note 73, at 621–24 (arguing arrests of journalists are prior restraints).

288. Alexander v. United States, 509 U.S. 544, 550 (1993).

courts' "progressively more elastic and unstable" definition of prior restraint is problematic precisely because the doctrine is one of "form rather than of substance."[289] That is, it prescribes a heightened presumption of unconstitutionality based on the *type* of state action at issue, rather than the actual *harm* of that action relative to punishments that occur after the speech has entered the marketplace of ideas. From one perspective, adding arrests to the actions that may constitute a prior restraint risks further muddying the doctrine.

Nonetheless, concerns over doctrinal tidiness should not prevent courts from finding that pretextual, retaliatory arrests can constitute prior restraints. As noted previously, at least some courts have already recognized arrests and seizures of newsgathering tools as prior restraints.[290] Moreover, understanding certain arrests of newsgatherers as a type of prior restraint rejects the formalism that has led to criticism of the doctrine. Pretextual arrests of newsgatherers are especially objectionable not because of the form of the restraint imposed, but rather because they implicate many of the heightened substantive speech harms—overbroad censorship decisions, vesting excess discretion in unaccountable actors, suppressing speech before it reaches the public—that make prior restraints disfavored in the first place.[291]

Moreover, it bears emphasizing the specific class of arrests that would raise an inference of a prior restraint. This Note proposes that a newsgathering exception to *Nieves*'s no-probable-cause rule should be available when it is clear to a reasonable observer that, at the time of arrest, a plaintiff was (1) primarily engaged in dedicated newsgathering (2) with the purpose of preserving images or information for possible dissemination to the public.[292] These elements, in the author's view, are sufficient to support an

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289. John Calvin Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L.J. 409, 414, 419 (1983).

290. See supra notes 96, 101 and accompanying text.

291. See supra notes 83–94 and accompanying text. Admittedly, newsgathering may not be the only First Amendment activity for which arrests could raise concerns of a prior restraint. For example, an arrest that prevents leafletting could theoretically be undertaken to prevent the future distribution of content. But the harm caused by suppressing the broad dissemination of news is potentially far greater—particularly today, when images and video can be instantaneously distributed widely via the internet and social media. See Cohen, supra note 25, at 17–18. Moreover, the same leaflet being handed out in this hypothetical could be distributed at a later date. See Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 n.2 (1986) (finding the closure of an adult bookstore for prostitution was not a prior restraint where the business could continue at another location). Conversely, an arrest of a journalist may irreversibly prevent the documentation of state abuse or misconduct. See supra note 94 and accompanying text.

292. One could argue that such an exception could cast a broad net, given the ubiquity of cell phone video recording at protests and other major gatherings. But determining whether or not a protestor who, say, briefly films a portion of a protest was *clearly* engaged in dedicated, impartial newsgathering would require a fact-specific inquiry. More importantly, anybody who invokes this exception would still need to show, per *Mt. Healthy*,

inference that an arrest actually prevented the capture and possible transmission of news. That an arrestee was employed as a journalist, or identified themselves as a legal observer or member of the press (for example, by wearing a special vest or media credential), would undoubtedly be relevant in analyzing whether a reasonable observer would clearly recognize the newsgathering purpose of the individual's activities; however, one's official or professional status should not be dispositive. Rather courts should apply a purposive analysis to ensure the exception covers newsgathering by ordinary citizens who deliberately seek to document government actions. An immediate intent to disseminate the captured content should not be required, since activities like "copwatching" may help "keep [police] honest," even if the images preserved are not immediately newsworthy.[293]

Accepting that such arrests may act as prior restraints, one solution would be to apply a heightened standard of Fourth Amendment reasonableness balancing to arrests of individuals clearly engaged in newsgathering.[294] In such cases, the arresting officer would have to consider the gravity of the suspected offense and whether First Amendment interests outweigh the state's interests in enforcing the law.[295] But the Supreme Court has rejected "reasonableness" balancing in arrests supported by probable cause.[296] Moreover, such an approach would almost certainly be too difficult for officers to implement and could deter justified arrests.[297]

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that their newsgathering activity—such as filming, photographing, or interviewing—was a but-for cause of the arrest. See infra notes 306–307 and accompanying text. Thus, the exception would likely not help someone who commits a felony or physically interferes with law enforcement while filming, since it's unlikely that a reasonable fact finder could conclude in such circumstances that newsgathering was the but-for cause of an arrest. Id. The exception will, however, potentially help those whose attend an event with the express intent to gather news and unknowingly violate laws while fulfilling that purpose.

293. See Garcia v. Montgomery County, 145 F. Supp. 3d 492, 507 (D. Md. 2015) ("[R]ecording governmental activity, even if that activity is not immediately newsworthy, has the potential to prevent government abuses through scrutiny or to capture those abuses should they occur.").

294. Cf. Alicia A. D'Addario, Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law, 31 N.Y.U. Rev. L. & Soc. Change 97, 120–23 (2006) (arguing that in cases involving arrests of protestors, "probable cause should be held unreasonable when the situation could have been handled in a manner permitting greater expression with minimal additional disruption").

295. See Jeffrey Bellin, Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World, 97 Iowa L. Rev. 1, 22–34 (2011) (proposing a framework by which courts would weigh the severity of a crime in evaluating Fourth Amendment reasonableness).

296. Virginia v. Moore, 553 U.S. 164, 171 (2008) ("[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.").

297. See Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019) ("Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick deci-

Recall, however, that the question in a § 1983 First Amendment retaliatory arrest case is whether an arrest is motivated by a desire to silence speech.[298] On one view, *Nieves*'s no-probable-cause rule merely installs a heightened pleading standard for § 1983 claims to weed out cases where the inference of retaliatory animus is too weak to overcome deferential Fourth Amendment analysis.[299] *Nieves* does not shrink substantive First Amendment rights, but it does raise the evidentiary showing a § 1983 retaliatory arrest plaintiff must make.[300]

Moreover, as noted above, the Supreme Court has granted additional procedural safeguards against prior restraints in Fourth Amendment cases involving seizures of allegedly obscene books or films.[301] Seizures of such content that are "plainly a form of prior restraint" must be preceded by an adversarial proceeding to determine if the materials sought are indeed obscene.[302] Of course, those cases dealt with seizures of property under the Fourth Amendment—not arrests. And in *Roaden*, the Court identified the Fourth Amendment's reasonableness standard as the vehicle for its heightened procedural protections.[303] Compare this to the arrest context, where the Supreme Court has rejected reasonableness balancing except in "extraordinary" cases.[304] Nonetheless, one can extrapolate from *Roaden* and its predecessors the broad lesson that in prior restraint cases involving overlapping First and Fourth Amendment concerns, courts may apply procedural safeguards to protect against the heightened expressive harm of prior restraints.

Hence, in § 1983 suits involving alleged retaliatory arrests undertaken to prevent newsgathering—and, by association, news dissemination[305]—courts would be justified in taking added steps to account for the unique harm of prior restraints. The easiest way to accomplish this is to treat the

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sions in 'circumstances that are tense, uncertain, and rapidly evolving.'" (quoting Graham v. Connor, 490 U.S. 386, 397 (1989))).

298. Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002); see also supra notes 31–33 and accompanying text.

299. See supra notes 117–127 and accompanying text (describing the conflicting First and Fourth Amendment principles at play in retaliatory arrest cases).

300. Cf. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part) (noting that the question at issue in *Nieves* was not whether probable cause erases a First Amendment violation but rather whether probable cause forecloses a civil damages claim under § 1983).

301. See Roaden v. Kentucky, 413 U.S. 496, 504–05 (1973); Lee Art Theatre v. Virginia, 392 U.S. 636, 637 (1968) (per curiam); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 210 (1964); Marcus v. Search Warrants of Prop., 367 U.S. 717, 731–32 (1961).

302. *Roaden*, 413 U.S. at 504–05.

303. Id. at 501 (noting the question in that case was whether the seizure incident to arrest of an allegedly obscene film was "unreasonable under Fourth Amendment standards").

304. Whren v. United States, 517 U.S. 806, 818 (1996).

305. See ACLU of Ill. v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012) (stating that a law "banning photography or note-taking at a public event . . . would obviously affect the right to publish").

existence of a prior restraint as a counterweight to *Nieves*'s no-probable-cause threshold—which, as noted above, does not affect substantive rights but instead requires an enhanced evidentiary showing by § 1983 retaliatory arrest plaintiffs when probable cause exists. If these two interests cancel each other out, one is left with the *Mt. Healthy* test.

Applying *Mt. Healthy* to First Amendment retaliatory arrests that function as prior restraints would better enable litigants and courts to address attempts by the state to suppress news and information. Critically, a newsgatherer detained with probable cause would still, under *Mt. Healthy*, have to prove that retaliatory animus was the but-for cause for an arrest.[306] This will be difficult to show in cases involving serious crimes, or where the arrestee's conduct is provocative or manifests a disregard for the law.[307] Thus, concerns that such an approach would subject police to a much higher risk of civil liability are misguided.

Nonetheless, courts will likely be hesitant to embrace a newsgathering exception to *Nieves*'s general, no-probable-cause standard. First, courts may be wary of expanding prior restraint doctrine to include arrests.[308] Second, courts have increasingly deferred to bright-line Fourth Amendment principles in cases with overlapping First Amendment concerns.[309] Indeed, *Nieves* is a clear example of this.[310] Thus, even if courts were to recognize certain retaliatory arrests of newsgatherers as prior restraints, it is not clear they would view this as sufficient to alter the pleading standard articulated in *Nieves*.

C. *Legislative Solutions Targeting State Suppression of Newsgathering*

Regardless of courts' receptivity to the newsgathering exception described above, Congress and state legislatures should consider enacting laws to address pretextual arrests targeting protected speech, including by newsgatherers. Some have urged Congress to overturn *Nieves*'s central holding that the existence of probable cause will generally defeat as a matter of law a First Amendment retaliatory arrest claim under § 1983.[311] Calls

306. See Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1952 (2018).

307. See supra note 248 and accompanying text.

308. See Alexander v. United States, 509 U.S. 544, 554 (1993) (declining to expand the doctrine to include a subsequent forfeiture order on the grounds that doing so "would blur the line separating prior restraints from subsequent punishments"); see also id. (arguing that because the First Amendment provides "greater protection from prior restraints . . . it is important for us to delineate with some precision the defining characteristics of a prior restraint" (internal citations omitted)).

309. See D'Addario, supra note 294, at 100 (noting courts have "often ignor[ed] First Amendment analysis in favor of Fourth Amendment analysis").

310. See supra notes 177–178 and accompanying text.

311. See, e.g., Statement from the Staff of the Knight First Amendment Institute at Columbia University, Knight First Amendment Inst. at Colum. Univ. (June 5, 2020), https://knightcolumbia.org/content/statement-from-the-staff-of-the-knight-first-amendment-

for dedicated legal protections for journalists and citizens who record police have also increased in the wake of protests over police brutality in the spring and summer of 2020.[312] Multiple states have considered legislation seeking to protect newsgatherers from police interference.[313]

New York's recently enacted right-to-record law merits consideration. The act recognizes a broad right of citizens to record "any moving or still image, sound, or impression" relating to law enforcement activity.[314] And it prohibits police from, among other things, "intentionally preventing or attempting to prevent" individuals from recording law enforcement activity or "stopping, seizing, searching, ticketing or arresting" them.[315] The act, however, makes it an affirmative defense for a police officer to show that, at the time of the arrest, there was probable cause for a crime "involving obstructing governmental administration."[316] The statute's cause of action also does not extend to individuals who "physically interfere" with law enforcement activity.[317] Thus, the risk remains that police can lawfully halt newsgathering "merely by claiming what police are doing is part of an ongoing investigation, and, therefore, that the act of recording is obstructing 'law enforcement activity.'"[318] Consider O'Neill's arrest described above.[319] One could argue her failure to move "physically interfered" with efforts to clear the area. In this and similar cases, probable cause would (as in *Nieves*) defeat a plaintiff's claim, regardless of whether a plaintiff can show retaliatory animus.

Congress and other states should likewise consider adopting legislation creating a dedicated cause of action for citizens, including journalists, who are arrested or interfered with while reporting on police activity. These laws should use the New York act as a template, with one important change: Rather than exempting a general class of offenses (such as "obstruction" crimes) from the cause of action, future laws should instead

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institute-at-columbia-university [https://perma.cc/8ZCT-KYAL] [hereinafter Knight Institute Statement].

312. See, e.g., Dan Shelley, Federal Law Needed to Protect Public, Journalists' Right to Record Police, RTDNA (June 24, 2020), https://www.rtdna.org/article/federal_law_needed_to_protect_public_journalists_right_to_record_police [https://perma.cc/UX9J-7BV2]; Knight Institute Statement, supra note 311.

313. See S. 629, 2019 S., 2019–2020 Reg. Sess. § 1 (Cal. 2020) (exempting journalists from police dispersal orders at protests); S. 3253, 243d Leg., Reg. Sess. (N.Y. 2020) (codified at N.Y. Civ. Rights Law § 79-p (McKinney 2020)) (recognizing a right to record law enforcement activity).

314. S.B. 3253 § 2. Recall that the Second Circuit, which includes New York, has not yet recognized a First Amendment right to film police. See Higginbotham v. Sylvester, 741 F. App'x 28, 30 (2d Cir. 2018) (suggesting that the issue is unsettled).

315. Civ. Rights § 79-p(3)(a)(i), (iv).

316. Id. § 79-p(3)(b).

317. Id. § 79-p(2).

318. Shelley, supra note 312.

319. See supra notes 1–9 and accompanying text.

seek to codify a modified version of the *Mt. Healthy* burden-shifting standard. Such laws could do this by creating an affirmative defense for arresting officers who can show that they (1) had probable cause to arrest the plaintiff, and (2) would have arrested the plaintiff regardless of their legally protected newsgathering activity.

As described above, this burden-shifting approach strikes an appropriate balance for retaliatory arrest cases.[320] It recognizes that probable cause for an offense—including one that arguably "interferes" with police activity—does not negate the possibility that improper animus may be the but-for cause for an arrest. In short, legislation like that advocated by this Note would preserve a viable civil cause of action for those arrested while reporting on police activity, while potentially deterring state efforts to suppress newsgathering. At the same time, jurisdictions that have applied *Mt. Healthy* to arrests have shown themselves capable of filtering out claims where a detainment was justified; thus fears of excessive police liability are likely overblown.[321]

CONCLUSION

Newsgatherers are not the only individuals affected by *Nieves*. But examining the implications of *Nieves* for professional and citizen journalists reveals the potentially broad consequences the decision could have. The absence of a realistic civil remedy to deter pretextual arrests of newsgatherers could impede the press's vital checking function and erode the practical value of citizens' right to film police activity. By engaging in a commonsense reading of *Nieves*'s atypical arrest exception, courts can preserve the ability of litigants to pursue claims in response to police retaliation against newsgathering and other First Amendment–protected activities. Moreover, courts and lawmakers should recognize that arrests of newsgatherers can function like prior restraints, and they should consider speech-protective solutions that prevent state actors from "limiting the stock of information from which members of the public may draw."[322] Doing so will ensure that newsgatherers like Tara O'Neill will have a legal pathway to vindicate their rights and confront future attempts by law enforcement to suppress the capture and dissemination of news.

320. See supra notes 248, 306–307 and accompanying text.

321. See supra note 248 and accompanying text.

322. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).