
Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers

*“The public should know what is going on. It has a right to know in detail what its guardians are doing in order that it may intelligently conclude as to whether they should be discharged, or slapped on the back with approval and have their pay raised. And the police on their part need the understanding of the public. They are thrown inevitably into close association with the seamy side of life; they are hired to control it. They need, therefore to become acquainted with the great, wholesome public. They need the spirit which they will gather from it to carry them through the trying, tempting days when they are wrestling with the outlaw.”*¹

I. INTRODUCTION

One may only speculate why police pulled over Michael Hyde on October 28, 1998.² Perhaps they were suspicious of the flashy Porsche he was driving, his long hair, his car’s excessively noisy exhaust, or perhaps they were just bored.³ When all was said and done, however, the reason Hyde was pulled over did not matter; he was convicted of a crime.⁴

After being pulled over, for reasons that are still not entirely clear, Hyde began to secretly record the officers’ statements with a tape recorder.⁵ Police officers ordered Hyde and his passenger out of the vehicle and searched both men.⁶ As the search of both men and the car ensued, the exchange between Hyde and the officers became heated, both parties used profanities, and the officers threatened to throw Hyde in jail.⁷ Unable to find any contraband in the

1. ARTHUR WOODS, POLICEMAN AND PUBLIC 178 (1919).

2. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 964 (Mass. 2001) (providing details of stop).

3. See *id.* (noting Hyde believed stop based on his appearance); see also Denise Lavoie, *SJC Upholds Conviction of Man Who Secretly Taped Police*, BOSTON GLOBE, July 13, 2001 (describing Hyde as “rock star” unfairly targeted because of his long hair, leather jacket, and sports car).

4. See *Hyde*, 750 N.E.2d at 964 (upholding Hyde’s conviction in 4-2 decision).

5. See *id.* at 964-65 (summarizing Hyde’s police encounter). Hyde began recording at the inception of the stop. *Id.* at 965. It is uncertain what motivated him to record the initial stop or the subsequent actions by the police officers. *Id.*

6. See *id.* at 964 (detailing exchange between Hyde and officers after initial stop).

7. *Id.* at 964-65 (reporting officers allowed Hyde to leave because stop had become so volatile); see also Lavoie, *supra* note 3 (reporting trial testimony disclosed details of exchange).

car and recognizing that the stop had gotten out of hand, the officers let Hyde go with a verbal warning for excessively noisy exhaust.⁸

Six days later and still distraught over the incident, Hyde went to the internal affairs division of the Abington Massachusetts police department and made a formal complaint.⁹ To substantiate his claim, he provided internal affairs with the tape recording he made.¹⁰ The Abington police investigated the matter and petitioned for a criminal complaint.¹¹ To Hyde's dismay, the criminal complaint was not for the officers that pulled him over; it was for him.¹²

The crime? Violation of the Massachusetts Anti-Wiretapping Statute by recording the police officers without their consent.¹³ The surreptitious recording of the police officers who pulled him over resulted in Hyde's conviction.¹⁴ Affirming his conviction, the Massachusetts Supreme Judicial Court (SJC) announced that Massachusetts's Anti-Wiretapping Statute does not provide an exception for surreptitious recordings when the person being recorded has no reasonable expectation of privacy.¹⁵

The Massachusetts Legislature specifically enacted the anti-wiretapping statute to protect private citizens from secret recordings.¹⁶ Massachusetts's ban on undisclosed electronic surveillance is significantly more rigid than its federal counterpart.¹⁷ Like the federal anti-wiretapping statute, the majority of state anti-wiretapping laws allow for one-party consent recordings.¹⁸ To satisfy

8. *Massachusetts v. Hyde*, 750 N.E.2d 963, 964-65 (Mass. 2001) (reiterating reason for traffic stop). In addition to the verbal warning for a noisy exhaust, the police also verbally cited Hyde for an unlit license plate. *See id.* at 965.

9. *Id.* (detailing Hyde's actions subsequent to encounter with Abington police).

10. *Id.* (recounting Hyde's appearance at Abington Police Department).

11. *Id.* (discussing procedure taken after Hyde filed complaint). Initially, the court magistrate refused to issue a criminal complaint against Hyde. *Id.* After a show-cause hearing, a district court issued a criminal complaint against Hyde. *Id.*

12. *See Hyde*, 750 N.E.2d at 965 (noting criminal complaint issued for Hyde after internal affairs complaint).

13. *Id.* at 971 (holding Massachusetts Electronic Surveillance Statute makes *no exception* for undisclosed recording of police officers); *see also* MASS. GEN. LAWS ch. 272, § 99 (2008) (codifying Massachusetts Electronic Surveillance Statute).

14. *See Massachusetts v. Hyde*, 750 N.E.2d 963, 965 (Mass. 2001) (detailing Hyde's district court conviction for violating Massachusetts Electronic Surveillance Statute). The court convicted Hyde on four counts of violating the Massachusetts Electronic Surveillance statute. *Id.*

15. *See id.* at 971 (holding no language of privacy expectation in statute).

16. *Id.* at 966 (inferring legislative intent to prevent all members of public from secretly recording others). The Massachusetts Electronic Surveillance Statute also provides that "any aggrieved person whose oral or wire communications were intercepted, disclosed or used excepted as permitted . . . shall have a cause of action against any person who so intercepts . . ." MASS GEN. LAWS ch. 272, § 99(Q) (2008).

17. *Compare* 18 U.S.C. § 2510(2) (2006) (requiring one-party consent), *with* MASS. GEN. LAWS ch. 272, § 99(B)(2) (2008) (imposing all-party consent requirement). The federal statute imposes the requirement that the speaker have a "justifiable expectation of privacy." 18 U.S.C. § 2510(2); *see Hyde*, 750 N.E.2d at 965 (describing differences between Massachusetts statute and its federal counterpart).

18. *See* Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversation When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 965 n.59 (2005)

the one-party consent requirement, only one party to the conversation must consent to the recording.¹⁹ In contrast, the Massachusetts statute requires that *all* parties consent to the recording.²⁰

Hence, the surreptitious recording of a police officer, similar to the one made by Hyde, would be free from prosecution in most other jurisdictions.²¹ Interestingly, Hyde would also likely have been free from prosecution had he simply held the tape recorder in plain view.²² Holding the recording device in plain view satisfies the all-party consent requirement, suggesting that *knowledge*, rather than *consent*, is all that is required, despite the language of the statute.²³

Seven years after the *Hyde* decision, Simon Glik was arrested for recording police officers that were arresting another individual.²⁴ Glik recorded the arrest with his cell phone because he believed the officers were using excessive

(listing states with one-party consent statutes).

19. See 18 U.S.C. § 2511(2)(c)-(d) (2006) (codifying one-party consent exception).

20. See MASS. GEN. LAWS ch. 272, § 99(Q) (2008) (requiring all parties consent to recording); see also *Massachusetts v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (stating all surreptitious recordings strictly prohibited by Massachusetts statute). It appears from the *Hyde* decision that mere knowledge is enough to satisfy the consent requirement. 750 N.E.2d at 967.

21. See Jessica Belskis, *Applying the Wiretap Act to Online Communications After United States v. Councilman*, 2 SHIDLER J.L. COM. & TECH. 18 (2006) (implying Hyde's actions not criminal in most states). Currently, twelve of the forty-nine states with anti-wiretapping laws require all parties to consent to the recording. *Id.* Therefore, in any of the other states that allow for the recording of individuals with only one-party's consent, Hyde would not have committed a crime. See *id.*

22. See *Hyde*, 750 N.E.2d at 966 (noting Hyde's conviction not result of recording, but for *secretly* recording); see also Harvey A. Silvergate & James Tierney, Op-Ed., *Commentary: Preventing Oversight for Police Misconduct*, MASS. LAW. WKLY., Jan. 28, 2008 (criticizing arrest of Boston man for openly recording police during arrest).

23. See MASS. GEN. LAWS ch. 272, § 99(B)(4) (2008) (defining unlawful "interceptions" as secret recordings made without prior authority by all parties); *Hyde*, 750 N.E.2d at 966 (suggesting knowledge of police officers through plain view recording enough to satisfy all-party consent requirement); see also *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 3-4 (Boston Mun. Ct. Jan. 31, 2008) (dismissing charges because cell phone recording held in plain view of officers). Though Glik did not get express consent from the officers who did not wish to be recorded, the court dismissed the case because Glik recorded them in plain view. *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 3-4. But see MASS. GEN. LAWS ch. 272, § 99 (2008) (prohibiting wiretapping in Massachusetts).

... Any person willfully commits an interception, attempts to commit an interception ... shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years ... The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication ...

§ 99 (emphasis added); see also *Lowinger v. Broderick*, 50 F.3d 61, 65 (1st Cir. 1995) (noting violation of Massachusetts Anti-Wiretapping Statute occurred when plaintiff recorded officer without his permission).

24. *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 1 (Boston Mun. Ct. Jan. 31, 2008) (detailing Simon Glik's arrest for recording police officers with cell phone); see also Marie Szaniszlo, *Lawyer Put on Trial for Drug Arrest*, BOSTON HERALD, Jan 26, 2008, at 6 (reporting Simon Glik's arrest for violating state anti-wiretapping statute).

force.²⁵ Although the recording of visual images alone does not violate the anti-wiretapping statute, audio recordings are an integral part of visual recordings, and most recording devices are equipped with both audio and visual recording capabilities.²⁶ Thus, Glik's recording violated the Massachusetts Anti-Wiretapping Statute because it had both a visual and audio component.²⁷ However, the district court dismissed the criminal charges against Glik because, unlike Hyde, Glik had been holding his cell phone in plain view.²⁸

Although not an issue in the *Glik* case, future cases may involve scenarios where it may not be readily discernable whether a person is making a surreptitious or a plain view recording.²⁹ With the rapid advancement of technology, detecting a recording may be more complicated than first thought.³⁰ The holding in *Hyde* presumes that when an individual holds a recording device in plain view the officer becomes automatically aware of the recording.³¹ However, due to the rapid advancement in recording technology, the practical application of the *Hyde* holding may be problematic.³² For example, a police officer may not immediately realize someone is recording

25. See Szanislo, *supra* note 24, at 6 (reporting Glik recorded officers because he felt arrest unlawful).

26. See *Massachusetts v. Wright*, 814 N.E.2d 741, 742 n.1 (Mass. App. Ct. 2004) (acknowledging recording visual images not violative of anti-wiretapping statute); see also Harvey Silvergate & James Tierney, Op-Ed., *Echoes of Rodney King*, BOSTON PHOENIX, Feb. 21, 2008 (pointing out most cell phones come equipped with both audio and visual recording components). At first, the Rodney King video was inaudible, but electronic filters allowed the officers' commands to be heard. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 971 n.11 (Mass. 2001).

27. See *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (discussing recording).

28. See *id.* (order granting motion to dismiss) (describing recording process); see also Silvergate and Tierney, *supra* note 26 (referencing dismissal of charges by trial court judge because recording not done in secret).

29. See Silvergate & Tierney, *supra* note 26 (predicting future difficulty in determining whether recordings furtive); see also Mike Miliard, *Sound Off*, THE BOSTON PHOENIX, Dec. 13, 2006 (reporting case involving anti-wiretapping conviction with recorder held in plain view). If the recording is made via cell phone, police officers may not realize they are being recorded until minutes after the recording has begun, which creates issues when determining whether something was recorded secretly. See Silvergate & Tierney, *supra* note 26 (raising issues about distinguishing surreptitious from obvious recording with rapid advance of technology). The weight of the distinction may create an incentive for officers recorded engaging in questionable conduct to deny having been aware of the device, whether it is a cell phone, MP3 player, or other recording device. *Id.*

30. See *supra* notes 28-29 and accompanying text (analyzing potential future issues with distinguishing surreptitious recordings from plain view recordings); see also Reply Brief of Defendant, Boston Police Department at 1, *Gouin v. Gouin*, No. 07-1604 (1st Cir. 2007) (arguing district court properly granted summary judgment for police); *Gouin v. Gouin*, 249 F. Supp. 2d 62, 79 (D. Mass. 2003) (refusing to consider officers should have noticed recording). The City of Boston brought a counterclaim against plaintiff for secretly recording arrest after he brought a civil rights suit. *Id.* at 10. Boston police saw the recorder, which they believed to be a cell phone, and were unaware that plaintiff was recording them. *Id.* at 28.

31. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001) (suggesting if Hyde held recorder in plain view no violation of statute would exist).

32. See *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (inferring officers' awareness of Glik's recording because they arrested him for violating anti-wiretapping statute).

him, which would force a court to decipher at what point the recording went from unlawful to lawful.³³ Additionally, the plain view doctrine provides an incentive to police officers who are engaged in unlawful police practices to deny knowledge of the recording completely and file a complaint for the illegal recording, rather than face punishment for police misconduct.³⁴

Today, secretly recording conversations is easier than ever.³⁵ Everyday devices such as cell phones, digital cameras, and MP3 players allow people to make recordings with the click of a button, making some plain view recordings practically impossible to detect.³⁶ A recent trend has emerged in which individuals record police misconduct, then post the recordings on the Internet.³⁷ Citizen-made Internet broadcasts of police brutality, coupled with sensationalized media coverage, give rise to serious concerns about the prevalence of police misconduct.³⁸ Nationally, the use of video and audio recordings has proven instrumental in both criminal and civil cases against wayward police officers.³⁹ Due to the rise in private citizens secretly recording

33. See Silvergate & Tierney, *supra* note 26 (opining plain view exception hinges upon officer's subjective awareness of recording). Subjective awareness of a recording may not be easily established, leaving officers caught engaging in unlawful police practices more inclined to deny knowledge of the recording, resulting in situations similar to the *Hyde* case. See *id.*

34. See *id.* (warning of future problems where police may not admit knowledge of recording).

35. See *infra* notes 36-39 and accompanying text (chronicling new recording and distribution technologies and their effects).

36. See Steven Greenhouse, *At the Bar; Secret tape-recording: A Debate that Divides Old-Line Ethicists from New-Wave Technocrats*, N.Y. TIMES, Sept. 16, 1994, at B18 (referencing effortlessness of modern day secret recordings).

37. See Keith B. Richburg, *New York's Video Vigilante, Scourge of Parking Enforcers*, WASHINGTON POST, Aug. 30, 2008, at A4 (describing rise in amateur videos of police misconduct posted on YouTube); see also Tim Conneally, *Police: Skip Youtube and Upload Eyewitness Videos to Us*, http://www.betanews.com/article/Police_Skip_YouTube_and_upload_eyewitness_videos_to_us/1217619257 (last visited Apr. 4, 2009) (urging citizens upload police misconduct videos directly to police department rather than YouTube). With so many videos of police misconduct on the Internet, the New York City Police Department has called for citizens to upload police misconduct videos directly to the police. See Richburg, *supra* (reporting on citizen trend of recording police misconduct); see also Tracy Smith, *YouTube Phenomenon Keeps Growing*, Aug. 4, 2006, <http://www.cbsnews.com/stories/2006/08/04/earlyshow/contributors/tracysmith/main1864812.shtml> (commenting on surprising amount of home videos posted on YouTube). YouTube drew 19.6 million viewers in 2006, triple the amount of viewers from 2005. *Id.* A search for "police brutality" on www.YouTube.com resulted in 9,330 videos, and a search for "police misconduct" led to another 712 videos. See YouTube – police brutality, http://www.youtube.com/results?search_query=polic+brutality&search_type= (last visited Apr. 4, 2009); YouTube – police misconduct, http://www.youtube.com/results?search_query=polic+misconduct&search_type=&q=f (last visited Apr. 4, 2009).

38. See Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 3-4 (2001) (suggesting growing distrust of police due to media coverage of police brutality and misconduct); see also Kevin Johnson, *Police Brutality Cases on Rise Since 9/11*, USA TODAY, Dec. 18, 2007, available at, http://www.usatoday.com/news/nation/2007-12-17-Copmisconduct_N.htm (last visited Apr. 4, 2009) (discussing increase in federal civil rights actions against police for excessive force since 2001).

39. See, e.g., *Scott v. Harris*, 550 U.S. 372, 378 (2007) (utilizing videotape in determination of excessive force in case against police officers); Michael Brick, *Police Officer Found Guilty in Videotaped Assault Attempt*, N.Y. TIMES, Mar. 11, 2004, at B8 (detailing criminal conviction of police officer using civilian-made video); Maeve Reston, *Airman's Family Urges U.S. Charges Against Ex-Deputy but Experts Say the Jury's Rapid Acquittal in the Chino Shooting Makes a Federal Case Unlikely*, L.A. TIMES, June 30, 2007, at 3

police officers, police have made numerous arrests for violations of state anti-wiretapping laws in all-party consent jurisdictions.⁴⁰

The SJC's interpretation of the state anti-wiretapping statute raises significant First Amendment concerns.⁴¹ According to the SJC, the plain language of the anti-wiretapping statute is unforgiving in its ban on undisclosed recordings.⁴² Therefore, *any* party's surreptitious recording of police officers in the course of their duties would be subject to prosecution.⁴³ This holding may infringe upon an individual's First Amendment right to document public officials, such as police officers, in the performance of their duties.⁴⁴

Remarkably, the First Circuit recently held that a woman had a First Amendment right to publish a surreptitious recording of police misconduct on the grounds that the recording, though illegal under the Massachusetts Anti-Wiretapping Statute, was a matter of public concern.⁴⁵ The First Circuit allowed the broadcast of the unlawful recording on the Internet despite the

(opening on sheriff shooting case). A sheriff shot a man at point blank range three times and falsely reported that the victim had charged after him. *See Reston, supra*. Although a jury acquitted the sheriff on all charges at trial, he was subsequently fired from the police department. *Id.*

40. *See* Timothy Williams, *Recorded on a Suspect's Hidden MP3 Player, a Bronx Detective Faces 12 Perjury Charges*, N.Y. TIMES, Dec. 7, 2007 (reporting on suspect who tape recorded his police interrogation); *see also* Washington v. Flora, 845 P.2d 1355, 1358 (Wash. App. Ct. 1992) (reversing defendant's conviction for violating anti-wiretapping statute); Andrew Wolfe, *Man Charged After Videotaping Police*, NASHUA TELEGRAPH, June 29, 2006 (commenting on New Hampshire man charged with violating anti-wiretapping statute); Andrew Wolfe, *Wiretap Charges May Face Review*, NASHUA TELEGRAPH, July 1, 2006 [hereinafter Wolfe Update] (updating story on New Hampshire man charged with violating anti-wiretapping statute); Radley Balko, *Straight Talk: Videotaping Police*, FOXNEWS.COM, <http://www.foxnews.com/story/0,2933,284075,00.html> (reporting man faces ten-year prison term for violating anti-wiretapping statute by secretly recording police); Posting of Mary Frances Prevost to California Criminal Lawyer Blog, http://www.californiacriminallawyerblog.com/2007/05/new_hampshire_police_arrest_m.html (May 13, 2007) [hereinafter Dover Man Arrested] (reporting man arrested and charged for secretly recording officers during traffic stop). Police arrested a New Hampshire man for violating the state anti-wiretapping statute after he brought a video of police officers acting "rude" while questioning his son to the police station. *See* Wolfe Update, *supra*. What is significant about his arrest is that the video portion did not violate the anti-wiretapping statute. *Id.* Instead, the violation was the audio portion of the tape. *Id.* Videotaping police without audio does not violate the New Hampshire law. *Id.* In *Flora*, a man was convicted of violating an anti-wiretapping statute similar to Massachusetts's statute. *Flora*, 845 P.2d at 1355-56. In reversing his conviction, the appellate court held that the police officers had no reasonable expectation of privacy in the encounter. *Id.* at 1358.

41. *See* Massachusetts v. Hyde, 750 N.E.2d 963, 977 (Mass. 2001) (Marshall, J., dissenting) (raising notion of possible First Amendment implications in statutory interpretation); *see also* Harvey Gee, *The First Amendment and Police Misconduct: Criminal Penalty for Filing Complaints Against Police Officers*, 27 HAMLINE L. REV. 225, 259-61 (2004) (noting California statute deters reporting of police misconduct and infringes First Amendment rights).

42. *See* Hyde, 750 N.E.2d at 967 (interpreting legislative intent to create stricter law than states with one party consent statutes).

43. *See id.* (implying no exception for any instance of surreptitious recording).

44. *See infra* Part III.B and accompanying text (analyzing First Amendment right to gather information under Hyde holding). Implicit in the Hyde holding is the idea that the media is also subject to criminal penalties for surreptitious recordings of police officers. *See* Hyde, 750 N.E.2d at 976 (Marshall, J., dissenting) (alerting majority media held to same statutory standards).

45. *See* Jean v. Mass. State Police, 492 F.3d 24, 33 (1st Cir. 2007) (deciding matters of public concern outweigh police department interests).

illegality of the recording itself.⁴⁶ In reaching its conclusion, the First Circuit held that the publisher's First Amendment rights are far more compelling than any privacy rights of police officers in the performance of their jobs.⁴⁷ Similarly, the *Glik* decision noted that despite the discomfort the officers felt while being recorded, Glik's First Amendment right to gather information is fundamental and therefore the state may not infringe on it.⁴⁸

This Note will initially investigate the history and rationale behind federal and Massachusetts anti-wiretapping laws, including the privacy issues raised in the *Hyde* opinion.⁴⁹ The Note will then chronicle society's burgeoning distrust of police officers and the evolution of police practices in response to the development of recording technology.⁵⁰ This Note will also discuss the impact of recordings on civil rights litigation, police training, and police misconduct.⁵¹ Next, the Note will introduce the First Amendment's guarantee of the public's right to gather and publish information on matters of public concern.⁵² Finally, this Note will analyze the pros and cons of surreptitious recordings of police by distinguishing secret recordings from plain view recordings in consideration of advancing modern technology and conclude that society's right to monitor public officials far exceeds police officers' expectation of privacy.⁵³

II. HISTORY

A. The Constitutional Balancing Act of Law Enforcement's Need for Electronic Surveillance and Individual Privacy Rights

The Supreme Court established the foundation of modern day electronic surveillance law in three decisions: *Olmstead v. United States*,⁵⁴ *Katz v. United States*,⁵⁵ and *Berger v. New York*.⁵⁶ In 1928, the Supreme Court in *Olmstead*

46. See *id.* (granting preliminary injunction for woman posting illegal recording of police misconduct on Internet).

47. *Id.* at 30; see also *infra* note 164 (referencing privacy rights of police officers "irrelevant" conclusion).

48. See *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (recognizing imbalance between freedom of speech and privacy interests). "Photography is a form of expression which is entitled to First Amendment protection just as the written or spoken word is protected. Photography as a means of communication and expression can be strikingly informative . . ." *Massachusetts v. Oakes*, 518 N.E.2d 836, 837 (Mass. 1988).

49. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 965 (Mass. 2001); see also *infra* Parts II.A-C (analyzing differences between Massachusetts and federal wiretap statutes).

50. See *infra* Part II.D (recounting nation's angst over law enforcement and governmental power).

51. See *infra* Parts II.E-F (providing analysis of benefits of police misconduct).

52. See *infra* Part II.G (investigating First Amendment right to gather information concerning public officials).

53. See *infra* Part III (analyzing merits of Massachusetts's strict rule and majority rule).

54. 277 U.S. 438 (1928).

55. 389 U.S. 347 (1967).

refused to construe the language of the Fourth Amendment to protect private oral conversations.⁵⁷ Although the public was displeased with this holding, the Court did not revisit the issue until almost forty years later in the seminal decision of *Katz v. United States*.⁵⁸

The analysis in *Katz* laid the groundwork for modern electronic surveillance law and overruled *Olmstead*.⁵⁹ In *Katz*, federal law enforcement agents secretly recorded Charles Katz using a public payphone to place illegal bets.⁶⁰ The trial judge allowed the tapes of his phone conversations into evidence, and a jury convicted Katz of illegal gambling.⁶¹ The Supreme Court reversed Katz's conviction, holding that "the Fourth Amendment protects people, not places."⁶² Katz was entitled to a reasonable expectation of privacy despite the fact that his conversation took place in a public phone booth.⁶³

Subsequent to the *Katz* decision, the Supreme Court in *Berger* struck down a New York statute that allowed authorities to eavesdrop on an individual for sixty days with the authority of an all-encompassing warrant that did not

56. 388 U.S. 41 (1967).

57. See *Olmstead*, 277 U.S. at 456-57 (focusing on plain language of Fourth Amendment); see also DANIEL J. SOLOVE ET AL., *PRIVACY, INFORMATION AND TECHNOLOGY*, ELECTIVE SERIES 68 (2006) (analyzing birth of federal electronic surveillance law after *Olmstead*). The plain language of Fourth Amendment states, "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The defendant in *Olmstead* challenged the validity of government wiretapping after police officers intercepted phone conversations by tapping telephone wires outside his home. *Olmstead*, 277 U.S. at 456-57. The intercepted conversations of the defendant ultimately led to his arrest and conviction for selling liquor in violation of the National Prohibition Act. *Id.* at 455-57. Referring to the troubling analysis of the majority, Justice Brandeis noted that when the Constitution was written, the drafters could not have predicted the means with which law enforcement could intercept private conversations. *Id.* at 472 (Brandeis, J., dissenting). Strict adherence to the plain language of the Fourth Amendment would result in the ultimate deprivation of citizen privacy as a result of law enforcement surveillance enhancement. See *id.* at 474. The public's displeasure in the wake of the *Olmstead* decision prompted Congress to enact Section 605 of the Federal Communications Act, which makes wiretapping a federal crime. See SOLOVE, *supra*, at 68.

58. See *Katz v. United States*, 389 U.S. 347 (1967) (overturning *Olmstead*); see also, SOLOVE, *supra* note 57, at 68 (referring to public disapproval of *Olmstead* decision).

59. See Howard S. Dakoff, Note, *The Clipper Chip Proposal: Deciphering the Unfounded Fears that Are Wrongfully Derailing Its Implementation*, 29 J. MARSHALL L. REV. 475, 489 (1996) (suggesting core of electronic surveillance jurisprudence based on *Katz* and *Berger* decisions).

60. See *Katz*, 389 U.S. at 348 (discussing circumstances surrounding Katz's conviction). Around the same time *Katz* was decided, the Supreme Court held in *Berger* that the New York Anti-Wiretapping Statute violated the Fourth Amendment because it did not require warrants to have the constitutionally required particularity. See *Berger v. New York*, 388 U.S. 41, 56 (1967) (urging particularity requirement crucial to protect privacy of citizens).

61. See *Katz v. United States*, 369 F.2d 130, 136 (9th Cir. 1966) (affirming district court conviction).

62. See *Katz*, 389 U.S. at 351 (clarifying scope of constitutional protection afforded by Fourth Amendment).

63. *Id.* at 351-52 (distinguishing public place versus private intentions). In this context, the Court held that even though Katz was standing in a public place, where he could be viewed by anyone, his conversation was still intended to be private. *Id.* at 352.

require law enforcement to specify the conversations they sought to record.⁶⁴ The Court held that the statute violated the Fourth Amendment by allowing for broad, unchecked wiretaps.⁶⁵ Essentially, law enforcement may eavesdrop, but only on specific conversations for which they obtain a warrant.⁶⁶

B. Title III and State Electronic Surveillance Laws

In response to the *Katz* decision, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).⁶⁷ Congress intended Title III to protect individuals from the dangers of uncontrolled electronic surveillance.⁶⁸ Title III codified a general prohibition on electronic surveillance by both law enforcement and private citizens.⁶⁹ Based largely on the decision in *Katz*, Congress carved out exceptions to the broad prohibition on wiretapping.⁷⁰ According to Title III, no violation of the anti-wiretapping statute exists if one or more parties to the recording consents, one party lacks a reasonable expectation of privacy in the conversation, or if a warrant was procured in good faith by a law enforcement official.⁷¹

Title III allows for a party to be completely unaware that someone else is recording their oral communications as long as one party to the conversation,

64. See *Berger*, 388 U.S. at 63-64 (holding New York Statute too broad and violative of Fourth Amendment); see also *infra* note 88 and accompanying text (discussing Justice Harlan's concurrence).

65. See *Berger*, 388 U.S. at 54-55 (stating statute's "broad sweep" of surveillance infringed on Fourth Amendment rights).

66. See *Berger v. New York*, 388 U.S. 41, 55-56 (holding warrants must describe conversations with particular specificity).

67. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. §§ 2510-22 (2006)) (promulgating electronic communication interception law).

68. See S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153-54 (advocating for electronic surveillance regulation). "Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." *Id.* at 2154. Title III was a response to growing public concerns that the prior statute, known as the Federal Communications Act, was not an adequate safeguard of privacy rights. *Id.* But see *United States v. Phillips*, 540 F.2d 319, 324 (8th Cir. 1976) (stating Title III enacted in response to law enforcement need to combat organized crime). Allowing law enforcement to wiretap private conversations helped police officers arrest organized crime members that would otherwise have eluded them. See *Phillips*, 540 F.2d at 324.

69. See *United States v. Giordano*, 416 U.S. 505, 514 (1974) (observing Congress's objectives when enacting Title III). The rationale behind Title III was to prohibit "all interceptions of oral and wire communications, except . . . interceptions permitted to law enforcement officers when authorized by court order." *Id.*

70. See *Katz v. United States*, 389 U.S. 347, 350-52 (1967) (detailing expectation of privacy); see also *infra* note 71 (describing exceptions to Title III).

71. 18 U.S.C. § 2511(2)(d) (2006) (detailing one-party consent exception). "Oral communication" is defined in Title III as "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) (2006) (emphasis added); see also 18 U.S.C. § 2511(2)(a)(ii)(A) (2006) (setting forth warrant exception); *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding warrants held invalid on appeal will not suppress evidence if warrant obtained in good faith).

often the person making the recording, consents to that recording.⁷² Similarly, an individual may secretly record another if he or she lacks a reasonable expectation of privacy in that conversation.⁷³ Finally, Congress included the crucial warrant exception because, at the time of Title III's enactment, law enforcement relied heavily on electronic surveillance tools to combat organized crime.⁷⁴ Law enforcement may obtain a warrant to conduct electronic surveillance when a neutral and detached magistrate finds that probable cause exists.⁷⁵

Forty-nine states have enacted statutes similar to Title III.⁷⁶ A majority of states have emulated Title III by including a one-party consent exception in their respective anti-wiretapping law.⁷⁷ A minority of states with anti-wiretapping statutes like Massachusetts require all parties give consent to the recording.⁷⁸ The Massachusetts Anti-Wiretapping Statute is one of the strictest

72. See 18 U.S.C. § 2511(2)(d) (detailing one-party consent exception). "It shall not be unlawful . . . 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 to such interception" *Id.*

73. See *Bartnicki v. Vopper*, 532 U.S. 514, 523 (2001) (noting Congress's intent to protect privacy of oral and wire communications through Title III); *Dalia v. United States*, 441 U.S. 238, 249-50 (1979) (setting forth Congress's intent for scope of Title III); *supra* note 71 (noting definition of "oral communications" under Title III). Congress enacted Title III to protect the "cherished privacy of law-abiding citizens" from the "threat" of electronic surveillance. See *Dalia*, 441 U.S. at 250 n.9.

74. See 18 U.S.C. § 2518(1) (2008) (describing warrant procedure); *Berger v. New York*, 388 U.S. 41, 60 (1967) (noting importance of eavesdropping capability for police); S. REP. 90-1097, at 2157 (describing purpose of Title III). "The major purpose of Title III is to combat organized crime." S. REP. 90-1097, at 2157. "It is said with fervor that electronic eavesdropping is a most important technique of law enforcement and that outlawing it will severely cripple crime detection." *Berger*, 388 U.S. at 60. Section 2518(7) provides for an exception to the warrant requirement for emergencies. 18 U.S.C. § 2518(7). However, in order to fall within the exception, law enforcement agents must apply for a judicial order within forty-eight hours of interception. See *id.*

75. See 18 U.S.C. § 2518(1) (2006) (detailing statutory procedure for obtaining wiretapping warrant).

76. See, e.g., MASS. GEN. LAWS. ch. 272, § 99 (2008) (requiring two-party consent); N.H. REV. STAT. ANN. § 570-A:9 (2008) (providing procedure for interception of wire communications); N.Y. CRIM. PROC. LAW § 700 (2008) (representing eavesdropping and video surveillance statute); R.I. GEN. LAWS § 12-5-1 (2008) (providing authorization of wiretaps). Presently, Vermont is the only state without an anti-wiretapping statute. See *Dinger*, *supra* note 18, at 965 n.58 (listing forty-nine state wiretap or eavesdropping statutes).

77. See MASS. GEN. LAWS. ch. 272, § 99 (2008); see also *Massachusetts v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (recognizing difference between Massachusetts's and federal anti-wiretapping statutes); *Massachusetts v. Vitello*, 327 N.E.2d 819, 832-34 (Mass. 1975) (discussing Massachusetts's wiretap statute); *Dinger*, *supra* note 18, at 965 n.59 (listing thirty-eight states with similar one-party consent exceptions to wiretap statutes).

78. See *Dinger*, *supra* note 18, at 967 n.66 (listing states with stringent anti-wiretapping laws). The following states require more than one-party consent: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington. *Id.*; see also *Lane v. Allstate Ins. Co.*, 969 P.2d 938 (Nev. 1998) (mentioning statutory requirement all parties consent to recording); *James A. Pautler, You Know More Than You Think*, *State v. Townsend, Imputed Knowledge, and Implied Consent Under the Washington Privacy Act*, 28 SEATTLE U. L. REV. 209, 211 n.18 (2004) (including discussion of state consent requirements). "The commission clearly designed the 1968 amendments to create a more restrictive electronic surveillance statute than comparable statutes in other States." *Hyde*, 750 N.E.2d at 967. "[A] State statute may adopt standards more stringent than the requirements of Federal law . . . a State may not

in the nation because, in addition to the all-party consent requirement, it prohibits surreptitious recording where one party to the recording has no reasonable expectation of privacy.⁷⁹

The absence of privacy language in the Massachusetts Anti-Wiretapping Statute led the SJC to hold that Hyde's secret recording of the police officers violated the statute.⁸⁰ The *Hyde* decision prompted several critical analyses of the Massachusetts Anti-Wiretapping Statute in relation to public officials.⁸¹ In states with similar anti-wiretapping statutes, prosecutors have brought criminal and civil suits against individuals for surreptitiously recording police officers during arrests.⁸² However, courts in these states have dismissed suits based on concerns about granting equal privacy rights to on-duty police officers.⁸³

Notably, those courts, in construing the anti-wiretapping statutes, recognized that police officers lack a reasonable expectation of privacy when interacting with individuals in public, whether during arrests, searches, or traffic stops.⁸⁴ The SJC based its holding in *Hyde* on the absence of any language regarding a party's reasonable expectation of privacy in the statute.⁸⁵ The fact that the SJC upheld Hyde's conviction raises the issue of whether courts should afford police officers the same privacy expectations as private citizens when acting under color of state law.⁸⁶

C. The Privacy Rights of Public Officials in the Performance of Public Duties

Since the inception of Title III, courts have consistently weighed the government's need for electronic surveillance with the intrusion upon the

adopt standards that are less restrictive than those set forth in Title III." *Vitello*, 327 N.E.2d at 833.

79. See MASS. GEN. LAWS, ch. 272, § 99 (B)(4) (2008) (lacking reasonable expectation of privacy exception); *Hyde*, 750 N.E.2d at 967 (interpreting legislative intent to protect all conversations, not just private conversations). "We conclude that the Legislature intended M.G.L. ch. 272, § 99, strictly to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge." *Hyde*, 750 N.E.2d at 967. Hyde could have avoided criminal prosecution if he simply announced his intention to record the encounter or held the recorder in plain view. See *id.* at 971.

80. See *Hyde*, 750 N.E.2d at 967 (holding recording violated statute). The Legislature intended "strictly to prohibit all secret recordings by members of the public." *Id.* (emphasis added).

81. See, e.g., Roger Michel, *Criminal Law: Electronic Surveillance – General Laws Chapter 272, Section 99*, 86 MASS. L. REV. 62, 62 (2001) (criticizing reasoning behind *Hyde* decision); Jeff Jacoby, *SJC Drops Ball on Privacy*, BOSTON GLOBE, Aug. 27, 2001, at A9 (opining incorrectness of *Hyde* decision by providing privacy rights to police officers); Editorial, *Public Conduct vs. 'Private' Speech*, BOSTON HERALD, July 21, 2001, at 16 (questioning court's interpretation of Massachusetts's anti-wiretapping law).

82. See *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 626-27 (N.J. 2002) (distinguishing New Jersey's anti-wiretapping statute from Massachusetts's); *Washington v. Flora*, 845 P.2d 1355, 1358 (Wash. 1992) (rejecting interpretation of anti-wiretapping statute to prohibit recording arrests).

83. See *Hornberger*, 799 A.2d at 627 (ruling defendant did not violate anti-wiretapping statute); see also *Flora*, 845 P.2d at 1358 (preventing anti-wiretapping statute from leading to recording arrests).

84. See *supra* note 83 (referring to decisions on wiretapping cases).

85. *Massachusetts v. Hyde*, 750 N.E.2d 963, 970-71 (Mass. 2001) (announcing Massachusetts does not require a reasonable expectation of privacy in communications, unlike federal statute).

86. See *infra* Part II.C (analyzing privacy rights of public officials).

“cherished privacy of law-abiding citizens.”⁸⁷ In adjudicating Title III’s constitutionality, courts have sweepingly applied Justice Harlan’s concurrence in *Katz*: a two-prong approach to determine when a person has a reasonable expectation of privacy.⁸⁸ The Harlan analysis hinges on whether a person has a genuine expectation of privacy and whether that expectation is something society is willing to accept.⁸⁹ Thus, a privacy expectation must be both subjectively and objectively reasonable to garner Fourth Amendment protection.⁹⁰

Although courts have steadfastly safeguarded the privacy of ordinary citizens’ “thought[s] and expression[s],” they have long recognized public officials to have a diminished expectation of privacy when acting in their official capacity.⁹¹ Acting within the scope of their official duties, the actions of public officials are of public concern, which is why courts generally do not afford them equal privacy protection to that of private citizens.⁹² This

87. *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 312 (1972) (discussing precedential authority for warrantless wiretapping under Title III).

88. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (establishing two-prong test for reasonable expectation of privacy).

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as “reasonable.” Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. The Supreme Court has applied this two-prong test to subsequent cases. *See generally United States v. Jacobsen*, 466 U.S. 109 (1984) (incorporating two-prong reasonable expectation of privacy test into legal analysis).

89. *See supra* note 88 (providing reasonable expectation of privacy test).

90. *See supra* note 88 (indicating expectation of privacy test requires objective and subjective reasonableness).

91. *See United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 302 (1972) (noting Congress’s intent to protect freedom of expression). “[A] public official, a fortiori, has no right of privacy as to the manner in which he conducts himself in office. Such facts are public facts and not private facts.” *Rawlins v. Hutchinson News Publ’g Co.*, 543 P.2d 988, 993 (Kan. 1975) (internal quotations omitted); *see also Steven D. Zansberg & Pamela Campos, Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 COMM. LAW 34 (2004) (explaining public officials diminished expectation of privacy). “[I]nvestigation [by relinquishment of public documents] into official misconduct is a legitimate public concern, and incidents relating to public employment are frequently found not to be private.” *Id.* Additionally, public employees do not enjoy First Amendment protection in words spoken as part of public employment. *See Garcetti v. Ceballos*, 547 U.S. 410, 419-25 (2006) (refusing to recognize First Amendment claim for public employee).

92. *See supra* note 91 (asserting public officials not entitled to equal privacy rights in job performance). Furthermore, “[t]he right of privacy . . . may be surrendered by public display.” *Wishart v. McDonald*, 500 F.2d 1110, 1113-14 (1st Cir. 1974) (internal quotations omitted). An individual has a justified expectation of privacy in their home, however, once they are in the public eye, that reasonable expectation of privacy diminishes. *See id.*

diminished level of privacy should apply to public officials, such as police officers, because of the profound interest the public has in learning of police misconduct.⁹³

Critics posit that affording police officers equal privacy rights to those of private citizens directly contradicts the constitutional framers' intent to limit police power.⁹⁴ Police officers have a duty to protect and serve their communities and have a substantial amount of authority to carry out those duties.⁹⁵ In certain situations, police officers may use weapons, employ various degrees of physical force, and take away individual liberties.⁹⁶ Furthermore, the police may search homes and seize property upon probable cause.⁹⁷ Granting such powers to law enforcement is a sacrifice that American citizens must make in order to enjoy the freedoms of living in a safe society.⁹⁸

The constitutional framers recognized that police and governmental power could potentially lead to abuse, which would be hazardous to a free society.⁹⁹ In drafting the Fourth Amendment, the framers struck a balance between the government's need to enforce laws and a citizen's right to be free from unreasonable searches and seizures.¹⁰⁰ Although limitations on police power

93. See *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 (Mass. 2000) (holding patrol officers constitute public officials for purposes of defamation); Zansberg & Campos, *supra* note 91, at 35 (arguing for full disclosure of police internal affairs records). "We conclude, because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers' high visibility within and impact on a community, that police officers, even patrol-level police officers . . . are public officials . . ." *Rotkiewicz*, 730 N.E.2d at 287 (internal citations omitted). One of the most compelling reasons for disclosure of police misconduct records is the public's right to know if violent officers are patrolling their streets. See Zazberg & Campos, *supra* note 91, at 34.

94. See *infra* note 102 and accompanying text (asserting Framers' intent to reduce police power and governmental intrusions upon private citizens).

95. See ELMER D. GRAPER, AMERICAN POLICE ADMINISTRATION, A HANDBOOK ON POLICE ORGANIZATION AND METHODS OF ADMINISTRATION IN AMERICAN CITIES 5 (1921) (highlighting importance of police force). "Upon the policemen we depend for protection. He is expected to preserve the public peace. His presence acts as a restraining influence upon the lawless elements who would endanger life and property." *Id.* It is of great importance to the general public safety that police officers are the most trustworthy and efficient of their kind. See *id.* at 6-7.

96. See RUSSELL W. GLENN ET AL., TRAINING THE 21ST CENTURY POLICE OFFICER, REDEFINING PROFESSIONALISM FOR THE LOS ANGELES POLICE DEPARTMENT 29-32 (2003) (discussing importance of protecting against public dangers); see also Dina Mishra, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1550 (2008) (arguing allowing citizen recordings necessary due to significant police power). Police officers have a critical responsibility to protect society by enforcing the law. See Glenn, *supra*, at 29.

97. See U.S. CONST. amend. IV (laying out law enforcement requirements to search and seize persons and property).

98. See *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990) (holding warrantless entry valid based on third party consent). The owner of a home that is searched based on reliable, but factually incorrect, information has suffered the "inconvenience of living in a safe society," not a Fourth Amendment violation. *Id.*; see also *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (recognizing need for minimal intrusions on privacy for police to effectively combat crime).

99. See *infra* note 102 (noting Framers' intent to discourage excessive police power).

100. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 976 (Mass. 2001) (Marshall, J., dissenting) (rejecting majority view that recording police would jeopardize other public officials); Michael A. Woronoff, Note,

have developed over the years, some critics assert that permitting individuals to surreptitiously record interactions with police officers, without fear of prosecution, is essential to balance the scales.¹⁰¹

D. A Nation's Trepidation with Law Enforcement: A History

The text of the Fourth Amendment demonstrates the framers' concern of allowing too much police discretion.¹⁰² Although the Fourth Amendment granted the explicit right for citizens to be free from unreasonable searches and seizures by law enforcement, it failed to provide a remedy for when law enforcement violated this right.¹⁰³ Absent a prescribed remedy for its violation, critics argued the amendment was futile in safeguarding against unreasonable law enforcement intrusions.¹⁰⁴

Recognizing that law enforcement may overreach and police misconduct

Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy, 18 U. MICH. J.L. REFORM 195, 195 (1984) (contrasting privacy concerns of police officers and private citizens); *infra* note 105 and accompanying text (introducing exclusionary rule and court oversight of police activities). "It is the recognition of the potential for [police] abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers." *Hyde*, 750 N.E.2d at 976. If society has an interest in the activities of the personal lives of police officers, it certainly has an interest in the conduct of police officers while on-duty. *See* Woronoff, *supra*, at 195.

101. *See* Howard Friedman, *Evaluating Police Misconduct Cases*, TRIAL, Dec. 1997, at 44, 46-47 (noting importance of police recordings in pursuit of civil rights claim against police officer); *see also* Mishra, *supra* note 96, at 1553 (arguing for state allowance of citizen recordings of police activity to better monitor corruption).

102. *See* U.S. CONST. amend. IV. "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*; *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (admonishing modern interpretation of Fourth Amendment jurisprudence as antithetical to Framers' intent). The main purpose of the Fourth Amendment was to "curb the exercise of discretionary authority by [police] officers." Davies, *supra*, at 556.

103. *See* *United States v. Leon*, 468 U.S. 897, 906 (1984) (noting Fourth Amendment does not provide for exclusionary remedy for violations); Laurence Naughton, Note, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 209 (1996) (distinguishing Fourth and Fifth Amendments). The Fifth Amendment provides a remedy, while the Fourth Amendment does not. *Id.* Courts were then inclined to provide a remedy for Fourth Amendment protections through the exclusionary rule. *Id.*

104. *See* *Weeks v. United States*, 232 U.S. 383, 393 (1914) (stating Fourth Amendment meaningless without remedy).

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id.; *cf.* *Adams v. New York*, 192 U.S. 585, 599 (1904) (refusing to exclude illegally obtained evidence at trial).

must be deterred, the Supreme Court originated the exclusionary rule, which bars the admissibility of evidence at trial if law enforcement attained it in violation of the defendant's constitutionally protected rights.¹⁰⁵ Essentially, if law enforcement seizes evidence through an unreasonable search or seizure, the evidence obtained is not admissible at the trial of the defendant, which often leads to a dismissal of charges.¹⁰⁶ Without the use of critical evidence at trial, a conviction is nearly impossible.¹⁰⁷ Much debate exists as to whether the exclusionary rule actually deters police misconduct.¹⁰⁸ An oft-quoted opinion by former Supreme Court Justice Cardozo recognizes the serious ramifications of the exclusionary rule in stating, "The criminal goes free because the constable has blundered."¹⁰⁹ Over time, scholars have criticized the effectiveness of the exclusionary rule in deterring law enforcement overreach.¹¹⁰

In addition to the exclusionary rule, other laws have been implemented for the purposes of deterring law enforcement overreach and police misconduct.¹¹¹ 42 U.S.C. § 1983 (Section 1983) is a civil remedy available to citizens that are victims of police misconduct.¹¹² Section 1983 provides individuals with a statutory right to sue police officers and municipalities for damages arising

105. See *Weeks*, 232 U.S. at 398 (announcing common law exclusionary rule and noting application in federal courts only). In the aftermath of the *Weeks* decision, courts continued to allow illegally obtained evidence at trial if procured by state rather than federal officials. See *Byars v. United States*, 232 U.S. 28, 33 (1927) (upholding right of federal agents to use evidence illegally obtained by state officials). Finally, in *Mapp v. Ohio*, the Supreme Court announced that the exclusionary rule applies to state officials, thus barring state law enforcement from using illegally obtained evidence as well. 367 U.S. 643, 655-56 (1961) (adopting federal exclusionary rule). After the exclusionary rule was developed, courts began overseeing police conduct by determining whether police practices were in accordance with the Fourth, Fifth, and Sixth Amendments. See GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE: OFFICERS, SUSPECTS AND RECIPROCALITY 10 (2004) (noting application of exclusionary rule after *Mapp* most "intrusive and overt control the police had experienced to date").

106. See *supra* note 105 and accompanying text (illustrating origination and development of exclusionary rule).

107. See *supra* note 105 and accompanying text (describing reasoning behind exclusionary rule).

108. See H.L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION 103-04 (2d ed. 2005) (addressing arguments for and against exclusionary rule); see also MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 150 (1992) (contrasting arguments concerning effectiveness of exclusionary rule in deterring police misconduct). In order to ensure that the protections afforded by the Fourth Amendment are upheld, there must be some sort of deterrent for police officers to recognize these rights. Compare *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414 (1971) (Burger, J., dissenting) (criticizing rationale behind exclusionary rule), and *New York v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (stressing detrimental effects of exclusionary remedy), with *Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (justifying need for exclusionary rule to deter Fourth Amendment violations). "[T]he hope that th[ese] objective[s] could be accomplished by the exclusion of reliable evidence from criminal trials [is] hardly more than a wistful dream." See *Bivens*, 403 U.S. at 415.

109. *Defore*, 150 N.E. at 587 (providing insight into exclusionary remedy in criminal trials).

110. See Littlejohn, *infra* note 135, at 368 (raising doubts about current forms of police brutality deterrence); Patton, *infra* note 132, at 753-54 (pointing out weaknesses in modern deterrence rules).

111. See *infra* notes 112, 115 (discussing civil and criminal statutes enacted to prevent police misconduct).

112. 42 U.S.C. § 1983 (2006); see also Ku Klux Act of 1871, ch. 22, § 1, 17 Stat. 13 (1873) (containing original version of section 1983).

from constitutional violations by law enforcement.¹¹³ Although some scholars are skeptical that Section 1983 and other civil remedies actually deter police misconduct, civil rights lawsuits against police officers under Section 1983 are on the rise.¹¹⁴ In addition to Section 1983, police officers are subject to criminal prosecution for committing egregious civil rights violations.¹¹⁵

In addition to these judicially and legislatively created tools, many police departments have implemented internal affairs departments and citizen investigatory commissions to investigate and discipline police misconduct.¹¹⁶ Citizen investigatory commissions help reduce citizen distrust of police officer discipline and concerns about police policing themselves.¹¹⁷ Overall, the judiciary and legislature have gone to great lengths to restrain police power and prevent instances of police misconduct.¹¹⁸

E. Efforts to Curb Police Misconduct by Recording Custodial Interrogations, Warrant Executions, and Field Stops

Electronic recording devices, particularly the video camera, have paved the way for an evolution in police practices.¹¹⁹ After tolerating centuries of coerced confessions and wrongful convictions, the public began to demand change and police departments responded by recording or videotaping custodial

113. See 42 U.S.C. § 1983 (providing for civil remedy).

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

Id.

114. See *supra* note 38 (commenting on police reform and civil rights lawsuits against police and municipalities); see also ALPERT AND DUNHAM, *supra* note 105, at 10 (discussing impact of civil rights litigation on police departments). “Civil litigation is becoming one of the most significant sources of regulation of police use of force outside of the police organization.” *Id.*

115. 18 U.S.C. §§ 241-242 (2006) (addressing federal penalties for deprivation of, or conspiracy against civil rights); see also Levenson, *supra* note 38, at 21-22 (discussing criminal and civil penalties for civil rights violations). Although rarely prosecuted, police officers are subject to criminal federal civil rights charges. Levenson, *supra* note 38, at 21; see also United States v. Koon, 34 F.3d 1416, 1424 (9th Cir. 1994), *rev’d in part, aff’d in part*, 518 U.S. 81 (1996) (affirming convictions of police officers who beat Rodney King).

116. See Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L.J. 209, 216-21 (1998) (critiquing different methods of reviewing police misconduct complaints).

117. See *id.* (highlighting advantages and disadvantages of citizen review boards in investigating police misconduct allegations).

118. See *infra* note 146 (analyzing local, state, and federal government efforts to reform police departments and practices).

119. See generally Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 772 (2005) (describing increasing use of recording devices as police practices). Every state agency in the country has utilized video cameras in police cars in some way. *Id.* at 795.

interrogations.¹²⁰ Although not mandated by federal law, hundreds of police agencies have begun recording at least a portion of custodial interrogations.¹²¹ Recording custodial interrogations serves both the interests of communities and the police.¹²² By recording interrogations, citizens and defendants are safeguarded from coerced, false confessions.¹²³ On the other hand, police officers are protected from accusations of police misconduct and overreach during custodial interrogations.¹²⁴

Police departments have also taken advantage of recording technology by documenting public rallies and traffic stops.¹²⁵ The benefit of recording police and citizen interaction has proven to be invaluable to both citizens and officers.¹²⁶ Disputes often arise during motion to suppress hearings as to whether probable cause exists to make a traffic stop, or as to the accuracy of a police report.¹²⁷ Recordings of police-citizen interactions bring clarity to criminal proceedings.¹²⁸

More recently, in a Section 1983 civil rights case, the Supreme Court viewed a videotape taken from a camera mounted on the roof of a police cruiser to determine whether the police officer used excessive force in violation of the Fourth Amendment.¹²⁹ The use of the recording was instrumental in the

120. See RICHARD LEO & GEORGE C. THOMAS, III, *THE MIRANDA DEBATE*, LAW, JUSTICE AND POLICING 272 (1998) (compiling statistical data on false confessions in United States). Despite the institution of Miranda warnings, suspects still make false confessions. *Id.* at 279; see also Thurlow, *supra* note 119, at 775-81 (discussing incidents of and police influence in false confessions).

121. See Thurlow, *supra* note 119, at 790-91 (noting police agencies with existing video recording policies). A survey in the 1990s found over 2,400 police agencies recorded interrogations presently. *Id.* at 813 n.3. Alaska and Minnesota are the only states required to record custodial interrogations. See *Stephan v. Alaska*, 711 P.2d 1156, 1159 (Alaska 1985) (holding state due process requires recording of custodial interrogations); *Minnesota v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (mandating "recording requirement for all custodial interrogations").

122. See Jason Trahan & Tanya Eiserer, *In-Car Video More Likely to Clear Police Officers Accused of Misconduct, Experts Say*, DALLAS NEWS, Mar. 29, 2009, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/032909dnmetdashcam.3e1b5b2.html> (last visited Apr. 6, 2009) (reporting on police officer benefits from in-car video). "Experts say that for most police officers, in-car video can rescue a career threatened by bogus allegations of misconduct." *Id.*

123. See *id.* (noting public benefits of custodial recordings).

124. See *id.* (explaining tactical advantages of recordings in police departments).

125. See Amy Dominello, *Police Say Videotaping Is Common*, GREENSBOROUGH NEWS & RECORD, Feb. 5, 2006, at B1 (mentioning commonality of police utilizing video recording in law enforcement).

126. See Robert Santiago, *Taser Incident: Report Clears Campus Police at UF*, MIAMI HERALD, Oct. 25, 2007, at B (reporting officers involved in taser incident cleared); see also Thurlow, *supra* note 119, at 809 (observing importance of recordings in both criminal trials and civil rights allegations).

127. See Stephen T. Watson, *Use of Dashboard Cameras in Police Cars Is on the Rise*, BUFFALO NEWS, Apr. 6, 2009 (reporting how police-citizen recordings are beneficial in traffic stops). Police-citizen recordings take the "he said, she said" out of investigative work. *Id.*

128. See Watson, *supra* note 127 (opining police-citizen recordings "exonerate police more often than not").

129. See *Scott v. Harris*, 550 U.S. 372, 381 (2007) (holding police officer justified in ramming fleeing vehicle in high speed chase). The videotape was highly influential in the Court's decision that the officer's actions were reasonable. See Jessica Silbey, *Justices Taken in by Illusion of Film*, BALTIMORE SUN, May 13, 2007, at 21A (criticizing Supreme Court's exclusive reliance on video footage in rendering decision).

Court's determination that the officer was justified in using a dangerous maneuver that forced the plaintiff's car off the road and ultimately resulted in his permanent paralysis.¹³⁰ In fact, the Supreme Court determined the police officer's actions were reasonable based on a viewing of the recording, thus digressing from established summary judgment principles in rejecting the plaintiff's version of events.¹³¹

Video and audio recordings provide insight into disputed events where, in cases of police misconduct or overreach, it is often a citizen's word against a police officer's.¹³² Juries are often more inclined to believe police officers over a citizen, who may have a criminal record, when that citizen makes an allegation of police misconduct.¹³³ Recordings can thus be extremely helpful not only to falsely accused police officers, but also to true victims of civil rights violations.¹³⁴

F. Police Misconduct in the National Spotlight

Despite both judicial and legislative efforts to deter police from engaging in unconstitutional behavior, police misconduct still exists today.¹³⁵ Although the exclusionary rule, Section 1983, and criminal civil rights laws provide remedies for victims of police misconduct, concerns over the effectiveness of these remedies linger.¹³⁶ In the spring of 1991, Rodney King brought police misconduct to the forefront of the nation's attention.¹³⁷ The images of four Los Angeles police officers beating Rodney King on the streets of Los Angeles made their way into living rooms across the country.¹³⁸ The Rodney King

130. See *Scott*, 550 U.S. at 381 (concluding officer forcing car off road was reasonable).

131. See *id.* at 378 (holding videotape accurately depicted facts the case). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

132. See Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 764-65 (1993) (describing civil rights suit as credibility contest between plaintiff and police officer). Juries are generally inclined to believe police officers, who are sworn to protect them, rather than the word of citizen-plaintiffs in civil rights trials. *Id.*

133. See *id.* at 765 (noting juries almost always believe police).

134. See *id.* at 766 (acknowledging video in civil rights cases may help plaintiffs); see also Santiago, *supra* note 126 (reporting clearance of officers in University of Florida taser incident, of which video footage taken).

135. See *supra* note 108 and accompanying text (opining exclusionary rule ineffective for police deterrence); see also Edward J. Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365, 368 (1981) (questioning success of Section 1983 claims in deterring police brutality); Patton, *supra* note 132, at 753-54 (evaluating effectiveness of Section 1983 claims against police officers).

136. See Littlejohn, *supra* note 135, at 368 (describing analysis of both exclusionary rule and Section 1983 claims and their impact on police misconduct); see also Dina Mishra, *Undermining Excessive Privacy For Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1551-53 (2008) (suggesting citizen recordings of police necessary to curb police power); Patton, *supra* note 132, at 766-802 (investigating Section 1983's effectiveness in deterring police brutality).

137. See *infra* note 138 (quantifying widespread broadcast of Rodney King tape across nation).

138. See Diana Greigo Erwin, *What We Thought We Saw on King Videotape Just Didn't Happen?*, LOS

videotape ignited public debate over the racial animus within police departments and prompted national concerns about police brutality.¹³⁹

After a lengthy state criminal trial, the jury found the four police officers not guilty.¹⁴⁰ The verdict sent shock waves across the country, resulting in the eruption of the worst riots the United States had seen in decades.¹⁴¹ Eventually, two of the police officers responsible for beating Rodney King were convicted in federal court.¹⁴² Crucial to the convictions was the videotape of the beating.¹⁴³

The Rodney King beating shed light on police brutality not only within the Los Angeles Police Department, but also in other major city police departments as well.¹⁴⁴ Police brutality would have remained a fiction to most of the American population without the publication of the Rodney King images.¹⁴⁵ The compelling revelation of police brutality in 1991 triggered the reformation

ANGELES DAILY NEWS, May 1, 1992, at N19 (highlighting portions of Rodney King videotape broadcast through national media outlets); see also *Man Who Taped Beating Seeks Payment*, N.Y. TIMES, June 5, 1991, at A22 (reporting man who videotaped Rodney King beating sought payment for video broadcast). George Holliday described his recording of the Rodney King beating as the “most-played video in the history of this country.” *Id.*; see also Seth Mydans, *In Los Angeles Riots, a Witness with Videotapes*, N.Y. TIMES, July 31, 1992, at A15 (characterizing Rodney King video as most watched home video in history).

139. See Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER L.J. 67 (1993) (emphasizing race as major factor in Rodney King beating); Tony Mauro, *Experts, the Public Ask Why Verdict Baffling to Most*, USA TODAY, May 1, 1992, at 4A (noting public loss of faith in jury system).

140. See Seth Mydans, *The Police Verdict; Los Angeles Policeman Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1 (reporting acquittal of police officers in Rodney King trial).

141. See Davis, *supra* note 139, at 68 (describing mass destruction caused by L.A. riots). After the Rodney King verdict, violence also broke out in San Francisco, Seattle, Miami, Las Vegas, Atlanta, and Madison. *Id.*

142. See *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993) (Sentencing Order) (sentencing Koon and Powell after convictions).

143. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 530 (1994) (recounting Rodney King federal trial). The prosecution introduced witness testimony and expert evidence; however, the Holliday videotape was the focal point of the federal trial. *Id.*

144. See WARREN CHRISTOPHER, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 91-92 (1991) (detailing recommendations for Los Angeles Police Department following Rodney King beating); see also Anthony Duignan-Cabrera & Michael Connelly, *The Rodney King Affair*, L.A. TIMES, Mar. 24, 1991, at A1 (introducing parties involved in beating aftermath). The Los Angeles riots following the Rodney King verdict resulted in nearly sixty deaths, 2,000 injuries, and an estimated \$1 billion in damages to the city. See Davis, *supra* note 139, at 68; Levenson, *supra* note 38, at 4-5 (noting New York Police Department reform following Rodney King case).

145. See Davis, *supra* note 139, at 68 (noting importance of videotape in Rodney King case). Middle class Americans had difficulty coming to terms with the Rodney King incident, refusing to believe that police officers were capable of such tyrannical behavior. *Id.* at 70. Without the videotape, most Americans would never have believed Rodney King’s side of the story. *Id.* at 69. If it were not for Holliday’s recording of the Rodney King beating, King would have most likely ended up a statistic in the criminal justice system. *Id.* A 1993 survey of 401 state and federal judges showed that six out of ten felt that without the videotape, the officers involved in beating Rodney King would not have been convicted in the federal civil rights trial. Gary A. Hengstler, *The Justice System: How Judges View Retrial of L.A. Cops*, 79 A.B.A. J. 70, 70 (1993) (surveying judges’ opinions).

of police training and discipline across the country.¹⁴⁶

In the aftermath of the Rodney King incident, there was a great deal of speculation concerning how to effectively prevent police misconduct.¹⁴⁷ Many critics agree that, without the Rodney King videotape, the nation would have remained ignorant about the realities of police violence.¹⁴⁸ As a result, law enforcement has seen an increase in citizens recording police activity.¹⁴⁹ The publication of recordings of police misconduct has prompted some municipalities to settle lawsuits rather than risk mammoth jury awards at trial.¹⁵⁰

G. First Amendment Implications of Banning Surreptitious Recordings of Police Officers

1. The Right to Gather Information

On its face, the Massachusetts Anti-Wiretapping Statute appears constitutional because it provides police officers equal protection to that of private citizens in their oral communications.¹⁵¹ However, critics contend that prohibiting the surreptitious recording of police officers while performing their public duties contravenes the First Amendment rights of individuals that are engaged in gathering public information.¹⁵² Federal circuit courts have

146. See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 107 (2005) (compiling tools designed to decrease police misconduct). The years following the Christopher Commission, an independent commission charged with investigating the Los Angeles Police Department after Rodney King, resulted in the implementation of an early intervention system designed to promote better police practices. *Id.* The early intervention system developed in Los Angeles was designed to promote better disciplinary problems within police departments and identify problem employees early. *Id.* In 2001, early intervention systems were mandated by the Commission on Accreditation for Law Enforcement Agencies. *Id.*

147. See Patton, *supra* note 132, at 757 (discussing police brutality litigation). Even the Rodney King videotape was not enough to convict police officers in the state trial. *Id.*

148. See RONALD WEITZER, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* 14-15 (noting general differing viewpoints on police officers between whites and minorities pre-Rodney King). Most whites are hesitant to believe that police departments are in need of reform because they lack direct contact with police officers, unlike minorities who tend to have more contact with police. See *id.* at 15. On the other hand, most minorities would agree that police departments are in need of change. See *id.*

149. See Annie Linskey, *Camera Turns Lens on Police Activities*, BALT. SUN, Feb. 13, 2008, at 1B (reporting new trend of citizens recording police).

150. See Kevin Flynn, *Record Payout in Settlements Against Police*, N.Y. TIMES, Oct. 1, 1999, at B1 (discussing major swell in settlement amounts paid to resolve police brutality claims). With so much publicity focused on police brutality cases, the City of New York was more inclined to settle rather than risk huge awards at trial. *Id.*

151. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 970 (Mass. 2001) (holding police officers and public officials have same rights of privacy as private citizens under statute).

152. See *Smith v. City of Cummings*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing right of private citizens to record public officials on public property). The First Amendment not only allows for the "gathering of information about . . . public officials," but also specifically protects the right to record matters of "public interest." *Id.*

recognized the importance of recording public officials, subject to time, manner, and place restrictions, including the recording of police officers.¹⁵³

The First Amendment to the Constitution provides, “Congress shall make no law . . . abridging the freedom of speech”¹⁵⁴ The Supreme Court later interpreted the First Amendment to permit the free exchange of information, especially regarding issues of public concern.¹⁵⁵ As a result of the much recognized First Amendment right to gather information of public interest, police interference with this right is subject to civil liability.¹⁵⁶ The First Amendment right to gather information empowers the public with the information to process and make meaningful democratic decisions.¹⁵⁷ Furthermore, the public needs the free flow of information to “realistically perceive and respond to the world.”¹⁵⁸ “Maintaining the flow of such information depends on protection for both [the acquisition of information] and its dissemination since, if either process is interrupted, the flow inevitably ceases.”¹⁵⁹

Recognizing the importance of the public’s First Amendment right to gather and disseminate information of public concern, the United States Court of Appeals for the First Circuit held that the right to publish matters of great public concern, such as police misconduct, outweighs any privacy rights of police officers or governmental incentives to deter surreptitious recordings.¹⁶⁰ Likewise, subsequent to the *Hyde* decision, a Massachusetts trial judge found in *Glik* that the First Amendment outweighs any police discomfort in being recorded while making an arrest.¹⁶¹ Although the individual in *Glik* recorded in

153. See *Smith*, 212 F.3d at 1333 (acknowledging First Amendment right of citizens to videotape and photograph police officers); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing “First Amendment right to film matters of public interest”).

154. U.S. CONST. amend. I.

155. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (emphasizing free speech in public interest matters). “The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* (internal quotations omitted).

156. See, e.g., *Smith*, 212 F.3d at 1333 (acknowledging First Amendment claim against police for preventing plaintiffs from videotaping); *Johnson v. Bax*, 63 F.3d 154, 157 (2d Cir. 1995) (allowing civil rights claim against police for violating plaintiff’s First Amendment rights); *Fordyce*, 55 F.3d at 439 (recognizing First Amendment right of citizens); see also Brief for American Civil Liberties Union of Massachusetts as Amici Curiae Supporting Appellant, *Massachusetts v. Hyde*, 750 N.E.2d 963 (2001) (No. 08429), 2000 WL 34610712 (arguing prosecution for recording police obstruction violates First Amendment right to gather information).

157. Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505 (1974) (examining public need for free flow of information).

158. *Id.* (stressing dissemination of information provides efficient democratic process).

159. *Id.* (emphasizing importance of both gathering and disseminating information of public concern).

160. *Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (suggesting public policy may warrant dissemination); see also *infra* note 164 and accompanying text (discussing *Jean* decision at length).

161. See *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (suggesting First Amendment rights prevail over officer discomfort).

plain view, he did so without the consent of the police officers.¹⁶² By weighing private citizens' First Amendment rights with the potential discomfort of being secretly recorded, the trial judge engaged in a balancing approach not utilized in the *Hyde* decision.¹⁶³

2. *The Right to Publish Information of Public Interest*

In 2007, the United States Court of Appeals for the First Circuit held that a Massachusetts woman's First Amendment right to publish an unlawful recording of police officers outweighed *any* privacy concerns of the officers.¹⁶⁴ A third party gave Mary Jean a video recording of police officers engaged in an illegal search of an individual's home.¹⁶⁵ The recording was taken secretly and was passed on to Jean for public dissemination.¹⁶⁶ Because the tape originated as an illegal recording of an arrest, the state police sought to prevent Jean's dissemination of that tape on the Internet, although she had no involvement in making the illegal recording.¹⁶⁷ The First Circuit held that both the government's interest in privacy and deterring future illegal interceptions was less compelling than a citizen's right to circulate a recording of police misconduct.¹⁶⁸ Any state interference in preventing Jean from broadcasting the illegal recording would have infringed her First Amendment rights; therefore, the court allowed her to publish the recording via the World Wide Web.¹⁶⁹

Departing from the legislative analysis used in *Hyde*, the First Circuit engaged in a balancing exercise to determine if the dissemination of the surreptitious recording was entitled to First Amendment protection.¹⁷⁰ In the aftermath of the decision, other courts considering violations of the anti-wiretapping statute utilized a balancing test, weighing the interests of citizens in recording and publishing instances of police misconduct with governmental privacy interests in deciding police recording cases.¹⁷¹ So far, courts have held

162. See *id.* (reciting facts of case). Glik held his cell phone in plain view to record the arrest, but the police officers did not want to be videotaped. *Id.*

163. Compare *id.* (recognizing First Amendment rights outweigh concerns of officers), with *Massachusetts v. Hyde*, 750 N.E.2d 963, 976 (Mass. 2001) (determining statutory application by analyzing legislative intent in enacting statute).

164. See *Jean*, 492 F.3d at 30 (characterizing privacy interests of police officers as "irrelevant"). In weighing the privacy interests of the police during the arrest with the publisher's First Amendment rights, the First Circuit found that publication of a matter of public concern was entitled to protection. *Id.* at 46.

165. See *id.* at 25 (detailing means in which Jean received videotape).

166. See *Jean v. Massachusetts State Police*, 492 F.3d 24, 25 (1st Cir. 2007) (summarizing facts of case).

167. See *id.* at 25-26 (noting plaintiff received tape from individual who recorded police with "nanny-cam").

168. See *id.* at 33 (allowing tape publication protected under First Amendment).

169. See *id.* at 33 (granting injunctive relief for plaintiff publisher).

170. See *Jean*, 492 F.3d at 33 (balancing interests of plaintiff and police).

171. See, e.g., *id.* at 25 (holding First Amendment rights to publish matters of public concern outweigh privacy rights of police); *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (regarding First Amendment right as more compelling than officer comfort in recordings). Compare

that a citizen's right to record and publish police misconduct outweighs government privacy interests.¹⁷²

III. ANALYSIS

A. *Detering Police Misconduct*

The nation's Founding Fathers were familiar with the abuse of government power.¹⁷³ This familiarity explains the constitutional safeguards they enacted to protect private citizens from law enforcement overreach.¹⁷⁴ Over time, the legislative and judicial branches implemented additional measures to sustain the protections guaranteed by the constitutional founders.¹⁷⁵ Civil rights actions against law enforcement and evidence suppression are among the most effective.¹⁷⁶ Nevertheless, local communities have also called for citizen commissions to insert an additional layer of protection.¹⁷⁷

Despite the development of judicial, legislative, and citizen-enacted remedies designed to prevent abuse of law enforcement authority, police misconduct still exists.¹⁷⁸ Fortunately, advancements in technology have provided citizens an additional way to deter police misconduct.¹⁷⁹ Handheld devices and recording equipment afford individuals an easy and effective method to document police-citizen interaction.¹⁸⁰ The threat of surreptitious citizen recordings of police interactions further deters police misconduct.¹⁸¹ In

Massachusetts v. Hyde, 750 N.E.2d 963, 966 (Mass. 2001) (analyzing reasonableness argument on interpretation of legislative history and purpose of statute), with Hyde, 750 N.E.2d at 976 (Marshall, J., dissenting) (raising issue of First Amendment rights in recording police).

172. See *supra* note 171 and accompanying text (pointing out cases subsequent to *Jean* decision held citizen rights outweigh government rights).

173. See Davies, *supra* note 102, at 556. The Constitutional Framers intended for the Fourth Amendment to protect against oppressive governmental power. *Id.*

174. See *id.* (discussing Constitutional Framers' motive in drafting Fourth Amendment).

175. See 42 U.S.C. § 1983 (2006) (providing remedy for civil rights violations for persons acting under color of state law); see also 18 U.S.C. §§ 241, 242 (2006) (criminalizing civil rights violations by persons acting under color of state law).

176. U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (extending exclusionary rule to state police when evidence seized in violation of Fourth Amendment); see also *supra* note 175 (listing civil and criminal remedies for constitutional violations by persons acting under color of state law).

177. See WALKER, *supra* note 146, at 107 (discussing importance of independent citizen commissions). Independent commissions, implemented to probe instances of police misconduct, help ensure the public has a third party avenue of investigation. *Id.*

178. See *supra* note 37 and accompanying text (citing several examples of modern day police misconduct).

179. See *supra* note 36 and accompanying text (noting ease of making surreptitious recordings with contemporary recording devices).

180. See *supra* note 40 and accompanying text (chronicling recent trend in arrests of citizens making secret recordings of police misconduct).

181. See Massachusetts v. Hyde, 750 N.E.2d 963, 976 (Mass. 2001) (Marshall, J., dissenting) (suggesting prevention of police misconduct of critical importance to society and social order); see also Linskey, *supra* note 149 (considering importance of citizen recordings of police misconduct).

addition, citizen recordings could provide police departments with documented instances of police misconduct, which could aid in police training, making police departments less susceptible to Section 1983 lawsuits.¹⁸² Conversely, it is inconceivable that granting law enforcement equal privacy rights to that of private citizens would facilitate the judicial and legislative objectives of deterring police misconduct.¹⁸³

Without the benefits of surreptitious recordings like the Rodney King tape, police internal affairs department may not have taken on the critical role they have today in investigating and disciplining police wrongdoing.¹⁸⁴ The Rodney King recording not only conferred benefits onto police departments, but it also provided citizens skeptical of the existence of police wrongdoing an opportunity to examine the reality of police misconduct.¹⁸⁵ It is axiomatic then that in some jurisdictions surreptitiously made citizen recordings of police misconduct can result in prosecution.¹⁸⁶

Americans should be equipped with all possible safeguards in order to guarantee the protection of their constitutional liberties.¹⁸⁷ Although legislative and judicial protections have deterred police misconduct, citizen-made recordings would provide additional focus on the prevention of police misconduct.¹⁸⁸ Citizen-made recordings would serve to protect both citizens and law enforcement from the devastating effects of police misconduct.

*B. First Amendment Implications of Banning Surreptitious
Recordings of Police Officers or Restraining Publication*

Preventing civilians from recording law enforcement interactions interferes with the First Amendment right to gather information, essential to the guaranteed liberty of living in a free society.¹⁸⁹ Although the First Circuit

182. See Watson, *supra* note 127 (highlighting benefits of police-citizen recordings). Training officers can watch and review recruit performance and offer critiques. *Id.* Police academies can use recordings to show the best and worst on-street performances. *Id.*

183. Hyde, 750 N.E.2d at 976 (highlighting importance of citizens' right to record public officials). Allowing law enforcement to use the Massachusetts Anti-Wiretapping Statute as a shield to protect themselves from claims of police misconduct seems inconceivable considering the public's right to gather information. *See id.*

184. See *supra* note 144 and accompanying text (stressing importance of Rodney King video in contemporary law enforcement and community sentiment towards police brutality).

185. See *supra* note 145 (pointing out impact of Rodney King video on the general public).

186. See Levenson, *supra* note 38, at 4-5 (outlining overhaul of major police departments' disciplinary procedures after Rodney King); see also *supra* notes 139, 145 and accompanying text (pointing out public awareness of police brutality after Rodney King video).

187. See *supra* note 102 (implicating importance of safeguards from abuse of law enforcement power).

188. See Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 288-89 (Mass. 2000) (emphasizing significance of public discussion and criticism of police conduct); see also Massachusetts v. Hyde, 750 N.E.2d 963, 966-67 (Mass. 2001) (Marshall, J., dissenting) (asserting public holds law enforcement to highest accountability and reduced privacy of police officers necessary).

189. See Hyde, 750 N.E.2d at 977 (Marshall, J., dissenting) (raising notion of possible First Amendment

established that the First Amendment protects the right to disseminate recordings attained through unlawful means, without the right to make recordings, the public will remain in the dark with respect to police misconduct.¹⁹⁰ Any cloak of secrecy surrounding police misconduct could result in community distrust of law enforcement.¹⁹¹ Without the trust of the public, police officers cannot effectively carry out their public safety responsibilities.¹⁹² If the police cannot effectively perform their duties as law enforcers, the public suffers the consequences of living in a society with diminished safety and security.¹⁹³

The First Amendment right to gather information serves both societal interests as well as law enforcement interests.¹⁹⁴ Prohibiting surreptitious recordings of police-citizen interactions would amount to an unreasonable obstruction to the gathering of information for public disclosure.¹⁹⁵ Recording, photographing, and videotaping both police officers and public officials is of great importance to society because it holds these officials accountable for their actions.¹⁹⁶ Affording private citizens a right to record public officials benefits the public and police departments and upholds the integrity of the First Amendment's guarantee of the free flow of information regarding public concerns.¹⁹⁷

Surreptitious citizen recordings of police misconduct are an indispensable means of informing both the public and police departments of police misconduct.¹⁹⁸ Lacking the right to surreptitiously record, citizens are left

implications in majority's interpretation of anti-wiretapping statute); Williams, *supra* note 40 (stressing without suspect's surreptitious recording unlawful interrogation tactics would have been unexposed); *see also supra* note 157 and accompanying text (underscoring importance of free flow of information in democratic society).

190. *Compare* Jean v. Mass. State Police, 492 F.3d 24, 33 (1st Cir. 2007) (allowing dissemination of illegal recording of police misconduct), *with* Hyde, 750 N.E.2d at 964 (upholding conviction for illegally recording police officers during traffic stop).

191. *See* Williams, *supra* note 40 (noting suspect's distrust of police prompted secret recording of detective); *see also* Hyde, 750 N.E.2d at 977 (considering elevated standard of responsibility for police).

192. *See* WOODS, *supra* note 1, at 178 (appreciating law enforcement and society's need for public trust of police).

193. *See id.* (stressing importance of public trust in law enforcement).

194. *See* Jean, 492 F.3d at 30 (concluding dissemination of public information vital part of free society); *see also* Santiago, *supra* note 126 (recounting clearance of University of Florida security after tasing student). A videotape of the entire sequence of events was instrumental in the investigation into the tasing of a Florida student. Santiago, *supra* note 126; *cf.* CHRISTOPHER, *supra* note 144, at ii (crediting videotape for federal indictment of four officers and conviction of two officers).

195. *See* Brief of the American Civil Liberties Union as Amici Curiae Supporting Appellant, Massachusetts v. Hyde, 750 N.E.2d 963 (Mass. 2001) (No. 08429).

196. *See id.* (analyzing First Amendment rights to videotape and photograph public officials and police officers).

197. *See supra* notes 194-196 and accompanying text (reasoning constitutional rights and societal benefits outweigh privacy concerns).

198. *See* Watson, *supra* note 127 (highlighting two-way benefits to both police and public for recording police-citizen exchanges).

without a major weapon in combating police misconduct.¹⁹⁹ Plain view recordings would not effectively capture police misconduct because police officers that are aware they are being recorded are less likely to engage in wrongdoing.²⁰⁰ Therefore, any effort by citizens to expose police misconduct would be thwarted by the warning a plain view recording affords police officers.²⁰¹

C. Privacy Rights: Both a Sword and Shield for Law Enforcement

Without a doubt, off-duty police officers should enjoy privacy rights equal to those afforded regular citizens; however, they should forfeit these rights once they assume their roles as government officials.²⁰² Permitting police officers to use anti-wiretapping laws as both a shield, cloaking wrongdoing caught by surreptitious recordings in privacy, and a sword, prosecuting citizens for such recordings and utilizing covert electronic surveillance for investigations, grants police officers the type of overreaching authority the Constitution's Framers sought to prevent.²⁰³ Moreover, the cases that shaped federal anti-wiretapping law demonstrate that restrictions on wiretapping were aimed to prevent law enforcement overreach and obtrusive police tactics.²⁰⁴ The privacy concerns at the forefront of anti-wiretapping laws were to protect private citizens from law enforcement officers, not the reverse.²⁰⁵ Allowing for the surreptitious recording of police officers finds support in both First Amendment principles and the objectives behind the nation's anti-wiretapping and privacy jurisprudence.²⁰⁶

199. See *id.* (stressing importance of police recordings).

200. See *Hyde*, 750 N.E.2d at 977 (Marshall, J., dissenting) (suggesting officers would not have acted so unprofessionally had they known they were being recorded).

201. See *Massachusetts v. Hyde*, 750 N.E.2d 963, 977-78 (Mass. 2001) (implying officers may not engage in wrongdoing with knowledge of citizen recording).

202. See *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 288-89 (Mass. 2000) (rebuking notion that even patrol officers be granted privacy equal to that of civilians).

203. See *supra* note 102 and accompanying text (surmising intent behind Fourth Amendment to prevent police overreach).

204. See *supra* notes 57-58 and accompanying text (discussing development of American privacy rights).

205. See generally *Katz v. United States*, 389 U.S. 347, 359 (1967) (advancing protection of individual privacy rights from threat of government oppression); see also Lavoie, *supra* note 3 (reporting on dismay over *Hyde* decision). "The preamble to the [Massachusetts Anti-Wiretapping Statute] said electronic devices are a danger to the privacy of all citizens. This case turns that notion on its head because here we had an individual trying to protect himself from a misdeed on the part of public officials and he's the one who ends up being arrested for it and prosecuted." See Lavoie, *supra* note 3 (quoting David Yas, publisher of *Massachusetts Lawyers Weekly*).

206. See *supra* notes 157, 195, 205 and accompanying text (arguing need for public's right to gather information and diminished expectations of privacy by police officers).

*D. Benefits of Surreptitious Recordings to Both
Civilians and Law Enforcement Officers*

Certain technological advancements have revolutionized the criminal justice system, including the advent of recording custodial interrogations.²⁰⁷ The benefits of recording custodial interrogations have been two-fold: recording has provided both a sense of security for persons being interrogated and a deterrent for unjust interrogation tactics.²⁰⁸ Evidence of unfair interrogation practices and forced confessions led scores of police departments to implement audio and visual recording systems.²⁰⁹ The protection provided by audio recordings should not stop in the interrogation room.²¹⁰ Law enforcement ought to make both audio and visual recordings of all field and traffic stops, and civilians should be encouraged to record law enforcement encounters.²¹¹ Recording all police-citizen interactions would greatly benefit both police and private citizens in subsequent proceedings, especially when there are accusations of police misconduct.²¹²

Massachusetts citizens and other all-party consent jurisdictions would benefit greatly from an exception allowing citizens to surreptitiously record police officers.²¹³ For instance, swifter resolutions to civil rights complaints against police officers could happen if live recordings of police-citizen interactions were on hand.²¹⁴ Such recordings would avoid forcing jurors to weigh the credibility of decorated officers with that of private citizens.²¹⁵

The success of a civil rights lawsuit is grounded in the credibility of

207. See Thurlow, *supra* note 119, at 772 (proffering dual benefits of custodial recordings to both police and suspects).

208. See Thurlow, *supra* note 119, at 772-73 (listing benefits to both law enforcement and society from custodial recordings).

209. See *supra* note 121 and accompanying text (reporting many agencies implemented procedure for recording confessions).

210. See Thurlow, *supra* note 119, at 793 (acknowledging police questioning does not happen only in confession room). Field interrogations should also be videotaped; otherwise, police could just circumvent recording requirements by conducting interrogations in the field. *Id.*

211. See Thurlow, *supra* note 119, at 794-95 (recognizing realistic need to record in field and outside realm of station house).

212. See Thurlow, *supra* note 119, at 795 (discussing benefits of videotape). Public concern over police misconduct has prompted many police departments to install cruiser-mounted cameras. *Id.*; see also Trahan & Eiserer, *supra* note 122 (reporting how police personnel feel recording police-citizen interactions reaps huge benefits to police departments).

213. See *infra* notes 215-217 and accompanying text (mentioning ways plaintiffs benefit from alleviating credibility burdens at trial).

214. See Flynn, *supra* note 150 (considering high publicity of police brutality encouraged rapid and costly settlements for civil rights complaints); see also Thurlow, *supra* note 119, at 797 (advocating use of videotape in police-citizen interactions). Videotaping all field and traffic stops would inevitably promote settlement for substantiated civil rights complaints and protect departments from frivolous ones. Thurlow, *supra* note 119.

215. See Patton, *supra* note 132, at 756 (opining plaintiffs not given fair opportunity at trial because discredited by juries). Civil rights cases are usually determined by the credibility given to the police officer or the plaintiff. *Id.*

witnesses, the private citizens, and the police officers involved.²¹⁶ Civil rights plaintiffs often have criminal records, so the availability of a recording of the law enforcement encounter could bolster their credibility at trial.²¹⁷ More often than not, jurors in civil rights cases may be biased in favor of the officer.²¹⁸ By relieving the weight of witness testimony at trial, jurors are more likely to render verdicts based on the facts rather than the credibility of the witnesses.²¹⁹

Additionally, surreptitious civilian recordings of police-citizen encounters would preserve judicial resources.²²⁰ For example, recordings could thwart frivolous civil rights lawsuits by providing plaintiffs' attorneys with a recording of their client's encounter.²²¹ Without a recording of the police-citizen incident, a plaintiff's attorney is forced to rely on his client's version of the story without all the facts.²²² Having a recording of the incident could aid an attorney in deciding whether his client has a viable civil rights claim.²²³ On the other hand, police-citizen recordings could also encourage prompt settlement in situations where a bona fide civil rights claim exists.²²⁴

Knowing that citizens are allowed to surreptitiously record any and all public interactions with police would provide a colossal disincentive to police officers who may be inclined to cross constitutional or ethical boundaries.²²⁵ Police-citizen recordings would also be invaluable to police training by providing real life scenarios to aid in educating and training police officers.²²⁶ Both the public at large and law enforcement stand to gain from citizen-made

216. See *id.* (drawing distinction between credibility of officers and citizens). Officers who are seen as protectors of all citizens are given more credibility in civil rights trials. See *id.* at 754. Plaintiff citizens face an uphill battle of jury bias to win a civil rights action against police officer. *Id.* at 754-57.

217. See *id.* at 754-56 (asserting many civil rights plaintiffs have criminal records and limited financial resources).

218. See *id.* at 753 (noting juries generally favor police officers in civil rights suits). State court juries tend to favor police officers less; however, plaintiffs forfeit the automatic discovery they would have in federal court to get a less biased jury in state court. *Id.* at 766.

219. See Patton, *supra* note 132, at 754 (reasoning Section 1983 ineffective because of lack of eye witnesses coupled with jury bias toward police).

220. See *supra* note 214 (implying less litigation would result if recordings of citizen-police encounters existed).

221. See *Rodney King Reluctant Symbol of Police Brutality*, CNN.COM, <http://archives.cnn.com/2001/LAW/03/02/beat.anniversary.king.02/> (last visited Apr. 4, 2009) (quoting Rodney King's own lawyer's disbelief when first hearing about beating of his client). "Until I saw the video, until we saw it on video, I didn't believe it to that degree." *Id.*

222. See *id.* (suggesting without videotape, Rodney King's ordeal might have been gone unpunished). Even King's own attorney didn't believe the seriousness of the offense until he viewed the tape. *Id.*

223. See *supra* note 221 (reporting on Rodney King's lawyer's use of videotape in assessing merits of case).

224. See *supra* note 214 and accompanying text (suggesting recordings will promote early settlement and reduce costs of litigation).

225. See Linskey, *supra* note 149 (examining new trend in videotaping police). "I think that cops are terrified of video cameras . . . I think the end result is cops will police a little more carefully." *Id.* (quoting Peter Moskos, formerly of the Baltimore Police Department).

226. See Watson, *supra* note 127 (discussing recording benefits to police officer training).

surreptitious recordings.²²⁷

E. The Massachusetts Anti-Wiretapping Statute in a Technology Savvy Society

The hidden gem of the *Hyde* decision was the SJC's holding that if Hyde had held his tape recorder in plain view, he would have been free from prosecution.²²⁸ The SJC's holding implies that a plain view recording satisfies the statute's consent requirement, thereby holding that consent is automatic once a party has knowledge of the recording.²²⁹ Once a police officer realizes he is being recorded, it appears consent is no longer required.²³⁰ Because knowledge may nullify the consent requirement, the issue arises of whether the officer had knowledge at the time the recording was being made.²³¹ In a society where recording technology is so rapidly advancing, determining whether an officer had knowledge of a recording may be difficult.²³² To certain generations of law enforcement, it may be obvious that a person is making a recording by holding out a cell phone or a camera and aiming it towards them, to other generations it may not be as obvious.²³³

With cell phones, MP3 players, cameras, and the infinitesimal recording devices on the market, determining whether an officer had knowledge of the recording may be extremely onerous.²³⁴ In many situations, a police officer may not be aware of the recording at the outset, but later realize they are being

227. See Linskey, *supra* note 149 (recognizing mass benefits to society and law enforcement by allowance of police recordings).

228. *Massachusetts v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001) (conceding no violation would have occurred if recorder held in plain view). Despite the SJC's holding that a plain view recording would have been free from prosecution, it acknowledged that the Massachusetts Anti-Wiretapping Statute requires all parties consent to the recording. *Id.* at 975 n.11. "The Legislature of Illinois had amended its wiretapping statute to prohibit the recording of any conversation unless all parties consented, *as the Massachusetts statute requires.*" *Id.* (emphasis added).

229. See *id.* (noting plain view recording would not have violated statute). Nowhere in the *Hyde* decision does the SJC avow that actual "consent" from the officers was required to make the recording lawful. See *id.*

230. See *id.* at 957 (inferring knowledge equals consent); see also *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (dismissing charges against defendant on grounds cell phone held in plain view). At no time did Glik request, nor did the officers give consent to the cell phone recording. *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008). But see Brief of Defendants-Appellees William Monahan, Boston and Paul F. Avery, *Gouin v. Gouin*, No. 07-1604 (1st Cir. 2008) (finding recording was not surreptitious). The City of Boston argued that although the police officers saw the tape recorder, they believed it to be a cell phone because of its small size, and they never gave express consent to be recorded. Brief of Defendants-Appellees William Monahan, Boston and Paul F. Avery at 10, *Gouin v. Gouin*, No. 07-1604 (1st Cir. 2008).

231. See *supra* notes 24-29 and accompanying text (asserting technology may pose problems to discerning whether recordings are surreptitious or obvious).

232. See *Silvergate & Tierney*, *supra* note 26 (foreseeing obstacle in courts differentiating between secret and obvious recordings). Not only may it be difficult to determine whether the recording was furtive, but discerning the officer's awareness of when the recording began would be problematic as well. See *id.*

233. See *supra* note 37 (describing recentness of recording devices and trend of recording police officers).

234. See *supra* notes 28-29 (noting police officers thought plaintiff's recorder was cell phone because of its small size).

recorded, leaving the citizen with a quasi-unlawful recording.²³⁵ Hence, burgeoning technology may render the SJC's plain view doctrine obsolete.²³⁶

The SJC's plain view recording doctrine nullifies the anti-wiretapping statute's explicit all-party consent requirement.²³⁷ Consent, acquired through knowledge of a plain view recording, implies that once an individual realizes they are being recorded, they no longer have an expectation of privacy in their oral communications. Hence, one reasonable interpretation of the *Hyde* holding could be that once an individual's expectation of privacy has diminished (becoming aware of the recording), no violation of the anti-wiretapping statute exists.²³⁸ This is a seemingly logical interpretation, except as applied to public officials, such as police officers, who already have a diminished level of privacy expectations.²³⁹ It is indisputable that police officers do not have a reasonable expectation of privacy in their oral communications while interacting with private citizens.²⁴⁰ Police officers making an arrest in a public area cannot reasonably expect their actions or their oral communications to be private.²⁴¹

In a society where recording conversations is practically undetectable, the Massachusetts Anti-Wiretapping Statute should maintain the all-party consent requirement, except where one party, such as an on-duty police officer or public official, does not have a reasonable expectation of privacy. Maintaining the all-party consent requirement would preserve the core privacy principles the Massachusetts Anti-Wiretapping Statute was designed to protect. Allowing citizens to surreptitiously record public officials who do not have a reasonable expectation of privacy would advance these core privacy principals as well as First Amendment interests in gathering information of public concern, thus allowing the necessary flexibility in balancing privacy needs with First Amendment rights.

235. See *supra* notes 26-29 and accompanying text (predicting future problems with plain view doctrine).

236. See Silvergate & Tierney, *supra* note 26 (calling plain view doctrine troublesome).

237. See MASS. GEN. LAWS, ch. 272, § 99 (2008) (Massachusetts Anti-Wiretapping Statute). "The term 'interception' means to secretly hear, 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.* (emphasis added); see also *Massachusetts v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001) (remarking wiretapping charges would have been dismissed had *Hyde* simply held recorder in plain view); *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (dismissing wiretapping charges against *Glik* because recording in plain view).

238. See *supra* note 237 and accompanying text (suggesting Massachusetts Anti-Wiretapping Statute requires knowledge, rather than express consent).

239. See *supra* note 93 and accompanying text (emphasizing public role of police officers and lack of privacy rights afforded public officers).

240. See *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008) (finding anti-wiretapping statute not violated because officers in public park and aware of recording).

241. See *id.* (dismissing charges because cell phone recording held in plain view of officers). *Glik* happened upon the police officers in the Boston Common while they were arresting an individual in front of countless passersby. *Id.*

IV. CONCLUSION

Modifying the statutory language of the Massachusetts Anti-Wiretapping Statute to include an exception to the all-party consent requirement when a party has no reasonable expectation of privacy would bring the Massachusetts statute in line with the majority of states that allow for the surreptitious recordings of on-duty police officers. There are few, if any, justifiable reasons, to bestow civilian-like privacy rights to on-duty police officers. Given the amount of power and responsibility that police officers possess, it is commonsensical that police privacy rights be diminished while on-duty. Abuse of the power conferred upon police officers has historically been problematic. Allowing surreptitious citizen recordings and promoting law enforcement recordings of traffic stops and interrogations protects both the public and law enforcement from the dangers of abuse.

The *Hyde* case demonstrates the type of police power exploitation that can result from the Massachusetts Anti-Wiretapping Statute as it stands. In *Hyde*, instead of being allowed to pursue his citizen complaint with the Abington police department, Hyde was charged and convicted of a crime. The crime was his attempt to protect his civil rights from police abuse. Police officers that abuse the power entrusted in them by their communities should be held accountable for their actions. Law enforcement officials should not be able to apply for a criminal complaint against a citizen who seeks to bring their misconduct to light.

Evidence of police misconduct is a matter of great public concern and is thus protected by the First Amendment right to gather and disseminate. Deterring the very means by which the public may gather this type of important information has significant First Amendment ramifications. Establishing public trust is an essential tool in law enforcement; therefore, allowing private citizens to record their interactions with the police is an excellent way to perpetuate that goal.

The current language of the Massachusetts Anti-Wiretapping Statute, as interpreted by *Hyde*, accords law enforcement more power than society should be willing to accept. The current state of law under *Hyde* confers upon law enforcement officials not only equal privacy expectations of ordinary citizens, but also the ability to prosecute someone that comes forward to report their wrongdoing. The SJC's current interpretation of the Massachusetts Anti-Wiretapping Statute through *Hyde* contravenes the spirit of the constitutional Framers' intent as well as important policy considerations.

Finally, reading the First Circuit's holding in *Jean*, in conjunction with *Hyde*, leads to an illogical result in Massachusetts where a citizen who surreptitiously records police misconduct is subject to arrest, but would be protected by the First Amendment in disseminating such a recording. The First Circuit concedes that recordings of police misconduct are too important to

muffle, which is precisely why such recordings are too vital to outlaw or otherwise discourage in the first place. Furthermore, with the ever-evolving technological world in which we live, a plain view recording may be mistaken for a surreptitious one based on the police officer's subjective knowledge, which could be the determining factor for whether a recording is lawfully within the plain view exception. Leaving the determination of whether an individual is recording in plain view to police officers provides a strong incentive to deny knowledge of a recording when an instance of police misconduct occurred. This type of subjective determination contravenes the spirit behind the First and Fourth Amendments' guarantee of protecting citizens from law enforcement overreach and the right to gather information.

Under the SJC's plain view exception, once an officer becomes aware that his oral communications are being recorded, he no longer has a reasonable expectation of privacy, effectively nullifying the all-party consent requirement. Because the plain view exception nullifies the consent requirement, the SJC's interpretation of the statute requires only that a party cease to have a reasonable expectation of privacy. If the statute merely requires that a party no longer has an expectation of privacy in that conversation, then a logical interpretation of the *Hyde* holding allows citizens to surreptitiously record police officers because they already have a diminished expectation of privacy based on their status as public officials. Therefore, with or without a tape recorder being held in plain view, a surreptitious recording of an officer's conversation would not violate any privacy rights of the police officer, thus upholding the privacy principals the Massachusetts Anti-Wiretapping Statute was designed to protect.

Considering the importance of privacy rights, the purposes behind the First Amendment right to gather and disseminate information, and the impractical plain view exception to the Massachusetts Anti-Wiretapping Statute, it is time that Massachusetts falls in line with the majority of other jurisdictions by creating an exception to its anti-wiretapping statute.

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