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## Yes, This Phone Records Audio!: The Case for Allowing Surreptitious Citizen Recordings of Public Police Encounters

*“Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.”<sup>1</sup>*

### I. INTRODUCTION

In today’s technologically advanced world, nearly fifty percent of Americans own smartphones, a statistic that increases to sixty-six percent when considering Americans between the ages of twenty-four and thirty-five.<sup>2</sup> This, along with the recording capabilities of smartphones, increases the potential number of police misconduct incidents caught on film.<sup>3</sup> In order to avoid inevitable police misconduct litigation and potential punitive actions by their agencies and departments, police officers discourage citizens from filming them, often implementing creative uses of state and federal laws against civilians who record their activities.<sup>4</sup> Such creative use of these laws raises constitutional concerns regarding civilian recordings of police officers performing their public duties, who for various reasons, do not want their on-

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1. Letter from Harry S. Truman, President of the United States to the Congress of the United States (Aug. 8, 1950), available at <http://www.presidency.ucsb.edu/ws/?pid=13576>.

2. See Philip Elmer-DeWitt, *Nielsen: 66% of Americans Ages 24-35 Own a Smartphone*, FORTUNE (Feb. 20, 2012, 2:00 PM), <http://tech.fortune.cnn.com/2012/02/20/nielsen-66-of-americans-ages-24-35-own-a-smartphone/> (discussing increase in smartphone users between ages twenty-four and thirty-five); Sam Gustin, *Nearly 50% of Americans Own Smartphones; Android, iPhone Dominate*, TIME (Mar. 1, 2012), <http://business.time.com/2012/03/01/nearly-50-of-americans-own-smartphones-android-iphone-dominate/> (discussing increase in smartphone use).

3. See Radley Balko, *The War on Cameras*, REASON.COM (Dec. 7, 2010, 7:00 AM), <http://reason.com/archives/2010/12/07/the-war-on-cameras/print> (discussing increase in incidents of civilians recording police officers in field); *Recording Video with a Smartphone*, ABC OPEN, [https://open.abc.net.au/assets/pdf/abc\\_open\\_tip\\_sheet\\_smartphone\\_video.pdf](https://open.abc.net.au/assets/pdf/abc_open_tip_sheet_smartphone_video.pdf) (last visited Oct. 17, 2014) (discussing capabilities of smartphones as recording devices).

4. See Balko, *supra* note 3 (criticizing police officers’ methods of arresting citizens who record them with smartphones). Police officers sometimes use state wiretapping statutes in unanimous consent states against civilian journalists who record police activity. See *id.* As a result, officers use the statutes to justify arresting citizens who record them, preventing documentation of the officers’ actions for future use against them in litigation. See *ACLU v. Alvarez*, 679 F.3d 583, 588 (7th Cir. 2012) (describing injunctive relief sought by ACLU against enforcement of eavesdropping statute for openly recording police); *Glik v. Cunniffe*, 655 F.3d 78, 79-80 (1st Cir. 2011) (describing arrest of citizen who openly recorded police with his cell phone); *Commonwealth v. Hyde*, 750 N.E.2d 963, 965 (Mass. 2001) (describing charges brought against man who recorded police during routine traffic stop).

duty activity recorded and therefore rarely consent to being recorded—especially when potential police misconduct exists.<sup>5</sup> Fortunately, such police activity has recently received scrutiny from federal and state courts, as well as the United States Department of Justice.<sup>6</sup>

Until recently, courts in states requiring consent of all parties to the recording of a conversation, also known as “unanimous consent states,” allowed prosecution of civilian journalists under wiretapping statutes; but the First Circuit and Seventh Circuit upheld the First Amendment right of citizens to record police officers in public.<sup>7</sup> The Department of Justice also recommended that a federal court in Maryland should rule that citizens have a right to record police officers performing their public duties.<sup>8</sup>

The right to openly record police officers in public is often upheld when challenged under wiretapping statutes in unanimous consent states.<sup>9</sup> Recent decisions extending such rights, however, have declined to recognize a right to surreptitiously record encounters between citizens and police officers.<sup>10</sup> This discrepancy raises First Amendment concerns regarding civilians’ constitutional right to record police, gives police the ability to circumvent this right, subjects those who wish to exercise it to potential prosecution, and reduces police accountability for their actions.<sup>11</sup>

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5. See Balko, *supra* note 3 (noting disdain held by police and public officials towards recording of their public duties).

6. See *Alvarez*, 679 F.3d at 608 (enjoining application of eavesdropping statute against citizens openly audio recording law-enforcement officers performing public duties); *Glik*, 655 F.3d at 89 (denying officer who arrested citizen under state wiretapping law qualified immunity); *Hyde*, 750 N.E.2d at 971 (holding secret recording of police officer during traffic stop illegal under state wiretap statute).

7. See *Alvarez*, 679 F.3d at 602-03 (recognizing direct burden of Illinois eavesdropping statutes on First Amendment rights); *Glik*, 655 F.3d at 85 (upholding rights of citizens to record police performing duties in public); Balko, *supra* note 3 (discussing recent incidents involving arrests of citizens for recording police). The Courts of Appeals for the First Circuit and Seventh Circuit held that citizens cannot be prosecuted under wiretapping statutes for recording police officers while the officers are performing their public duties. See *Alvarez*, 679 F.3d at 608; *Glik*, 655 F.3d at 79. The Massachusetts Supreme Judicial Court affirmed the conviction of a defendant because his recording of a police officer during a traffic stop was done secretly. See *Hyde*, 750 N.E.2d at 964.

8. See Justin Fenton, *DOJ Urges Judge to Side with Plaintiff in Baltimore Police Taping Case*, BALTIMORE SUN (Jan. 11, 2012), [http://articles.baltimoresun.com/2012-01-11/news/bs-md-ci-aclu-doj-videotaping-20120111\\_1\\_police-officers-police-department-baltimore-police](http://articles.baltimoresun.com/2012-01-11/news/bs-md-ci-aclu-doj-videotaping-20120111_1_police-officers-police-department-baltimore-police) (describing Department of Justice’s Civil Rights Division’s recommendation to U.S. District Judge Benson Everett Legg).

9. See *Alvarez*, 679 F.3d at 608 (extending right to openly record police encounters with civilians); *Glik*, 655 F.3d at 85 (protecting citizens who openly record police from prosecution).

10. See *ACLU v. Alvarez*, 679 F.3d 583, 605-06 (7th Cir. 2012) (declining to extend right to surreptitiously record police encounters with civilians); *Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011) (rejecting prosecution of citizens who openly record police but not of citizens who surreptitiously record them).

11. See Balko, *supra* note 3 (discussing arguments in favor of and against allowing citizens to record police). See generally Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487 (2011) (arguing for First Amendment right to record police during public encounters with citizens); J. Peter Bodri, Comment, *Tapping Into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U.J. GENDER SOC. POL’Y & L. 1327 (2011) (criticizing

This Note argues in favor of explicitly recognizing the rights of citizens to record police in order to hold them accountable for their public actions and protect citizens from police misconduct and wrongful prosecution.<sup>12</sup> It also discusses the merits of extending the right to record public actions of police officers to surreptitious citizen recordings.<sup>13</sup> Part II discusses the history of the First Amendment as it applies to citizens' recordings of police and state and federal wiretapping statutes as they apply to such recordings.<sup>14</sup> Part III provides a detailed analysis of how the First Amendment protects the rights of citizens to record police and how the use of wiretapping statutes and other criminal charges to prosecute those who do record police over the course of performance of public police duties interferes with that right.<sup>15</sup> Finally, Part IV concludes that the benefits of extending an absolute right to record public police activity, with limited exceptions, outweigh the potential hindrances to the performance of police duties.<sup>16</sup>

## II. HISTORY

### A. *The First Amendment Application to Citizen Recordings of Public Police Encounters*

The First Amendment of the U.S. Constitution prevents the government from enacting laws that interfere with the freedom of speech or of the press, thereby guaranteeing citizens the right to communicate and express their opinions without retaliation from the government.<sup>17</sup> Originally, the First Amendment only applied to the federal government, but in *Lovell v. City of Griffin*,<sup>18</sup> the Supreme Court recognized the freedoms of speech and of the press as “among the fundamental personal rights and liberties . . . protected by the Fourteenth Amendment from invasion by state action.”<sup>19</sup> While not all

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use of wiretapping laws to prosecute citizens who record police in public).

12. See *supra* note 11 and accompanying text (discussing merits of extending absolute right to citizens' recordings of public police activity).

13. See *infra* Part III.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See U.S. CONST. amend. I (declaring freedom of expression). The text of the First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*; see also *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (discussing constitutional guarantee to discuss matters of public concern without punishment). Justice Murphy, delivering the opinion of the Court, wrote “[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Id.* at 101-02.

18. 303 U.S. 444 (1938).

19. *Id.* at 450 (recognizing freedoms of speech and press as fundamental personal rights); see also *Thornhill*, 310 U.S. at 101-02 (embracing right to speak publicly and truthfully without fear of restraint or

forms of speech or expressive conduct are protected by the First Amendment, the government cannot interfere with speech or expressive conduct unless either the potential for harm or a sufficient government interest exists under the circumstances.<sup>20</sup> The government may not regulate expression based on its content, especially if the expression conveys a person's views or beliefs, or is political in nature; but as an exception, the government may regulate the expression if it incites or is likely to incite "imminent lawless action."<sup>21</sup>

Content-neutral regulations, however, are sometimes permissible, but the regulations must withstand intermediate constitutional scrutiny.<sup>22</sup> A content-neutral speech restriction will withstand the intermediate scrutiny test set forth in *United States v. O'Brien* "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>23</sup>

Although a legitimate government interest or purpose may allow regulation of some speech or expression, the regulation must be reasonable.<sup>24</sup> Time, place, and manner restrictions are allowable if the restrictions "are justified without reference to the content of the regulated speech . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."<sup>25</sup> Government officials can neither arbitrarily enforce an existing regulation or law nor retaliate against those who participate in protected speech or expression because of a personal aversion to its content.<sup>26</sup> While certain government and public officials may

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punishment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (rejecting absolute freedom of speech and press under First Amendment). Justice Murphy explains this protection, "enable[s] the members of society to cope with the exigencies of their period." *Thornhill*, 310 U.S. at 102; see also *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (holding ordinance relating to corporate expenditures invalid for abridging expression protected by First Amendment).

20. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-85 (1992) (listing forms of speech and expression government may proscribe); *New York v. Ferber*, 458 U.S. 747, 774 (1982) (holding New York law against distribution of child pornography did not violate First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942) (affirming judgment of conviction under state law denouncing "fighting words"); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (describing situations where speech not protected, while affirming conviction for anti-draft pamphlet distribution).

21. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (outlining exceptions to prohibition of states' use of force or law to abridge free speech).

22. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (setting forth intermediate scrutiny test for use in content neutral-speech regulations).

23. *Id.* at 377 (providing standard for intermediate scrutiny in content-neutral speech regulation cases).

24. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (permitting reasonable restrictions on free speech when legitimate purpose exists); see also *Cox v. Louisiana*, 379 U.S. 559, 572-73 (1965) (reversing defendant's conviction for interfering with administration of justice).

25. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (describing reasonable regulations on speech); see also *Cox*, 379 U.S. at 572-73 (discussing reasonable regulations on speech).

26. See *Ward*, 491 U.S. at 791 (permitting reasonable time, place, and manner restrictions on free speech when legitimate purpose exists); see also *Cox*, 379 U.S. at 572-73 (reversing defendant's conviction for

have a personal interest in regulating some forms of speech, the private interest of a government agent is not sufficient to permit regulation, and arresting citizens for personal reasons violates their First Amendment rights.<sup>27</sup> Therefore, police officers may only arrest a person for speech or conduct intended to interfere with an investigation or the performance of their duties, such as “fighting words.”<sup>28</sup> Vague or overbroad restrictions on speech increase the risk of discriminatory enforcement and deter potentially lawful speech and expression, especially when the penalty for violation of the restriction is criminal rather than civil.<sup>29</sup> Also, the government may only regulate the presentation of speech, rather than its content, and such restrictions on the

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interfering with, obstructing, or impeding administration of justice). In *Cox*, a civil rights leader was arrested and later convicted for leading a protest near a courthouse in violation of a Louisiana statute, which prohibited demonstrations near a courthouse “with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty.” LA. REV. STAT. ANN. § 14:401 (2014); *Cox*, 379 U.S. at 560. The Court found the statute served a legitimate government interest and was valid on its face; but the Court reversed the defendant’s conviction for the unconstitutional manner in which it was enforced because the defendant was told that the location of his demonstration did not fall within the statute’s definition of “near” the courthouse. *Cox*, 379 U.S. at 564, 571; see also *City of Houston v. Hill*, 482 U.S. 451, 465-67 (1987) (criticizing Texas statute as overbroad for giving police authority to arrest citizens for verbal interruptions); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (holding teacher’s exercise of right to speak on public issues improper basis for dismissal).

27. See Steven A. Laultt, Note, *Sunlight is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 355-57 (2012) (highlighting police distaste for being filmed and efforts to hinder citizen recordings). Police have an interest in preventing recordings of their actions because without the recording their version of the facts regarding an incident would likely appear more credible to a court than other sources, and it protects their mistakes from public attention. See *id.* For these reasons, police developed “a startling array of tactics,” relying on the public’s willingness to comply with police orders to discourage the public from recording their actions while performing their public duties. See *id.* When officers are unsuccessful in stopping citizens from recording them, they often turn to hindering, interference, or obstruction statutes to threaten arrest and prosecution. See *id.* at 356-57; see also Michael Potere, Note and Comment, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 278-79 (2012) (discussing reasons police pursue citizen videographers and arguing for citizens’ right to record police). “[P]olice officers fear the potentially damaging effect video footage can have on their reputation, efficacy, and safety. This fear is exacerbated by the increasing prevalence of technology that makes it possible to simultaneously capture and edit high-quality videos and then subsequently disseminate them on the Internet.” Potere, *supra*, at 278 (internal footnotes omitted).

28. See *Colten v. Kentucky*, 407 U.S. 104, 109 (1972) (refusing to protect persistent attempts to speak which interfere with officer’s attempt to issue ticket); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942) (declining to extend First Amendment protection to words likely to incite fighting); *King v. Ambs*, 519 F.3d 607, 613 (6th Cir. 2008) (determining speech instructing witness not to respond to police questioning not protected). But see *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (holding objecting to questionable treatment by police constitutionally protected); *Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003) (calling police officer “son of a bitch” does not amount to “fighting words”); *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (holding obscene gestures and cursing at police officer protected by First Amendment).

29. See *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (acknowledging deterrent effect of criminal statutes proscribing some forms of speech). The *Reno* Court explained that overbroad restrictions on speech create potential confusion regarding what forms of speech are permitted. See *id.* The confusion deters those who may otherwise engage in lawful speech or conduct because of the fear of prosecution when criminal penalties are attached. See *id.*

recording of police officers are not likely “justified without reference to the content of the regulated speech,” or “narrowly tailored to serve a significant governmental interest.”<sup>30</sup>

The purpose of the federal Bill of Rights is to minimize the ability of government officials to rule in their own self-interest by:

[P]rotect[ing] the ability of local governments to monitor and deter federal abuse, ensur[ing] that ordinary citizens [will] participate in the federal administration of justice . . . and preserv[ing] the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions.<sup>31</sup>

Consequently, the First Amendment guarantees citizens the right to openly and publicly discuss matters of public concern.<sup>32</sup> It also guarantees that this right is clearly established and logically applies to matters relating to government officials.<sup>33</sup>

The First Amendment further allows citizens to act in accordance with their

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30. *Clark*, 468 U.S. at 293 (outlining requirements for reasonable time, place, and manner restrictions on public speech).

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also Reno*, 521 U.S. at 879 (finding reasonable time, place, and manner restrictions inapplicable to content). The recording restrictions are not likely content neutral—and therefore overly broad because “ample alternative channels” for communication are not left open—because the police can interpret any restrictions placed on citizen recordings of police officers to restrict any and all recordings of such nature, and can selectively enforce them based on their own personal motivations. *See Reno*, 521 U.S. at 879; *see also City of Houston v. Hill*, 482 U.S. 451, 458-60 (1987) (discussing Court’s task in determining constitutionality of statute for overbreadth).

31. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xiii (1998) (describing purpose of Bill of Rights). Professor Amar argues that the Bill of Rights was centrally concerned with controlling the “agency costs” associated with a representative government, where those in power might try to rule in their own self-interest, contrary to the interests of the people they were elected to represent. *See id.*

32. *See Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (upholding freedom of labor organizers to disseminate information concerning facts of labor dispute). The Supreme Court recognized that “[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Id.*

33. *See Crawford-El v. Britton*, 523 U.S. 574, 584 (1998) (condemning retaliatory prosecution by government officials for speaking out against them); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (discussing purpose of First Amendment insofar as it protects against unbridled censorship by government officials); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033-34 (1991) (discussing purpose of free-speech protection in relation to protection against arbitrary enforcement).

personal views and beliefs without fear of retaliation.<sup>34</sup> A person's status as a public employee may affect his First Amendment protections if he is speaking in his official capacity on matters of public concern; however, if the public employee is speaking as a citizen, then the First Amendment protects him as it would anyone else.<sup>35</sup> This distinction exists to encourage "free and open debate" by the public on important matters of public concern—which the activities of police officers certainly are—and to protect citizens from government officials who pursue their own self-interests by holding those in positions of authority accountable for their decisions.<sup>36</sup>

Encouraging free and open debate through citizens monitoring and reporting the actions of police holds police accountable for their actions and is a favorable public-policy objective.<sup>37</sup> Communities established police forces because of the common opinion that there ought to be people acting as representatives of the society they are members of and therefore responsible to the public they protect and serve.<sup>38</sup> While the purpose of the police has always been to act as "representatives or agents of society," their authorization to use force against citizens puts them in a unique position to abuse their authority and therefore creates the need to subject their actions to additional scrutiny.<sup>39</sup> Because of this responsibility and the impact of police actions on public welfare, the right of citizens to monitor and report officers' actions has existed

34. See *Crawford-El*, 523 U.S. at 588 n.10 (noting retaliation threatens exercise of protected speech); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invalidating statute outlawing category of speech with no relationship to danger it sought to prevent); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (holding teacher's exercise of right to speak on public issues cannot furnish basis for dismissal). Justice Stevens stated in his opinion in *McIntyre* that the purpose of the Bill of Rights—particularly the First Amendment—is "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357.

35. See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (outlining standard used to determine whether government employee speaking as citizen or as employee); see also *Pickering*, 391 U.S. at 574-75 (overturning dismissal of teacher for writing letter in newspaper criticizing allocation of school funds).

36. See *Pickering*, 391 U.S. at 571-72 (extending First Amendment protection to government employees speaking as citizens on matters of public concern); see also AMAR, *supra* note 31, at 21 (discussing history and original purpose of First Amendment's protection of freedom of expression). Amar suggests that the purposes of the First Amendment was to protect citizens against government officials putting their own interests above the interests of their constituents and to protect individuals and minorities from tyrannical majorities who try to oppress views that are unpopular among them. See AMAR, *supra* note 31, at 21.

37. See *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing First Amendment right to gather information about public officials on public property); see also Potere, *supra* note 27, at 296-301 (stating right to record police officers recognized by Eleventh Circuit in *Smith v. City of Cumming*).

38. See Potere, *supra* note 27, at 298-99 (describing police officers' function as representatives and members of society); see also DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE: CRITICAL PERSPECTIVES ON CRIME AND LAW* 86 (2007) (arguing criminal justice system should reflect views and interests of community); VICTOR G. STRECHER, *THE ENVIRONMENT OF LAW ENFORCEMENT: A COMMUNITY RELATIONS GUIDE* 15 (1971) (concluding "policemen are proxies for other citizens" in United States).

39. See Potere, *supra* note 27, at 298-99 (discussing police officers' function in society and unique authorization to use force against citizens); see also ZENITH GROSS & ALAN REITMAN, *POLICE POWER AND CITIZENS' RIGHTS: THE CASE FOR AN INDEPENDENT POLICE REVIEW BOARD* 4 (1966) (illuminating fact police function as only government officials authorized to use force against citizens).

since police forces were first established, as evidenced by newspaper reports of police misconduct as early as the nineteenth century.<sup>40</sup> Police forces became more organized as the forces grew and evolved, and the complaint process became more formal as police oversight committees, funded by the government and staffed by civilians, formed to investigate allegations of police misconduct and recommend appropriate punishment when necessary.<sup>41</sup> Today, police forces continue to be monitored by oversight committees.<sup>42</sup> Federal law also provides a private remedy in tort for citizens whose constitutional rights have been deprived by police or other state actors, allowing plaintiffs to recover damages, court costs, and attorney's fees.<sup>43</sup>

*B. Privacy Expectations Included in Wiretapping Statutes Do Not Prohibit Citizen Recordings of Public Police Encounters*

An argument often made by police and public officials when citizens are charged under wiretapping statutes for recording public police encounters is that police have a legitimate expectation of privacy.<sup>44</sup> Ironically, the

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40. See Potere, *supra* note 27, at 298-300 (detailing public observation and monitoring of police for hundreds of years). Furthermore, newspapers have reported on cases of police misconduct and other questionable activities of police and public officials since as early as the nineteenth century, indicating an awareness of the scrutiny placed on those entrusted with protecting society. See *id.* at 299. The Chicago Tribune published an editorial in 1893 describing an instance where a citizen was arrested for threatening to report a police officer because the officer failed to clear a crowded street. See *id.* (chastising police officer for striking citizen who threatened to report officer). The officer was later dismissed from the police force after he unsuccessfully defended his actions in "police court." See *id.* at 299-301.

41. See Cheryl Beattie & Ronald Weitzer, *Race, Democracy and Law: Civilian Review of Police in Washington, DC*, in CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS 41, 51-52 (Andrew Goldsmith & Colleen Lewis eds., 2000) (discussing establishment of D.C.'s "Civilian Complaint Review Board" to adjudicate "all non-frivolous cases" against police); Potere, *supra* note 27, at 300 (discussing evolution of police forces and how society monitors and controls alleged misconduct); see also James R. Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515, 520, 523, 526 (1971) (discussing establishment of Civilian Complaint Review Boards in New York City and Philadelphia in 1950s). When these oversight committees originated, reports of possible police misconduct were based on eyewitness testimony and hearsay. Potere, *supra* note 27, at 300. With emerging technologies giving citizens the ability to record activity wherever they are it is now easier to obtain hard evidence when police misconduct is alleged, increasing the accuracy of the outcomes of such investigations. See *id.* at 301 (acknowledging impact of emerging technologies on evidence in police misconduct investigations by oversight committees).

42. See Potere, *supra* note 27, at 300-01 (discussing existence and function of police oversight committees). The existence of police oversight committees, whose function is to recommend punishment for police misconduct, demonstrates the government's objective to reduce police misconduct and encourage citizens to report questionable police activity. See *id.*

43. See 42 U.S.C. § 1983 (2014) (providing private tort action for deprivation of constitutional rights by state actors); 42 U.S.C. § 1988 (2014) (awarding attorney's fees for successful actions under 42 U.S.C. § 1983).

44. See *ACLU v. Alvarez*, 679 F.3d 583, 606-07 (7th Cir. 2012) (rejecting privacy expectation asserted by state's attorney in conversation at issue); *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993) (finding no expectation of privacy in conversation between prisoner and police officer); see also Alderman, *supra* note 11, at 496-500 (discussing state wiretapping statute provisions including reasonable expectation of privacy requirement); Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 881-90 (1998) (discussing privacy in relation to eavesdropping and

wiretapping statutes used by police officers to arrest citizens originated from the Fourth Amendment's expectation of privacy afforded to *protect* citizens.<sup>45</sup> The central issue in both *United States v. Olmstead* and *United States v. Katz*—the Supreme Court decisions that recognized the expectation of privacy—was whether police recordings made without the defendant's knowledge violated the defendant's Fourth Amendment rights.<sup>46</sup>

Before *Katz*, police could conduct surveillance and record citizens as long as they did not physically intrude on a constitutionally protected place or thing.<sup>47</sup> After Justice Harlan's concurring opinion in *Katz*, however, the test for determining a citizen's reasonable expectation of privacy became whether or not "a person [has] exhibited an actual (subjective) expectation of privacy and, [whether] the expectation [is] one that society is prepared to recognize as 'reasonable.'"<sup>48</sup> The Court has not recognized a reasonable expectation of privacy in activities or communications knowingly exposed to the public, such as the contents of garbage or a person's movements in a motor vehicle on public highways.<sup>49</sup> Furthermore, if there is a vantage point from which any

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recording of communications).

45. See *Katz v. United States*, 389 U.S. 347, 348-49 (1967) (challenging interception of communications made by defendant from enclosed telephone booth under Fourth Amendment); *Olmstead v. United States*, 277 U.S. 438, 455-57 (1928) (challenging wiretaps by police leading to convictions of appellants), *overruled by Katz*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41 (1967).

46. See *Katz*, 389 U.S. at 351 (analyzing privacy expectations of defendant recorded inside phone booth without warrant); *Olmstead*, 277 U.S. at 464 (comparing privacy expectations of telephone conversations to privacy expectations of mail correspondence). The *Olmstead* Court read the Fourth Amendment narrowly, extending its protections only to constitutionally protected areas because it only applied to "the person, the house, his papers, or his effects," rather than the words he projects over the telephone from inside the house to another unprotected location. *Olmstead*, 277 U.S. at 464. The *Olmstead* decision was overruled in *Katz*, where the reasonable expectation of privacy test originated, because the Court found that the Fourth Amendment "protects people, not places," and that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351. Despite recognizing the states' responsibility and authority in regards to personal privacy rights, the *Katz* Court removed the "constitutionally protected area" requirement that previously determined whether a privacy right existed under the Fourth Amendment because "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351 n.9.

47. See *Weeks v. United States*, 232 U.S. 383, 390 (1914) (discussing constitutional protections provided by Fourth Amendment to citizen's home), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961), and *Elkins v. United States*, 364 U.S. 206 (1960). *But see Hester v. United States*, 265 U.S. 57, 59 (1924) (rejecting extension of Fourth Amendment expectation of privacy protection to open fields owned by defendant).

48. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (outlining current language used by courts for reasonable expectation of privacy). A citizen manifests an actual expectation of privacy by taking steps to conceal his activity from the public, and when the steps taken are recognized by society as reasonable, such activity is protected by the Fourth Amendment. See *id.*

49. See *California v. Greenwood*, 486 U.S. 35, 40 (1988) (refusing to extend reasonable expectation of privacy to garbage left in public view); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (permitting use of tracking devices to monitor vehicle movements on public way). There is no reasonable expectation of privacy in a person's movements from one place to another in public, nor is there such a privacy expectation in the movements of objects outside a person's home under the "open fields" doctrine. See *Knotts*, 460 U.S. at 282, 285. Law enforcement officers' reliance upon a signal emitted from a beeper to monitor an object's movements and to locate the object does not change this because "[n]othing in the Fourth Amendment

member of the general public could lawfully observe a person's activity and the actor should have known or reasonably foreseen an observation from such a vantage point, no reasonable expectation of privacy exists, unless the area observed is immediately adjacent to a constitutionally-protected area.<sup>50</sup>

In response to the *Katz* decision, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act (Title III) to protect citizens from unwarranted intrusions subjecting them to criminal or civil actions.<sup>51</sup> Congress modeled the personal privacy right of citizens against illegal wiretapping, along with the provisions provided by Title III, after Justice Harlan's reasonable expectation of privacy test from his concurrence in *Katz*.<sup>52</sup> Courts interpret the definition of "oral communications" provided by Title III and the Electronic Communications Privacy Act (ECPA) to mean that interception of spoken communications is only prohibited when the recorded party demonstrates an actual (subjective) expectation of privacy society views as objectively reasonable.<sup>53</sup>

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prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancements as science and technology afford[] them . . ." *Id.* at 282.

50. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (permitting use of sophisticated but readily-available camera to conduct surveillance of commercial plant); see also *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986) (denying motion to suppress aerial observations of marijuana plants in defendant's backyard).

51. See Alderman, *supra* note 11, at 493 (discussing conception of Title III); Bodri, *supra* note 11, at 1332-33 (discussing Congress's purpose in drafting Title III of the Omnibus Act).

52. See Alderman, *supra* note 11, at 493 (discussing influence of *Katz* decision on implementation of Title III). Title III's definition of "oral communication" follows the language of Justice Harlan's concurrence in *Katz*. See Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 (2014) (recodifying Title III and providing adjustments and additions to original provisions of Act); Alderman, *supra* note 11, at 493 (recognizing similarities between language in Justice Harlan's *Katz* concurrence and Title III's "oral communications" definition); see also G. STEVENS & C. DOYLE, *PRIVACY: WIRETAPPING AND ELECTRONIC EAVESDROPPING* 13-14 (2002) (describing definition of "oral communication" and "wire communications" in current federal wiretapping statute). Congress recast Title III in 1986 in the ECPA, following the general outline of Title III and including adjustments and additions in order "to strike a balance between the interests of privacy and law enforcement." STEVENS & DOYLE, *supra*, at 7. The ECPA—the current federal wiretapping statute—protects only face-to-face conversations that the speakers justifiably expect to be private. See *id.* at 13. Also, "wire communications" must involve some form of voice communications, such as aural transfers, for the statute's protections to apply. See *id.* Compare 18 U.S.C. § 2510 (defining oral and wire communications), with *Katz v. United States*, 389 U.S. 347, 361 (1967) (outlining Justice Harlan's reasonable expectation of privacy test). According to Title III, "'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C. § 2510(2). The definition mirrors the language in Justice Harlan's "reasonable expectation of privacy" test requiring that the subjective expectation of privacy exhibited by an individual "be one that society is prepared to recognize as 'reasonable'" for Fourth Amendment privacy protections to apply. *Katz*, 389 U.S. at 361.

53. See 18 U.S.C. § 2511(1)(a) (2014) (prohibiting unauthorized interception of communications); § 2511(1)(c) (prohibiting disclosure of communications); § 2511(2)(d). Section 2511(2)(d) states "[i]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent . . ." § 2511(2)(d). The ECPA and Title III are one-party consent wiretapping statutes, which means the statutes prohibit interception and disclosure of any oral, wire, or

Police and public officials do not enjoy the same expectation of privacy as private citizens.<sup>54</sup> Some courts have held that the privacy expectations of police and public officials are reduced when they are acting in their official capacities, especially when the activity they seek to keep private occurs in public, where it is easily observable because such actions are, by their very nature, exposed to the public.<sup>55</sup> Other courts ruling on this issue have held that, for expectation of privacy purposes, police officers are public officials subject to lesser privacy expectations due to the broad powers invested in the officers, the high potential for abuse of power, and their influence and notoriety within the community.<sup>56</sup> These court decisions, considered along with the history of citizen reporting previously discussed, further supports the conclusion that the police do not have a justifiable expectation of privacy when performing duties in public.<sup>57</sup>

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electronic communication unless one party to the communication offers prior consent or is the recorder. *See id.*; *see also* 18 U.S.C. § 2518 (2014) (providing procedural steps for law enforcement officers to obtain court orders to wiretap suspects); § 2518(10)(a) (prohibiting admissibility of evidence of communications intercepted in violation of statute); § 2520 (providing civil remedies for non-government entities unlawfully intercepting communications); § 2511(4)(a) (providing maximum penalty for interception of communications in violation of Title III); Alderman, *supra* note 11, at 493-94 (outlining provisions and remedies provided by Title III). Title III and the ECPA also provide procedural steps for obtaining court orders to wiretap suspects, prohibit admission of evidence of communications obtained in violation of the Act, and provide civil remedies for aggrieved parties and criminal penalties for the illegal interception of oral communications. *See, e.g.*, § 2511(4)(a); § 2518(10)(a); § 2520; *see also* STEVENS & DOYLE, *supra* note 52, at 13 (discussing ECPA's protections of oral communications in which speakers have justifiable expectation of privacy); Alderman, *supra* note 11, at 493 (discussing courts' interpretation of Title III's privacy provisions in "oral communications"). The definitions used in the ECPA limit interception prohibitions by describing communications beyond the Act's grasp as well as communications it may restrict. *See* STEVENS & DOYLE, *supra* note 52, at 13. The three types of communications protected by the ECPA are "telephone (wire), face to face (oral), and computer [(electronic)]." *Id.*

54. *See* State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (finding no privacy expectation in conversation occurring during arrest where passerby could easily overhear it); *see also* Bodri, *supra* note 11, at 1332 (outlining several rationales used by courts in denying same privacy expectations to police as citizens); *cf.* Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000) (concluding police officers "are 'public official[s]'" for defamation purposes).

55. *See* Flora, 845 P.2d at 1357-58 (denying privacy protection to publicly exposed comments made during traffic stop); *see also* Bodri, *supra* note 11, at 1332 (describing courts' application of "open field" doctrine to privacy expectations of police in public). "[C]ertain courts have ruled that comments police officers make in the course of their public duties are comments that have been knowingly exposed to the public." Bodri, *supra* note 11, at 1332. The "open field" doctrine, which denies a reasonable expectation of privacy to things a person knowingly exposes to the public by leaving it in view of the public, provides further justification against extending the same privacy expectations enjoyed by citizens to police officers acting in their official capacity. *See id.*

56. *Cf.* Rotkiewicz, 730 N.E.2d at 287 (discussing reasons to treat police officers as public officials for defamation purposes).

57. *See* Potere, *supra* note 27, at 298-300. (discussing common practice of monitoring and reporting police activity). The fact that police activity is commonly monitored and reported by members of the public alerts law enforcement officials that members of the public can and will monitor their actions. *See id.* at 298-99; *see also supra* notes 40-42 (discussing history of citizen reporting and police oversight).

### C. State Wiretapping Statutes and Their Treatment by Courts

With respect to the interception of wireless communications, the wiretapping statutes of many states vary.<sup>58</sup> The distinctions between state wiretapping statutes are numerous and among the varied provisions are differing expectations of privacy, exemptions for those acting “under color of law,” additional requirements for prosecution, and varying definitions for “oral” and “wire” communications.<sup>59</sup> Some federal circuit courts differ in the reasoning of their decisions on the constitutionality of state wiretapping statutes and all continue to refuse to make a determination regarding surreptitious recordings for various reasons.<sup>60</sup> Furthermore, the Illinois Supreme Court recently declared a similar wiretap statute unconstitutionally vague and overbroad on its face.<sup>61</sup>

#### 1. Georgia

In *Smith v. City of Cumming*,<sup>62</sup> the plaintiffs used a police scanner and video camera to track and record police officers in an attempt to record evidence of

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58. See 720 ILL. COMP. STAT. ANN. 5/14-2(a)(1)-(2) (West 2014), *invalidated by* *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014) (declaring unanimous verdict refusing to differentiate between open and surreptitious recordings); MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2014) (defining “interception” of communications). Under the Massachusetts wiretapping statute “‘interception’ means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . . .” MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4); see also ALASKA STAT. ANN. §§ 42.20.310-42.20.320 (West 2014) (failing to protect recorder when recorded party does not have expectation of privacy); ARK. CODE ANN. § 5-60-120(c)(1) (West 2014) (exempting any person acting under color of law from statute’s prohibitions); GA. CODE ANN. §§ 16-11-60, 16-11-62 (West 2014) (prohibiting recording “in a clandestine manner” of “private conversation” in “private place.”); IOWA CODE ANN. §§ 727.8, 808B.2 (West 2014) (insulating from prosecution “openly present” recorders who actively participate in or listen to communication); KY. REV. STAT. ANN. §§ 526.010, 526.070 (West 2014) (requiring no expectation of privacy of recorded party to subject recorder to statute’s provisions); ME. REV. STAT. ANN. tit. 15, §§ 709-710 (2014) (permitting criminal prosecution only when recorder not “within the range of normal unaided hearing”); N.M. STAT. ANN. § 30-12-1 (West 2014) (prohibiting interception of communications through telephone lines, cable, and other electronic-wire transmissions); N.Y. PENAL LAW § 250.05 (McKinney 2014) (prohibiting unlawful wiretapping, “mechanical overhearing of a conversation,” or interception of electronic communication); Bast, *supra* note 44, at 919-26 (comparing and contrasting provisions of wiretapping statutes in all fifty states). The information provided in the appendices of Carol Bast’s article relates to the applicable laws in 1998. See Bast, *supra* note 44, at 919-26.

59. See *supra* note 58 and accompanying text (explaining distinctions and various provisions of state wiretapping statutes).

60. Compare *ACLU v. Alvarez*, 679 F.3d 583, 606-607 (7th Cir. 2012) (declining to determine constitutional right to surreptitiously record police due to openness of planned recordings), with *Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011) (holding surreptitious recording of police unlawful under Massachusetts wiretapping statute because of statutory language).

61. See *People v. Melongo*, 6 N.E.3d 120, 126-27 (Ill. 2014) (holding Illinois wiretapping statute unconstitutionally vague and overbroad on its face); see also *Eavesdropping Statute was Unconstitutionally Overbroad on Its Face*, WEST’S CRIM. LAW NEWS, Apr. 17, 2014 (reporting Illinois Supreme Court’s decision in *People v. Melongo*).

62. 212 F.3d 1332 (11th Cir. 2000).

police making improper traffic stops.<sup>63</sup> During the course of their tracking and recording, the plaintiffs never interfered with the police and openly recorded the stops from public property.<sup>64</sup> On appeal, the Eleventh Circuit held the plaintiffs “had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct,” reasoning the “First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”<sup>65</sup>

Although *Smith* addresses open recordings of police and active attempts by citizens to track, monitor, and record police activity, rather than surreptitious recordings of police officers performing their public duties, it nevertheless supports a First Amendment right to record police in public.<sup>66</sup> *Smith* actively tracked and recorded the police while looking for improper conduct, invading any subjective expectation of police privacy, but the court nevertheless upheld the legality of his behavior.<sup>67</sup> Although the decision fails to address surreptitious recordings, the greatness of the plaintiff’s intrusion on the police officers’ privacy nevertheless supports an inference that the police do not enjoy an expectation of privacy in public.<sup>68</sup>

## 2. Pennsylvania

In *Kelly v. Borough of Carlisle*,<sup>69</sup> a police officer noticed a passenger, Kelly,

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63. See Appellant’s Brief at 11, *Smith*, 212 F.3d 1332 (No. 99-8199), 1999 WL 33618060, at \*11 (summarizing facts); Potere, *supra* note 27, at 297 (describing facts leading to litigation under 42 U.S.C. § 1983 for deprivation of First Amendment rights); see also 42 U.S.C. § 1983 (2012) (providing civil claim for deprivation of constitutional rights by police officers). When a United States citizen’s constitutional rights are violated by a government official acting under color of state law, that citizen may file a claim under 42 U.S.C. § 1983, which provides a remedy for deprivation of constitutional rights. § 1983. Section 1983 reads:

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

§ 1983.

64. See Potere, *supra* note 27, at 297 (discussing citizens’ recordings of police from public property without interfering with duties). The police were still able to obtain an arrest warrant for videotaping of police officers and used it to intimidate, harass, and embarrass them at their place of business. See *id.*

65. See *Smith*, 212 F.3d at 1333 (recognizing plaintiffs’ right to record police activity of public interest on public property).

66. See Potere, *supra* note 27, at 298 (discussing impact of *Smith* holding on First Amendment right to record police in public).

67. See *id.* at 297-98 (describing invasiveness of plaintiff’s tracking and recording of police activity).

68. See *id.* at 297-98 (comparing invasiveness of plaintiff’s actions to ordinary circumstance where a citizen records police officer).

69. 622 F.3d 248 (3d Cir. 2010).

recording him, allegedly without his knowledge or consent.<sup>70</sup> The officer seized the video recorder and called an assistant district attorney, who confirmed that Kelly's use of the video recorder to record the officer was a violation of the Pennsylvania wiretap statute; the officer called for backup and arrested Kelly.<sup>71</sup> The police declined to press charges against Kelly, but Kelly sued the arresting officer and the Borough of Carlisle for deprivation of his First and Fourth Amendment Rights under 42 U.S.C. § 1983, along with several state law claims.<sup>72</sup> On appeal, the Third Circuit acknowledged that existing case law recognizes a broad right to record police performing their public duties, but also noted existing case law suggests a narrower right and refused to extend a right to record police officers to the specific facts of this case.<sup>73</sup> In support of its decision that the First Amendment does not protect citizen recordings of police during traffic stops, the court reasoned that none of the case law relied on by Kelly dealt with traffic stops, which the Supreme

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70. *See id.* at 251 (explaining facts leading up to arrest for recording police officer during traffic stop). The defendant was filming the officer with a video camera he placed on his lap during a routine traffic stop, after the officer had informed the defendant that the traffic stop was recorded as mandated by department policy. *See id.* at 51. At his deposition, the officer stated: "as a police officer, when we conduct traffic stops and we're audio and video recording, we know—I know it's the law that I must at some point during the stop inform the occupants that they're being audio and video recorded in accordance with the [A]ct." *Id.* at 251 (alteration in original).

71. *See id.* at 251-52 (describing assistant district attorney's recommendation to recorded officer and subsequent arrest of citizen recorder). The assistant district attorney reviewed the Pennsylvania wiretap statute and told the officer it was appropriate to arrest Kelly, but advised the officer not to seek bail at Kelly's arraignment. *See id.* at 252. The officer told the assistant district attorney that he made the initial stop for speeding and bumper height violations and seized the camera after realizing Kelly was recording him, but the officer did not inform the assistant district attorney that the police also recorded the traffic stop. *See id.* Although the arresting officer recommended Kelly be released on his own recognizance at the arraignment—as the assistant district attorney had advised—the presiding local magistrate ordered bail, which the defendant could not make and resulted in a twenty-seven hour detention. *See id.* at 252.

72. *See id.* at 252 (discussing claims brought against defendants by Kelly after charges against Kelly were dropped); *Kelly v. Borough of Carlisle*, No. 1:07-cv-1573, 2009 U.S. Dist. LEXIS 37618, at \*11 (M.D. Pa. May 4, 2009) (concluding actions of arresting officer and advice of assistant district attorney reasonable), *aff'd in part, vacated in part*, 622 F.3d 248 (3d Cir. 2010).

73. *See Kelly*, 622 F.3d at 262 (applying case law narrowly to context of recording police during traffic stops); *see also Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing First Amendment right, subject to reasonable time, manner, and place restrictions, to record police); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (recognizing free speech right to film police officers in performance of their public duties). *But see Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 183-84 (3d Cir. 1999) (holding planning committee's resolution prohibiting videotaping of public meetings did not violate First Amendment); *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006) (declining to adopt First Amendment protection to observation and monitoring of public officials). Concluding there was "insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment," the court reasoned that the cases relied on were not sufficiently analogous to the current facts to put the officer on notice of a clearly established right to record police under the circumstances. *See Kelly*, 622 F.3d at 262 (refusing to recognize general right to record police officers during performance of their public duties).

Court recognized as “inherently dangerous situations.”<sup>74</sup>

### 3. Massachusetts

The Massachusetts wiretapping statute makes it a crime to secretly record any oral communication without the consent of all parties to the conversation, and it prohibits only surreptitious, rather than open, recordings.<sup>75</sup> Courts continue to follow the language of the Massachusetts wiretapping statute closely when dealing with interceptions of communications between police and the public and have refused to extend additional constitutional rights to citizens who are arrested for recording police officers under this statute.<sup>76</sup> The most recent case addressing the Massachusetts wiretapping statute is *Glik v. Cunniffe*,<sup>77</sup> in which the court held that a citizen’s videotaping of the arrest of a homeless man in Boston Common did not violate the wiretapping statute when he openly recorded the arrest with his cell phone.<sup>78</sup> In so holding, the *Glik* court recognized that the First Amendment protects the rights of citizens to film public officials in public spaces.<sup>79</sup> The *Glik* court extended this First Amendment right only to the facts of the case, however, and took steps to limit the holding in order to avoid making the right to record police during the performance of their duties absolute.<sup>80</sup>

In *Commonwealth v. Hyde*,<sup>81</sup> however, the Massachusetts Supreme Judicial Court held that the surreptitious use of an audio recorder to record a police officer during a traffic stop was unlawful.<sup>82</sup> Following the plain language of the Massachusetts wiretapping statute, the *Hyde* court interpreted it to mean that any secret recording of any member of the public, regardless of their public function or the manner in which they conduct their actions in a public place,

74. See *Kelly*, 622 F.3d at 262 (acknowledging Supreme Court’s recognition of traffic stops as “inherently dangerous situations”); see also *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (recognizing traffic stops as inherently dangerous situations).

75. See MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2014). The Massachusetts wiretapping statute defines “interception” as “secretly hear[ing], secretly record[ing], or aid[ing] another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.” *Id.*; see ch. 272, § 99(C)(1) (restricting purposeful “interception of any wire or oral communication”); see also Alderman, *supra* note 11, at 503 (discussing provisions of Massachusetts wiretapping statute).

76. See *Glik v. Cunniffe*, 655 F.3d 78, 87 (1st Cir. 2011) (indicating surreptitious recordings of police unlawful); *Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (rejecting argument against applicability of statute because police performing public duties have no privacy expectation).

77. 655 F.3d 78.

78. See *id.* at 80, 83-84 (outlining underlying facts of arrest).

79. See *id.* at 83-84, 87-88 (recognizing First Amendment protections; rejecting officer’s assertion use of cell phone makes recording surreptitious).

80. See *id.* at 84 (recognizing lawfulness of reasonable time, place, and manner restrictions on First Amendment rights).

81. 750 N.E.2d 963.

82. See *Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (finding surreptitious use of audio recorder to record police officer during traffic stop unlawful).

was unlawful under the statute.<sup>83</sup> The dissenting justices in *Hyde*, however, felt that there was no legislative intent to protect police from having their public duties recorded, reasoning that “[w]e hold police officers to a higher standard of conduct than other public employees, and their privacy interests are concomitantly reduced.”<sup>84</sup>

#### 4. *Illinois*

Until recently, the Illinois Eavesdropping Act prohibited the recording of a conversation using any type of recording device without the consent of all parties to the conversation, “regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.”<sup>85</sup> Unlike the Massachusetts wiretapping statute, however, the Illinois act included specific provisions severely penalizing “eavesdropping of . . . conversation[s] . . . between any law enforcement officer, State’s Attorney . . . or a judge, while in the performance of his or her official duties.”<sup>86</sup> Illinois courts did not extend a First Amendment right to record police officers to its citizens until the Seventh Circuit’s decision in *American Civil Liberties Union v. Alvarez*,<sup>87</sup> which was the first wiretapping case in Illinois involving citizens recording police officers that had not been dropped, settled, plead out, or otherwise not decided by courts.<sup>88</sup>

The Illinois Eavesdropping Act was first scrutinized in *Alvarez*, where the Seventh Circuit finally recognized the First Amendment right of citizens to record police but declined to extend this right to surreptitious recordings.<sup>89</sup> In *Alvarez*, the American Civil Liberties Union of Illinois (ACLU) planned to carry out audio recordings in connection with their “police accountability program” and sought declaratory and injunctive relief under 42 U.S.C. § 1983

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83. See *id.* (extending protection from nonconsensual, surreptitious recording to all members of the public, including police officers).

84. See *id.* at 976 (Marshall, C.J., dissenting) (noting higher standard to which police officers held). The dissent also noted that common practice in Massachusetts courts is to treat public officials as “persons” only when they are specifically defined as such in statute. See *id.* at 974, 975 n.13 (arguing no legislative intent to protect police from surreptitious recording).

85. See 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West 2014) (defining word “conversation” under Illinois Eavesdropping Act); 720 ILL. COMP. STAT. ANN. 5/14-2(a)(1) (West 2014), *invalidated by* *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014) (prohibiting use of recording device to document conversation without consent of all parties).

86. See 720 ILL. COMP. STAT. ANN. 5/14-4(b) (West 2014) (including additional penalties for eavesdropping on government officials).

87. 679 F.3d 583 (7th Cir. 2012).

88. See Robert J. Tomei Jr., Comment, *Watching the Watchmen: The People’s Attempt to Hold on-Duty Law Enforcement Officers Accountable for Misconduct and the Illinois Law that Stands in Their Way*, 32 N. ILL. U. L. REV. 385, 394-400 (2012) (discussing Illinois proceedings dealing with prosecution of citizens for recording police). Tomei notes that prior to *Alvarez* courts did not have a chance to rule on this issue for a variety of reasons. See *id.*

89. See *Alvarez*, 679 F.3d at 606-07 (declining to discuss issue of private recordings of police because of openness of planned recordings).

to prevent Cook County's State's Attorney from enforcing the wiretapping statute against them.<sup>90</sup> The Seventh Circuit concluded "[t]he Illinois eavesdropping statute restricts an expressive medium used for the preservation and dissemination of information and ideas" and that "[o]n the factual premises of [the] case, the statute does not serve the important governmental interest of protecting conversational privacy."<sup>91</sup>

While finding the Illinois Eavesdropping Act unconstitutional in regard to citizens openly recording police in public, the court declined to address the application of First Amendment protections to surreptitious recordings of police in public places because it was outside the scope of the case.<sup>92</sup> The court

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90. See *id.* at 586, 588 (outlining declaratory and injunctive relief sought by ACLU against Cook County State's Attorney). The ACLU's plan was to implement a police accountability program "by openly audio recording police officers without their consent when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful." *Id.* at 588.

91. *Id.* at 608 (finding Illinois wiretapping statute overly restrictive without serving important government interest based on current facts). After the *Alvarez* ruling, the ACLU conveyed its intention to focus its efforts on the district courts to secure the right to record police in public and obtain a permanent injunction so its police accountability program could continue without any threat of prosecution. See Tal Kopan, *Supreme Court Won't Hear Police Recording Case*, POLITICO (Nov. 26, 2012), <http://www.politico.com/blogs/under-the-radar/2012/11/supreme-court-wont-hear-police-recording-case-150290.html> (discussing ACLU's reaction to outcome of *Alvarez*). The ACLU released a statement saying: "We now hope to obtain a permanent injunction in this case, so that the ACLU's program of monitoring police activity in public can move forward in the future without any threat of prosecution," and that "[t]he ACLU of Illinois continues to believe that in order to make the rights of free expression and petition effective, individuals and organizations must be able to freely gather and record information about the conduct of government and their agents—especially the police." *Development in ACLU v. Alvarez—Illinois Eavesdropping Law*, ACLU (Nov. 26, 2012), <http://www.aclu-il.org/development-in-aclu-v-alvarez-illinois-eavesdropping-law/>. Anita Alvarez—the Cook County State's Attorney—responded to the decision by filing a petition for certiorari in hopes of receiving "legal clarification and guidance with respect to the constitutionality and enforcement of the Illinois Eavesdropping Act," but the Supreme Court denied certiorari. See Kopan, *supra*.

92. See *ACLU v. Alvarez*, 679 F.3d 583, 600-03 (7th Cir. 2012) (holding Illinois Eavesdropping Act unconstitutional under heightened First Amendment scrutiny). The main reason the court found the Illinois Eavesdropping Act unconstitutional as it applied to citizen recordings of police was because the burden it placed on First Amendment speech and press rights was direct rather than incidental, which subjects it to heightened First Amendment scrutiny. See *id.* at 602-03. In summarizing its opinion that Illinois' eavesdropping statute abridges the First Amendment freedoms of speech and press, the court stated:

In short, the eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.

*Id.* at 600.

In regards to the directness of the Illinois Eavesdropping Act on First Amendment rights of free speech and press, the court concluded:

[I]t should be clear by now that its effect on First Amendment interests is far from incidental . . . . [T]he statute specifically targets a communication technology; the use of an audio recorder—a medium of expression—triggers criminal liability. The law's legal sanction is directly leveled

did note, however, that the state's attorney failed to identify a substantial government interest in prohibiting audio recordings of public conversations between citizens and police officers.<sup>93</sup> It also acknowledged the difference in "accuracy and immediacy" between audio recordings and notes, transcripts, or silent videos of conversations between citizens and police and found that this difference did not justify criminalizing audio recordings of public officials.<sup>94</sup> Finally, the court observed that public conversations between citizens and police officers do not carry privacy expectations or constitute "private talk in public places."<sup>95</sup> The court said if the purpose of the law is to protect such privacy rights, then it must be more narrowly tailored to serve that interest and simultaneously avoid infringing on the First Amendment freedoms of speech and press.<sup>96</sup>

Since the *Alvarez* decision, the Illinois Supreme Court, in *People v. Melongo*,<sup>97</sup> has held that the Illinois wiretapping statute is unconstitutional because it is vague and overbroad.<sup>98</sup> *Melongo* involved a challenge to the Illinois Act brought by a criminal defendant who was charged under the wiretapping statute for recording and publishing her telephone conversations with a court reporter's supervisor.<sup>99</sup> After a hearing on a motion to dismiss, the

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against the expressive element of an expressive activity. As such, the statute burdens First Amendment rights directly, not incidentally.

*Id.* at 602-03.

93. *See id.* at 606 (recognizing absence of substantial government interest in banning recording conversations between citizens and police). The state's attorney conceded that the ACLU's members were allowed to reconstruct and distribute the dialogue between police and citizens through means other than recording without violating the Illinois eavesdropping statute. *See id.*

94. *See id.* at 606 (rejecting alternative methods of documenting police activity proposed by state's attorney).

95. *See id.*

96. *See Alvarez*, 679 F.3d at 606 (finding no justification for criminalizing recordings of public officials on public privacy expectation grounds). The court recognized that "private talk in public places is common," and that some conversations in public places may carry a reasonable expectation of privacy, but the court stressed conversations that take place in public between police officers and private citizens do not fall into that category. *See id.* at 606-07; *see also id.* at 613 (Posner, J., dissenting). In finding the Illinois wiretapping statute unconstitutional, the court reasoned that the Illinois statute "obliterates" the distinction between private and nonprivate conversations by criminalizing any audio recording obtained without the consent of those involved in the conversation. *See Alvarez*, 679 F.3d at 608. The court found that the law as it stood was not narrowly tailored to serve the government interest of protecting the privacy of citizens attempting to have private conversations, whether they are in a public or private place, stating: "If protecting privacy is the justification for this law, then the law must be more closely tailored to serve that interest in order to avoid trampling on speech and press rights." *See id.*

97. 6 N.E.3d 120 (Ill. 2014).

98. *See id.* at 126-27 (declaring Illinois wiretapping statute unconstitutionally overbroad on its face).

99. *See id.* at 122-23 (discussing underlying facts of constitutional challenge of Illinois wiretapping statute). The defendant in *Melongo* surreptitiously recorded three telephone conversations with the Assistant Administrator of the Cook County Court Reporter's Office, Criminal Division and posted them to her website after being told that "any dispute over the accuracy of a transcript should be presented to the judge for resolution." *Id.* at 122. The dispute in question was in relation to a discrepancy between court records

trial court, relying in part on *Alvarez*, “found the statute both facially unconstitutional and unconstitutional as applied to [the] defendant” because it “appear[ed] to be vague, restrictive and [made] innocent conduct subject to prosecution.”<sup>100</sup> The court also found that the statute violated substantive due process.<sup>101</sup> Agreeing with the trial court’s decision and employing intermediate scrutiny to the wiretapping statute, as suggested by the Seventh Circuit in *Alvarez*, the Illinois Supreme Court held that “the statute’s scope [was] simply too broad” because it “criminalize[d] the recording of conversations that cannot be deemed private.”<sup>102</sup> The court further noted that “the statute [did] not distinguish between open and surreptitious recording,” and it concluded that the lack of such distinction, together with the overbroad scope of the statute, “burden[ed] substantially more speech than is necessary to serve a legitimate state interest in protecting conversational privacy.”<sup>103</sup> Therefore, the court concluded that the statute “[did] not survive intermediate scrutiny;” and it held the recording provision facially unconstitutional “because a substantial number of its applications violate[d] the first amendment.”<sup>104</sup>

##### 5. *Maryland and the United States Department of Justice*

A Maryland citizen brought suit in federal district court against the Baltimore City Police Department (BCPD), alleging that its officers had deleted his cell phone recordings in violation of his First Amendment, Fourth Amendment, and Fourteenth Amendment rights.<sup>105</sup> The BCPD moved for summary judgment, prompting the Civil Rights Division of the United States Department of Justice (DOJ) to file a statement of interest urging the court to deny the motion.<sup>106</sup> The DOJ argued that “[t]he First Amendment [p]rotects the [r]ecording of [p]olice [o]fficers [p]erforming [t]heir [d]uties in [p]ublic.”<sup>107</sup>

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indicating she missed a court date and the official transcript proving she was in court. *Id.*

100. *See id.* at 123.

101. *Melongo*, 6 N.E.3d at 123 (summarizing trial court’s granting of motion to dismiss).

102. *Id.* at 126 (holding Illinois wiretapping statute overbroad for criminalizing innocent conduct). The court gave the following examples of types of speech which the Illinois wiretapping statute criminalized that could not be deemed private: “a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others.” *Id.*

103. *People v. Melongo*, 6 N.E.3d 120, 127 (Ill. 2014) (concluding Illinois wiretapping statute failed intermediate constitutional scrutiny).

104. *Id.* (holding recording provision of Illinois wiretapping statute unconstitutional).

105. *See* Statement of Interest of the United States at 1-3, *Sharp v. Balt. City Police Dep’t*, No. CCB-11-2888, 2013 WL 937903 (D. Md. March 1, 2013), 2012 WL 9512053 (discussing arrest of citizen for recording officer and constitutional issues raised in subsequent litigation).

106. *See id.* at 1-4 (discussing DOJ’s filing of statement of interest and BCPD’s opposition citizen’s suit).

107. *Id.* at 4-10 (arguing in favor of First Amendment right to record police performing public duties). The DOJ recognized that while the right to record police can be limited by reasonable time, place, and manner restrictions, the right cannot be limited in any other way and the court may make a “reasoned judgment based on established constitutional principles” when there is no binding precedent to the contrary. *See id.* at 5-6. They further argued that the reason the police seized and deleted the recordings was because they wanted to suppress the recordings’ content in order to prevent the contents dissemination, which not only violated Sharp’s

While the DOJ acknowledged that the BCPD took some measures to address the citizen's allegations, it pointed out that the "measures do not demonstrate that First Amendment violations could not recur," which made summary judgment inappropriate in this case.<sup>108</sup> The DOJ recommended that, at a minimum, the BCPD "should develop a comprehensive policy that specifically addresses individual's First Amendment right to observe and record officer conduct," implement the policy "through periodic training," and routinely test the effectiveness of the policy through "quality assurance mechanisms."<sup>109</sup>

The DOJ also argued that "[t]he Fourth Amendment [p]rotects [p]rivate [p]roperty [f]rom [s]eizure or [s]earch [w]ithout a [w]arrant or [p]robable [c]ause," and that "[t]he Fourteenth Amendment [p]rohibits the [s]eizure and [d]estruction of [p]roperty [w]ithout [d]ue [p]rocess."<sup>110</sup> The DOJ pointed out that "[w]hen material falls 'arguably within First Amendment protection,' and officers' warrantless seizure of that material 'br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition' of that material, the Fourth Amendment is violated."<sup>111</sup> The DOJ acknowledged that the "seizure and destruction of [the plaintiff's] videos appears to have been based on the content of those videos and prevented their dissemination," resulting in a Fourth Amendment violation.<sup>112</sup> Because "[p]rivate citizens have both a

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right to disseminate ideas and information to a broad audience, but also potentially violated the right of potential recipients to receive such information. *See id.* at 7.

108. *See id.* at 7-10. The BCPD voluntarily developed training protocols and created a new policy in an attempt to clarify the rights of individuals who engage in activities protected by the First Amendment, but the DOJ did not find the policies and protocols sufficient to prevent constitutional violations moving forward. *See id.* at 8. The DOJ argued that the training documents submitted by the BCPD did not "explicitly acknowledge that private citizens' right to record the police derives from the First Amendment," did not "provide clear and effective guidance to officers about the important First Amendment principles involved," and that rather than providing evidence of permanent changes to BCPD policy, they asked the court to "conclude that [BCPD's] General Order is sufficient to prevent future constitutional violations based on Defendants' assurances alone." *Id.* at 9.

109. *See* Statement of Interest of the United States, *supra* note 105, at 10 (outlining DOJ's recommendations for policy regarding BCPD's treatment of citizen recorders). The DOJ also recommended that the BCPD "should track allegations that an officer has interfered with a citizen's First Amendment right to observe and/or record the public performance of police duties." *Id.* at 10.

110. *See id.* at 10-17 (discussing Fourth and Fourteenth Amendment implications of seizure of recordings of police).

The interests animating the Fourth Amendment's prohibition against unreasonable searches and seizures are heightened when the property at issue is also protected by the First Amendment. The Supreme Court has held that Fourth Amendment limitations on law enforcement officers' authority to seize individuals' property must be "scrupulously observed" when the item seized contains information protected by the First Amendment and "the basis for the seizure is disapproval of the message contained therein."

*Id.* at 11 (quoting *Walter v. United States*, 447 U.S. 649, 655 (1980)).

111. *See id.* at 12 (second alteration in original) (quoting *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973)) (discussing Fourth Amendment implications involved when First Amendment protections violated by seizure).

112. *See id.* at 12 (arguing seizure and subsequent deletion of recordings of police motivated by contents

possessory interest in their cell phones and a recognized expectation of privacy in the contents of their cell phones,” the DOJ argued that the warrantless seizure of the plaintiff’s cell phone and destruction of its content was unlawful because the officer lacked probable cause and no recognized exception to the warrant requirement was present.<sup>113</sup> The DOJ further argued that the BCPD officers “appear[ed] to have violated the core requirements of procedural due process when—without providing notice or an opportunity to be heard—they allegedly—and irrevocably—deprived [the plaintiff] of the recordings on his cell phone.”<sup>114</sup>

Finally, the DOJ sent a letter to the parties in hopes of influencing the BCPD to adopt policies relating to citizens recording police officers performing their public duties.<sup>115</sup> The DOJ recommended that the department’s “[p]olicies [] affirmatively set forth the First Amendment right to record police activity” in order to “provide officers with practical guidance on how they can effectively discharge their duties without violating that right.”<sup>116</sup>

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of videos); *see also* *Roaden*, 413 U.S. at 504 (discussing link between First and Fourth amendments when effects seized are protected by First Amendment).

113. *See* Statement of Interest of the United States, *supra* note 105, at 13-14 (arguing plaintiff’s Fourth Amendment rights violated by warrantless search and seizure of cell phone); *see also* *United States v. Place*, 462 U.S. 696, 701 (1983) (discussing exceptions to warrant requirement for Fourth Amendment searches and seizures); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (recognizing privacy interest in texts and call records but finding search incident to arrest permissible).

114. *See* Statement of Interest of the United States, *supra* note 105, at 17 (arguing deprivation of plaintiff’s cell phone recordings violated his Fourteenth Amendment rights).

115. *See* Letter from Jonathan M. Smith, Chief Special Litig. Section, U.S. Dep’t of Justice Civil Rights Div. to Mark H. Grimes, Balt. City Police Dep’t & Mary E. Borja, Wiley Rein LLP 1 (May 14, 2012), available at [http://www.justice.gov/crt/about/spl/documents/Sharp\\_ltr\\_5-14-12.pdf](http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf) (discussing Judge Paul W. Grimm’s scheduling of settlement conference between parties involved in litigation). The purpose of the letter was to assist the parties during the upcoming settlement conference and “reflect[] the United States’ position on the basic elements of a constitutionally adequate policy on individuals’ right to record police activity.” *See id.*

116. *See id.* at 2-3 (describing need for practical guidance regarding citizen recordings of police officers). Regarding the range of prohibited responses to individuals observing or recording the police, the DOJ suggested that:

[P]olicies should instruct officers that, except under limited circumstances, officers must not search or seize a camera or recording device without a warrant. In addition, policies should prohibit more subtle actions that may nonetheless infringe upon individuals’ First Amendment rights. Officers should be advised not to threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or recording devices.

*Id.* at 5.

Regarding when an individual’s actions amount to interference with police duties, the DOJ suggested that “the order should define what it means for an individual to interfere with police activity and, when possible, provide specific examples in order to effectively guide officer conduct and prevent infringement on activities protected by the First Amendment.” *Id.* Concerning when the seizure of recordings and recording devices is permissible, the DOJ suggested that:

A general order should provide officers with guidance on how to lawfully seek an individual’s

## III. ANALYSIS

While circuit courts have usually recognized the general right to record police officers in public, they have repeatedly and narrowly applied that right by permitting reasonable time, place, and manner restrictions and limiting their holdings to the facts of each case.<sup>117</sup> This is particularly true in regard to surreptitious recordings of police officers in public.<sup>118</sup> In those cases, courts have not extended First Amendment protections to such recordings but instead have narrowly considered the facts of each case in order to avoid confronting the First Amendment issue.<sup>119</sup> For instance, the First and Seventh circuits have recognized a right to openly, but not surreptitiously, record police officers in public, but reached this conclusion based on the statutory definitions of “interception” in their respective jurisdictions.<sup>120</sup>

*A. Surreptitious Citizen Recordings of Public Police Encounters Outweigh the Government’s Interest in Prohibiting Such Recordings*

Going forward, when courts deal with situations involving citizen-recordings of police officers in public, they will inevitably have to balance the government’s interest in prohibiting such recordings against the citizen’s

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consent to review photographs or recordings and the types of circumstances that do—and do not—provide exigent circumstances to seize recording devices, the permissible length of such a seizure, and the prohibition against warrantless searches once a device has been seized.

*Id.* at 8.

The DOJ also suggested that “[p]olicies should provide clear guidance on supervisory review” in order to reconcile inconsistencies in the current general order regarding when a supervisor should be called and require “a supervisor’s presence at the scene to approve all arrests or any other significant action” by an officer dealing with citizen recordings of public police activity. *See id.* at 7-8.

117. *See* ACLU v. Alvarez, 679 F.3d 583, 606-07 (7th Cir. 2012) (refusing to extend right to record police officers beyond scope of case); Glik v. Cunniffe, 655 F.3d 78, 88 (1st Cir. 2011) (holding openly recording police officers in public with cell phone not “secret” under statutory definition). The *Glik* court held that “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment” but acknowledged that it is subject to reasonable time, place, and manner restrictions. *See id.* at 85. By analyzing the language in the statute prohibiting “secret” recordings and prior decisions on this issue, the court implied that the prohibition of such “secret” recordings was in fact a reasonable restriction to place on citizens recording police in public. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 263 (3d Cir. 2010) (rejecting extension of First Amendment right to record police officers during traffic stops).

118. *See supra* note 117.

119. *See supra* note 117 (comparing circuit court decisions regarding reasonable time, place, and manner prohibitions on citizens recording police).

120. *Compare* 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West 2014) (containing language expressly disclaiming reasonable privacy expectation requirement without surreptitious only requirement), and Alvarez, 679 F.3d at 605-06 (declining to analyze right to surreptitiously record police in public because of open nature of planned recordings), with MASS. GEN. LAWS ANN. ch. 272, § 99(b)(4) (West 2014) (defining “interception” of oral communications), and *Glik*, 655 F.3d at 88 (holding arrest of plaintiff unlawful because recording not secret as required by Massachusetts statute).

liberty interests.<sup>121</sup> The government's interest in protecting police officers' expectation of privacy—by prohibiting citizens from recording the officer—does not likely outweigh a citizen's right to record public officials in public places.<sup>122</sup> Although protecting the officers' expectation of privacy is a legitimate government interest, citizens have a First Amendment right in recording the public behavior of police officers; and to survive constitutional scrutiny the government must either place more narrowly tailored restrictions on such recordings or assert additional legitimate government interests that outweigh citizens' First Amendment protections.<sup>123</sup> Government restrictions must withstand heightened constitutional scrutiny and will not do so when citizens are arrested simply because police do not want their actions recorded.<sup>124</sup>

Even if the government can narrowly tailor restrictions and assert additional legitimate state interests, the strong First Amendment rights at stake, along with the public interest in permitting recordings of police conduct, will likely still defeat such restrictions.<sup>125</sup> The liberty interests advanced by permitting citizens to record police officers in public weighs heavily against restricting such recordings, regardless of how narrowly tailored the restriction is or if the restriction is supported by a compelling government interest.<sup>126</sup>

The First Amendment encourages free and open discussion by ensuring that no government retaliation will occur against those who speak out, even if their positions are unpopular; the protection applies here because police are public officials, recording is expressive conduct, and observing and recording police conduct is of public interest.<sup>127</sup> Additionally, police officers are in a unique

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121. *Cf. Glik*, 655 F.3d at 84 (recognizing right to record public officials subject to reasonable time, place, and manner restrictions). The court declined to analyze reasonable time, place, and manner limitations because the location of the incident—the Boston Common, the oldest city park in the country—is a public forum where the ability of a state to limit a citizen's First Amendment rights are “sharply circumscribed.” *See id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

122. *See Alvarez*, 679 F.3d at 586 (discussing state's attorney's reliance on conversational privacy against citizens' liberty interests regarding citizens recording police).

123. *Cf. ACLU v. Alvarez* 679 F.3d 583, 608 (7th Cir. 2012) (holding statute's application likely unconstitutional because important government interest of protecting conversational privacy not served).

124. *See id.* at 600-04 (concluding eavesdropping statute must withstand heightened First Amendment scrutiny and would likely fail intermediate scrutiny).

125. *See supra* notes 37-42 and accompanying text (describing government policy reasons for permitting citizen recordings of police and interests they advance).

126. *See supra* notes 37-42 and accompanying text (discussing additional government interests advanced by permitting citizens to record police officers in public); *cf. Potere, supra* note 27, at 298-301 (describing history of citizens monitoring and reporting police activity).

127. *See Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (guaranteeing right to discuss publicly and truthfully matters of public concern without fear of retaliation); *see also, e.g., Alvarez*, 679 F.3d at 608 (holding statute restricts medium utilized for “preservation and dissemination of information and ideas”); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (recognizing First Amendment right to record police in public); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding right to gather information about actions of public officials on public property constitutionally protected).

position to retaliate against speech or expressive conduct they find distasteful, disagreeable, or threatening to their reputation, livelihood, or safety because they are authorized to use force and arrest citizens.<sup>128</sup> Police officers' unique ability to retaliate against citizens who record their conduct may lead to censorship by causing citizens to stop their recordings prematurely, frustrating the First Amendment interest of encouraging free and open discussion.<sup>129</sup> Therefore, courts should carefully consider police behavior when deciding cases involving police recordings.<sup>130</sup>

*B. Courts Should Apply Intermediate Scrutiny to Cases Involving Citizen Recordings of Public Police Encounters*

When it appears likely that an officer attempted to prevent a citizen from recording his or her actions out of retaliation or in order to prevent documentation of questionable actions of the officer or other officers, courts should lean towards finding the officer's actions unlawful and provide the citizen appropriate remedies and punitive actions.<sup>131</sup> By recognizing a general right to record police activity in public without finding a constitutional violation, the court in *Smith v. City of Cumming* allowed subsequent courts relying on this case to interpret that right to whatever extent they desired, laying the foundation for inconsistent opinions on this issue.<sup>132</sup> Subsequent decisions by the First, Third, and Seventh circuits have ruled inconsistently on the extent of the First Amendment right to record public police activity.<sup>133</sup> Such inconsistent case law permits courts to continue to limit the First Amendment right to record police officers performing their public duties, emboldens legislators to continue to prohibit such recordings, and allows police—motivated by personal reasons—to continue to deprive citizens of their right to record and report on matters of public concern.<sup>134</sup> For these reasons, courts should recognize that the right to record matters of public interest

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128. See Potere, *supra* note 27, at 298 (discussing police officers' unique grant of state power to use force against citizens).

129. *Cf. id.* at 309-12 (discussing effect of subsequent punishment for recording police officers as form of prior restraint).

130. *Cf. id.* (recognizing likelihood of police abuse of power).

131. See *supra* notes 127-30 and accompanying text (discussing reasons police arrest citizens for recording them and why such arrests unlawful).

132. See *Smith*, 212 F.3d at 1333 (declining to specify what police actions would violate general right to videotape police activities).

133. Compare *ACLU v. Alvarez*, 679 F.3d 583, 605-08 (7th Cir. 2012) (concluding surreptitious recordings not at issue, but extending right to openly record police), and *Glik v. Cunniffe*, 655 F.3d 78, 82-84 (1st Cir. 2011) (recognizing qualified right to record police), with *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (concluding case law insufficient to establish First Amendment right to record police during traffic stop).

134. *Cf. Bodri*, *supra* note 11, at 1348-49 (arguing unanimous consent wiretap statutes improperly used against citizens recording police officers); Potere, *supra* note 27, at 316 (advocating police not entitled to violate Constitution by "cloaking their misconduct in secrecy").

extends to recording police in public to the furthest extent the facts of the case at issue will allow, including surreptitious recordings where necessary, and hold such recordings lawful unless police officers can show they had a legitimate expectation of privacy in the recorded activity relating to an important government interest.<sup>135</sup>

The Third Circuit continues to refuse to explicitly extend a First Amendment right to citizens to record public police encounters, whether they are open or surreptitious; in *Kelly v. Borough of Carlisle*, the court stated a traffic stop is an inherently dangerous situation, but it is not made more dangerous by recording a police officer during the stop.<sup>136</sup> In fact, the court thought that citizen recordings probably make traffic stops less dangerous because it is highly unlikely the subject of a stop will place an officer in harm's way when he knows his actions are being recorded.<sup>137</sup> Also, where the officer is recording the encounter, like in *Kelly*, courts should assume the officer consented to the citizen's recording because he is aware his actions are being recorded.<sup>138</sup>

In *ACLU v. Alvarez*, the Seventh Circuit refused to analyze the right to surreptitiously record on-duty police officers in public because it correctly reasoned that such analysis was unnecessary under the facts of the case.<sup>139</sup> While *ACLU v. Alvarez* addressed open recording of police officers for a "police accountability program," it also recognized that "surreptitiously

135. See *supra* note 133-34 and accompanying text (outlining problems caused by inconsistent rulings by jurisdictions dealing with citizen recordings of on-duty police).

136. See *Kelly*, 622 F.3d at 262 (finding case law insufficiently analogous to facts of case to put officer on notice).

137. See *id.* at 262 (recognizing traffic stops as inherently dangerous situations). The Third Circuit's reasoning was flawed because a suspect planning on acting in a dangerous manner is not likely to record such dangerous activity, especially in the presence of the police. *Contra id.* If police mistake a recording device for a weapon during an inherently dangerous situation, then probable cause is established, but probable cause is not established because a recording itself adds to the danger involved. *Contra id.* Here, there was no need for the court to address the dangerousness of the situation because there was no indication the officer was at risk, believed he was at risk, or made the decision to arrest the plaintiff for any reason other than that he was recording the officer. *Cf. id.* at 251-52.

138. *Cf. id.* at 251-52 (explaining officer informed passengers traffic stop recorded but failed to tell assistant district attorney). The officer recorded the traffic stop, which eliminated any expectation of privacy he had during the encounter and consequently eliminated whatever legitimate government interest that existed in prohibiting the citizen from recording the stop. *Cf. id.* at 259. The fact that the officer declined to mention to the assistant district attorney he was also recording the encounter suggests some degree of awareness on his part that he lacked probable cause to arrest the plaintiff. *Cf. id.* at 252. The Third Circuit vacated the District Court's grant of qualified immunity to the police officer in *Kelly*, stating:

because the District Court did not consider the facts in the light most favorable to Kelly, did not evaluate the objective reasonableness of [the officer's] decision to rely on [the assistant district attorney's] advice in light of those facts, and did not evaluate sufficiently the state of Pennsylvania law at the relevant time.

*Id.* at 258-59.

139. See *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012) (describing preliminary injunction sought against Illinois State's Attorney for open recordings for "police accountability program").

accessing the private communications of another . . . clearly implicates recognized privacy expectations.”<sup>140</sup> The fact that the Seventh Circuit left this issue unresolved prevents this right from becoming clearly established, which continues to result in police officers arresting citizens for making such recordings.<sup>141</sup>

The Seventh Circuit also concluded that intermediate scrutiny should be applied when analyzing citizen recordings of public police activity under wiretapping statutes and correctly implied that broad prohibitions on such recordings would likely fail intermediate scrutiny.<sup>142</sup> While the court acknowledged that the First Amendment does not prevent the enactment of legislation that provides increased levels of conversational privacy and that the legislature can use the “Fourth Amendment ‘reasonable expectation of privacy’ doctrine as a benchmark,” they held that legislatures cannot sever the link between the statute’s means and end.<sup>143</sup> Although this holding applies to the statute’s provisions rather than its application, the link between the statute’s means and ends is also severed when the statute is applied for a purpose other than protecting conversational privacy.<sup>144</sup>

Using the same constitutional analysis in all cases involving wiretapping statutes will result in more consistency among jurisdictions dealing with this issues.<sup>145</sup> Further, the appropriate standard of review in cases dealing with arrests of citizens for recording police officers under wiretapping statutes is the intermediate scrutiny test employed by the Illinois Supreme Court in *People v. Melongo*.<sup>146</sup> This standard will protect the right to record public police activity to a greater degree and will also prevent citizens from making recordings that go beyond the protections of the First Amendment because there is an important government interest in preventing improper recordings of police in certain situations.<sup>147</sup>

The First Circuit reviewed, but did not apply any constitutional scrutiny standard to the Massachusetts wiretapping statute and declined to analyze the constitutionality of the statute in *Glik*.<sup>148</sup> Instead, it held that there was no

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140. *See id.* at 605 (concluding surreptitious recordings relevant under facts of case, although they implicate recognized privacy expectations).

141. *Cf. supra* Part II.C (discussing impact of courts’ failure to clearly establish right to record police).

142. *See Alvarez*, 679 F.3d at 604 (concluding Illinois statute “[l]ikely [f]ails [i]ntermediate [s]crutiny”).

143. *See id.* at 606 (requiring wiretap statutes to maintain link between means applied to accomplish intended purpose).

144. *Cf. id.* at 606, 608 (limiting holding to provisions of Illinois wiretapping statute).

145. *Cf. supra* notes 142-44 and accompanying text (discussing application of intermediate constitutional scrutiny to wiretapping cases).

146. *See People v. Melongo*, 6 N.E.3d 120, 126-27 (Ill. 2014) (applying intermediate scrutiny test to wiretapping statute in finding it unconstitutionally overbroad).

147. *Cf. supra* notes 142-44 and accompanying text (discussing potential important government interests in preventing citizens’ recordings of police).

148. *See Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011).

probable cause for the arrest because the recording was not “secret,” as the statute required.<sup>149</sup> Although the First Circuit recognized a right to record public police encounters with citizens, it analyzed the constitutionality of the arrest under the Fourth Amendment; and it did not apply the First Amendment or intermediate scrutiny to the statute, thus avoiding the potential of finding the statute unconstitutional under the First Amendment when applied to citizen recordings of police in public.<sup>150</sup> The court should have applied intermediate scrutiny to the Massachusetts wiretapping statute under the facts of the case like in *Melongo*.<sup>151</sup> Had it done so, it could have extended the right to surreptitiously record public police encounters with citizens because the police argued they were unaware the cell phone used by the plaintiff recorded audio, even though they asked the plaintiff if it did before the arrest.<sup>152</sup>

While *Glik* was a good opportunity to extend the right to surreptitiously record public police encounters, it was perhaps not the right case to do so.<sup>153</sup> Even if the First Circuit had extended the right beyond open recordings, the facts would still be easily distinguishable from other circumstances because the Boston Common—where the recording occurred—is a traditional public forum, where the right to record matters of public concern is heightened.<sup>154</sup> Despite this, the First Circuit should have still found a way to extend a First Amendment right to surreptitiously record public police encounters with citizens under limited circumstances: where privacy expectations are not violated and the recording does not interfere with lawful police activity.<sup>155</sup> Going forward, courts should use the same intermediate scrutiny test employed by the Seventh Circuit in *Alvarez* and the Illinois Supreme Court in *Melongo*, not only when addressing constitutional challenges to wiretapping statutes themselves, but also when addressing how the statutes are applied when police arrest citizens for recording encounters with them.<sup>156</sup> By doing so, courts will

149. *See id.* (holding officer lacked probable cause under statutory definition because recording not “secret”).

150. *Cf. id.* (narrowing holding to open recordings of police by finding recording not “secret”).

151. *Compare id.* at 87-88 (discussing appellants’ argument against openness of recording with cell phone), with *Melongo*, 6 N.E.3d at 126-27 (applying intermediate First Amendment scrutiny to facial challenge of wiretapping statute).

152. *See Glik*, 655 F.3d at 80 (discussing police officer’s behavior towards plaintiff prior to his arrest).

153. *Cf. id.* at 85 (distinguishing facts of case from facts of cases relied on by appellants).

154. *See Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (acknowledging states strictly prohibited from limiting First Amendment activity in traditional public spaces). Had the First Circuit held that the First Amendment protected even surreptitious recordings in traditional public places, police officers in subsequent cases could easily distinguish their actions from the facts of *Glik* on the grounds that the recording took place in a less traditional public forum, such as a sidewalk or alley. *Cf. id.*

155. *Cf. id.* (reasoning peaceful recordings of arrests in public spaces not reasonably subject to limitation). The complaint indicated that the plaintiff filmed the officers from a comfortable distance and did not speak to them or interfere with them in any way, except by directly responding to the officers’ questions when they addressed him. *See id.* The court stated that “[s]uch peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Id.*

156. *See ACLU v. Alvarez*, 679 F.3d 583, 604-08 (7th Cir. 2012) (applying intermediate constitutional

not extend an absolute right to record public police activity, but rather a right to record public police encounters with civilians, which are not private in nature and therefore do not violate any privacy expectation intended to be protected by the statutes.<sup>157</sup>

*C. Policy Arguments Regarding Citizen Recordings of Public Police Encounters*

Law enforcement agencies should review the letters from the DOJ when developing policies regarding arrests of citizens for recording public police encounters with citizens.<sup>158</sup> By affirmatively setting forth the First Amendment right to record police activity, law enforcement agencies will avoid depriving citizens of their constitutional rights, resulting in fewer lawsuits against departments for such deprivations and an increase in trust and cooperation between civilians and police.<sup>159</sup> These interests are further promoted when department policies describe the range of prohibited police responses to individuals observing or recording officers, what actions amount to interference with police duties, and when it is permissible to seize recordings and recording devices.<sup>160</sup> Also, by enacting policies that provide clear guidance on supervisory review and require a supervisor be at the scene to approve all arrests or significant police action in response to citizen recordings of public police activity, departments will avoid constitutional deprivations by frustrated officers who make arrests based on their personal distaste for citizens recording them.<sup>161</sup>

From a legislative standpoint, an effective way to prevent the wrongful prosecution of citizens for recording public police encounters is to provide specific protections for citizens in wiretapping statutes.<sup>162</sup> The most effective way to ensure citizens are not wrongfully prosecuted under wiretapping statutes is for Congress to amend the current federal wiretapping statute to include such

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scrutiny to Illinois wiretapping statute).

157. *Cf. id.* at 606-08 (reasoning conversations at issue do not “carry privacy expectations even though uttered in public places”); *Glik*, 655 F.3d at 84 (demanding restraint by law enforcement when expressive conduct does not interfere with their work).

158. *See supra* Part II.C.5 (discussing DOJ’s recommendations regarding court rulings and police policies for arrests of citizen police recorders).

159. *See supra* note 115 and accompanying text (recommending affirmatively setting forth First Amendment right to record police activity in police department policies).

160. *See supra* note 115 and accompanying text (recommending implementation of police policies describing when seizures of recordings and recording devices are permissible).

161. *See* Letter from Jonathan M. Smith, Chief Special Litig. Section, U.S. Dep’t of Justice Civil Rights Div. to Mark H. Grimes, Balt. City Police Dep’t & Mary E. Borja, Wiley Rein LLP, *supra* note 115, at 8 (recommending requiring supervisor’s approval of all arrests and other actions relating to recordings of police).

162. *See* Alderman, *supra* note 11, at 531-32 (calling for legislative action adopting statutory exceptions to criminalization of civilians recording public police activity); Bodri, *supra* note 11, at 1348-49 (calling for legislative clarification to include recordings of on-duty police officers); Lutt, *supra* note 27, at 381 (arguing “state and local governments should energetically pursue legislative solutions” to protect citizens rights).

statutory exceptions.<sup>163</sup> This would make the right to freedom from such wrongful arrests and prosecution a federal right; and such congressional action would preclude states from continuing to allow enforcement of provisions of state wiretapping statutes that do not guarantee at least the same level of protection to citizens as the federal statute.<sup>164</sup>

Public policy favors extending the right to record public police encounters with citizens beyond the level that is currently protected by case law.<sup>165</sup> Particularly, it favors permitting certain surreptitious recordings of police encounters with citizens in public, subject to reasonable limitations.<sup>166</sup> The Seventh Circuit acknowledged a police officer may have several justifiable reasons for prohibiting a civilian from recording him, including discussing matters of national and local security, maintaining safety and control, securing crime scenes and accident sites, and protecting the integrity and confidentiality of investigations; however, the citizens who record public police encounters rarely implicate the interests recognized by the Seventh Circuit.<sup>167</sup>

While surreptitious recordings of any of the above mentioned forms of police activity interfere with important government interests, surreptitious recordings of public police encounters with citizens will not interfere with these interests because of the public nature of such encounters.<sup>168</sup> For instance, as the Seventh Circuit stated, “[p]olice discussions about matters of national and local security do not take place in public where bystanders are within earshot;” and while they implicate the Fourth Amendment expectation of privacy, they do not address police encounters with citizens because they are conversations between two law enforcement officials rather than between an officer and a citizen.<sup>169</sup> Furthermore, while the steps taken by police to ensure that safety and control are maintained, to secure crime scenes and accident sites, and to

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163. *Cf.* Alderman, *supra* note 11, at 531-32 (arguing constitutional principles and public policies demand protection of right to record public police activity); Bodri, *supra* note 11, at 1348-49 (calling for congressional action to require wiretapping laws to conform to reasonable expectation of privacy); Lutt, *supra* note 27, at 378-81 (outlining legislative solutions to wrongful prosecution of citizens for recording public police activity).

164. *Cf. supra* Part II.C.5 (discussing statutory solutions and DOJ’s recommendation addressing inconsistent state wiretapping statutes).

165. *See* Bodri, *supra* note 11, at 1348-49 (illuminating incorrect applications of state wiretapping statutes to arrest citizens who record police encounters); *cf.* *ACLU v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (referencing public’s interests in permitting citizen recordings of police officers).

166. *See* Bodri, *supra* note 11, at 1348-49 (arguing wiretapping statutes incorrectly used to prosecute citizens for filming public police activity); *cf.* *Alvarez*, 679 F.3d at 606-07 (describing legitimate government interests in prohibiting citizen recordings of police encounters); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (outlining First Amendment right to record public officials as it pertains to citizens recording police).

167. *See Alvarez*, 679 F.3d at 607 (recognizing legitimate government interests in preventing citizen recordings of police not present when activity public).

168. *Cf. id.* (describing possible legitimate government interests in preventing citizen recordings of police officers).

169. *Id.* (recognizing police discussions about matters of security do not take place in public). Matters of national and local security are not ordinarily discussed with members of the general public unless a civilian had information pertinent to this legitimate government interest. *Cf. id.*

protect the integrity and confidentiality of investigations may result in an encounter between the police and citizens, the police cannot prohibit a citizen from recording as long as the act of recording such steps does not interfere with or jeopardize such government interests.<sup>170</sup> Therefore, if a recording of such activity does interfere with public safety and order, it does not matter whether the recording was open or surreptitious because it is illegal due to its interference with the government interest.<sup>171</sup>

Prohibiting arrests and prosecution of citizens for recording public police encounters also holds the police accountable for their actions by encouraging citizens to record potential police misconduct without fear of retaliation.<sup>172</sup> Not only will this help the victims of police misconduct by establishing more credible evidence in legitimate police misconduct lawsuits, it will also help police officers avoid false accusations of misconduct and frivolous lawsuits because the recording corroborates the officer's version of the facts.<sup>173</sup> Encouraging additional citizen recording of public police activity will also provide more accurate evidence in court proceedings involving police officers, allowing juries to be less reliant on police testimony.<sup>174</sup> While juries should trust the testimony of police officers, police officers can still make mistakes relating to the facts of the underlying event or present their testimony to suit their interest in the case, just as private citizens do.<sup>175</sup> Therefore, when video evidence exists to discredit or corroborate the testimony of a police officer it is more likely that juries will reach the correct verdicts.<sup>176</sup> By permitting surreptitious recordings of public police encounters with citizens, police are put on notice that their actions during such encounters are scrutinized and subject to recording, which holds them to a greater degree of accountability to the public than merely allowing open recordings of public police activity.<sup>177</sup>

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170. *See id.* at 607 (acknowledging police authority in relation to public safety and other legitimate law enforcement needs); *see also supra* notes 167-68 and accompanying text (discussing police role in maintaining public order and conducting law enforcement related duties).

171. *Cf. ACLU v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (acknowledging police officers' authority to "take all reasonable steps to maintain safety and control").

172. *See Bodri, supra* note 11, at 1347 (discussing recording public police activity to hold police accountable for their actions). Prohibiting prosecution of citizens for recording public police encounters also promotes accuracy of police testimony during trials. *See id.*

173. *See id.* (discussing effect of video evidence on police misconduct litigation).

174. *See id.* (discussing how citizens' recordings of police present more credible evidence in court proceedings). Juries tend to view police testimony as more credible than that of private citizens. *See id.*

175. *See id.* at 1347 (discussing importance of witness testimony in cases of alleged police misconduct). According to Bodri, "[v]ery few checks on police misconduct currently exist, and often suits brought against police for misconduct and civil rights violations come down to the word of the plaintiff against the word of the police officer." *Id.*

176. *Cf. Bodri, supra* note 11, at 1347 (discussing effect of video evidence as supplement to police testimony). While juries should not view police officers as more credible than private citizens, this is hardly true in practice. *Id.* Where available, video evidence in misconduct suits will help plaintiffs successfully bring claims and decrease potential juror bias in favor of the police. *Id.*

177. *See id.* (arguing few checks on police misconduct exist); *see also Potere, supra* note 27, at 314 ("[A]n

*D. Public Policy Favors Allowing Surreptitious Recordings of Public Police Activity To Promote Police Accountability*

While police do have legitimately held fears relating to permitting citizens to freely record them, these fears are either unfounded or easily alleviated.<sup>178</sup> The secrecy of a citizen's recording of a police encounter, however, has no bearing with respect to these fears.<sup>179</sup> If the impetus of the officer's fears is his misconduct, the manner in which he was recorded is irrelevant because he still acted inappropriately.<sup>180</sup> An officer's misconduct should not allow him to suppress such a recording simply because he was unaware it was occurring.<sup>181</sup> If courts suppress such recordings police will be encouraged to act in any manner they wish, regardless of whether the recording conforms to department policy, advances a government interest, or falls within the scope of their duties or authority.<sup>182</sup>

While a legitimate concern exists that allowing more citizen recordings of police encounters may potentially drive police to inaction due to the constant fear of reprisal, "[t]he inherently public nature of policing and its well-established exposure to the public for observation and criticism make over-deterrence resulting from citizens recording police conduct unlikely."<sup>183</sup> In other words, police officers know their actions may be publicly scrutinized and potentially filmed regardless of their actual awareness that a recording is taking place, which makes the nature of the recording irrelevant.<sup>184</sup> Furthermore, fears that surreptitious recordings will harm an officer's reputation are easily alleviated by those officers simply acting in accordance with proper police customs and policies, and requiring police to document their activities to provide more accurate accounts of their actions.<sup>185</sup>

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awareness of ubiquitous citizen recording can be instilled in young officers during training.").

178. See Potere, *supra* note 27, at 312-17 (outlining police officers' fears relating to increased permission for citizens to film them).

179. See *id.* (discussing potential problems with and solutions to permitting more citizen recordings). None of the potential problems with permitting citizen recordings of police depend on the openness of citizen recordings of police encounters. *Cf. id.* Furthermore, the risk of one potential harm—dangerousness of recording police—is actually lessened when a citizen surreptitiously records an officer because if the officer is unaware of the recording device he cannot mistake it for a weapon. *Cf. id.* at 313-14.

180. *Cf. id.*

181. *Cf. id.* (discussing possible effects of encouraging citizen recording of public police activity).

182. *Cf. Alderman, supra* note 11, at 528-31 (discussing "[v]indication of [c]onstitutional [r]ights in § 1983 [a]ctions" and "[s]ymmetry with [b]est [p]olice [p]ractices"). "States that shield police officers from public recordation also shield themselves from liability—doubling the injustices created by these statutes." *Id.* at 528. If a cloak of privacy shields public police action, then police officers are effectively given a license to abuse their authority because "the risk of getting caught evaporates beneath the aura of impunity." *Id.* at 530.

183. Potere, *supra* note 27, at 312.

184. See *id.* at 312-13 (arguing police exposure to public makes over-deterrence unlikely).

185. See *id.* at 315-16 (discussing remedies for police officers' fear of false footage damaging their reputations).

## IV. CONCLUSION

In order to prevent further constitutional violations, legislatures, law enforcement agencies, and courts must recognize an affirmative right to record public police encounters, regardless of whether the recordings are open or surreptitious. Congress should amend the federal wiretapping statute to include specific provisions permitting all citizen recordings of public police encounters that do not directly interfere with police business or important government interests, which will effectively extend this right to all citizens and prevent states from prohibiting such recordings. State legislatures should also include provisions in wiretapping statutes explicitly protecting citizens' right to record police encounters, regardless of whether the recordings are open or surreptitious. Additionally, law enforcement agencies should adopt policies that prevent police officers from arresting citizens for merely recording officers and implement training programs to educate officers on when it is appropriate to instruct citizens to stop recording. Further, courts should apply intermediate scrutiny when dealing with cases involving citizen recordings of police encounters. Moreover, courts should find constitutional violations anytime a statute or its application is not narrowly tailored or applied to serve a significant government interest. Finally, courts should deem police officers to have constructive notice that their actions may be monitored, documented, recorded, and reported and refuse to permit officers to arrest citizens who record them in a less than open manner.

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