

April 2014

## The Need for Additional Safeguards Against Racist Police Practices: A Call for Change to Massachusetts & Illinois Wiretapping Laws

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### Recommended Citation

Andrew M. Whitson, *The Need for Additional Safeguards Against Racist Police Practices: A Call for Change to Massachusetts & Illinois Wiretapping Laws*, 34 B.C.J.L. & Soc. Just. 195 (2014), <https://lawdigitalcommons.bc.edu/jlsj/vol34/iss1/7>

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# THE NEED FOR ADDITIONAL SAFEGUARDS AGAINST RACIST POLICE PRACTICES: A CALL FOR CHANGE TO MASSACHUSETTS & ILLINOIS WIRETAPPING LAWS

ANDREW MARTINEZ WHITSON\*

**Abstract:** Police misconduct is still prevalent throughout the United States. Unfortunately for members of minority communities, this misconduct often comes in the form of racially discriminatory police practices. In many cases, such practices are deeply rooted in the police department's culture. It is imperative that all citizens are equipped with every possible safeguard from such abuse at the hands of the police. In Massachusetts and Illinois, however, wiretapping and eavesdropping laws prevent people from employing one such safeguard that has proven to help change unconstitutional police practices. The safeguard that those laws criminalize is the ability to surreptitiously record on-duty police. This Note recommends that state legislatures in Massachusetts and Illinois create exceptions to their wiretapping and eavesdropping laws so as to allow surreptitious recording of on-duty police officers.

## INTRODUCTION

Early in the morning on April 17, 2010, in Seattle, Washington, Martin Monetti, Jr. and two of his friends were walking home after celebrating Monetti's twenty-first birthday.<sup>1</sup> All of a sudden, Monetti and his friends were surrounded by police cars and ordered to the ground.<sup>2</sup> The officers were there to investigate an armed robbery that had occurred at the location from which Monetti and his friends had just left.<sup>3</sup>

While lying prone on the ground, Monetti was subjected to a barrage of verbal and physical abuse.<sup>4</sup> Detective Shandy Cobane leaned

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\* Editor-in-Chief, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2013–2014).

<sup>1</sup> Complaint for Violation of Civil Rights and Personal Injury at 3, *Monetti v. City of Seattle*, No. 2:11-cv-01041-RSM (W.D. Wash. Feb. 13, 2012) [hereinafter *Complaint*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; Sara Jean Green, *Racial-Shur Lawsuit Settled, but Lawyer Critical of Police*, SEATTLE TIMES, June 28, 2012, at B1.

<sup>4</sup> See *Complaint*, *supra* note 1, at 3; Seattle Times Staff, *Videotaped SPD Incidents Led to Probe*, SEATTLE TIMES (Sept. 21, 2012), <http://seattletimes.com/flatpages/local/video-taped-spd-incidents-led-to-federal-probe.html>.

down into Monetti's face and threatened him with an overtly racist comment, stating, "I will beat the fucking Mexican piss out of you homey. You feel me?"<sup>5</sup> Moments later, Cobane stomped on Monetti's hand and head when he made a motion to wipe his eye.<sup>6</sup> Then, another officer, Mary Woollum, went over to Monetti and stomped on the back of his legs for no apparent reason.<sup>7</sup>

Monetti was released after approximately thirty minutes.<sup>8</sup> When he got up from the ground, the officers noticed that he was dazed and unsteady on his feet.<sup>9</sup> They did not, however, get him any medical attention.<sup>10</sup> The other Seattle police officers who witnessed the assault on Monetti did nothing to stop the attacks, nor did they report the use of force to supervisors.<sup>11</sup>

Unbeknownst to the Seattle police officers, and luckily for Mr. Monetti, there was a freelance photographer across the street with a video camera.<sup>12</sup> This unnamed person gave the video depicting the attack to a Seattle television station, and it soon became a well-publicized incident.<sup>13</sup> The video sparked an internal affairs investigation into the officers' actions.<sup>14</sup> Moreover, together with other videos of Seattle police misconduct, it helped lead to an investigation by the Department of Justice (DOJ) of the Seattle Police Department's ("SPD") use of excessive force, particularly against minorities.<sup>15</sup> The City of Seattle ultimately settled a lawsuit filed by Monetti for \$150,000.<sup>16</sup>

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<sup>5</sup> Complaint, *supra* note 1, at 3; dcpolls, *Seattle Police Video Allegedly Shows Officers Stomping and Kicking Suspect*, YOUTUBE (May 9, 2010), <http://www.youtube.com/watch?v=tc-oiM6SS6E>.

<sup>6</sup> Complaint, *supra* note 1, at 3; *Seattle Cops Stomp on Detainee*, KIROTV.COM (May 7, 2010), <http://www.kirotv.com/news/news/seattle-cops-stomp-on-detainee/nDRHc/>.

<sup>7</sup> See Complaint, *supra* note 1, at 3; KIROTV.COM, *supra* note 6.

<sup>8</sup> See Complaint, *supra* note 1, at 3; KIROTV.COM, *supra* note 6.

<sup>9</sup> KIROTV.COM, *supra* note 6.

<sup>10</sup> See *id.*

<sup>11</sup> Complaint, *supra* note 1, at 3, 6.

<sup>12</sup> See KIROTV.COM, *supra* note 6; dcpolls, *supra* note 5.

<sup>13</sup> See KIROTV.COM, *supra* note 6; Seattle Times Staff, *supra* note 4.

<sup>14</sup> KIROTV.COM, *supra* note 6.

<sup>15</sup> Seattle Times Staff, *supra* note 4; see Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., and Jenny A. Durkan, U.S. Attorney, W. Dist. of Wash., to Hon. Michael McGinn, Mayor, City of Seattle, at 3, 27 (Dec. 16, 2011), available at [http://www.justice.gov/crt/about/spl/documents/spd\\_findletter\\_12-16-11.pdf](http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf) [hereinafter SPD Investigation] (detailing results of the Seattle Police Department's civil rights pattern or practice investigation).

<sup>16</sup> Notice of Settlement of All Claims, *Monetti v. City of Seattle*, No. 2:11-cv-01041-RSM (W.D. Wash. June 27, 2012); Green, *supra* note 3.

On June 3, 2011, Alvin, a teenage Harlem resident, was walking home from his girlfriend's house when he was stopped by the New York City police.<sup>17</sup> The officers stopped and frisked Alvin, then let him go.<sup>18</sup> After Alvin walked two more blocks, three different plain-clothed police officers again stopped him.<sup>19</sup> Alvin told them he had just been stopped and asked why they were stopping him again.<sup>20</sup> One of the officers responded by saying that Alvin looked suspicious since he was wearing his hood up.<sup>21</sup> Another officer then threatened Alvin, stating that he was going to slap him if he did not shut his mouth.<sup>22</sup>

The officers made Alvin put his hands on top of his head while they frisked him and searched through his pockets.<sup>23</sup> The officers then began to twist Alvin's arm behind his back and asked him if he wanted to go to jail.<sup>24</sup> When Alvin asked what he was being arrested for, one of the officers responded, "For being a fucking mutt."<sup>25</sup> The officer proceeded to say, "Dude, I am gonna fuckin' break your arm, then I'm gonna punch you in the fuckin' face."<sup>26</sup> The encounter lasted less than two minutes and ended with the officers pushing Alvin down the sidewalk and telling him to "take a fucking walk."<sup>27</sup>

When he saw the officers initially approach, Alvin realized that they were going to perform a stop-and-frisk on him, so he secretly recorded the interaction on his cell phone.<sup>28</sup> The surreptitious recording became one of the only known recordings of New York City police officers performing a stop-and-frisk.<sup>29</sup> The recording also led to Alvin becoming the subject of a documentary on the controversial stop-and-frisk policy, which was in turn covered by national media outlets such as *The Nation* and *New York Magazine*.<sup>30</sup>

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<sup>17</sup> Ross Tuttle & Erin Schneider, *Stopped-and-Frisked: For Being a F\*\*king Mutt* [VIDEO], *NATION* (Oct. 8, 2012), <http://www.thenation.com/print/article/170413/stopped-and-frisked-being-fking-mutt-video>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Joe Coscarelli, *NYPD Officers Stop-and-Frisk Teen For Being a F\*\*king Mutt*, *N.Y. MAG.* (Oct. 9, 2012), <http://nymag.com/daily/intel/2012/10/nypd-stop-and-frisk-caught-on-tape.html>; Tuttle & Schneider, *supra* note 17. The documentary and full recording of Al-

New York City's controversial "stop-and-frisk" crime fighting program accounted for roughly half a million stop-and-frisk encounters each year.<sup>31</sup> The stop-and-frisk program, supported by former Mayor Bloomberg, has come under fire for its racist and unjust application, but prior to Alvin's stop, there had never been evidence substantiating these criticisms.<sup>32</sup>

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What Alvin and Mr. Monetti's encounters have in common is that they both involved the surreptitious recording of on-duty police officers in public without the officers' consent or knowledge.<sup>33</sup> Alvin was able to audio record the police by using his cell phone.<sup>34</sup> The freelance photographer in Monetti's case filmed the officers from afar, but was still able to pick up the officers' voices in his video.<sup>35</sup> None of the officers involved appeared to know at the time that they were being recorded.<sup>36</sup>

With respect to these incidents in Washington and New York, the police were the subjects of legal recordings.<sup>37</sup> Had the incidents occurred in Illinois or Massachusetts, however, the recording of the officers' racist statements and actions would have been illegal and subject to harsh criminal sanctions.<sup>38</sup> The policy behind the prohibition of surreptitious recordings is the notion that the officers' right to privacy pro-

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vin's encounter with the NYPD can be accessed online at <http://www.thenation.com/print/article/170413/stopped-and-frisked-being-fking-mutt-video>. Tuttle & Schneider, *supra* note 17. On August 12, 2013, New York City was held liable for violating the Fourth and Fourteenth Amendment rights of petitioners in *Floyd v. City of New York* due to the NYPD's racially discriminatory stop-and-frisk policy. 2013 WL 4046209, at \*7 (S.D.N.Y. Aug. 12, 2013). The court found that of the 4.4 million stops conducted by the NYPD between January 2004 and June 2012, eighty percent were performed on blacks and Hispanics and at least 200,000 were made without reasonable suspicion. *Id.* at \*1, 4. The court also noted that the NYPD's practice of making these kinds of unconstitutional stops and unconstitutional frisks was a form of racial profiling. *Id.* at \*6-7.

<sup>31</sup> See Ray Rivera, *Police-Stop Data Shows Pockets Where Force Is Used More Often*, N.Y. TIMES, Aug. 16, 2012, at A17; Tuttle & Schneider, *supra* note 17. The number of stops rose from 314,000 in 2004 to 686,000 in 2011. *Floyd*, 2013 WL 4046209, at \*3.

<sup>32</sup> See Coscarelli, *supra* note 30; Tuttle & Schneider, *supra* note 17.

<sup>33</sup> See dcpolls, *supra* note 5; KIROTV.COM, *supra* note 6; Tuttle & Schneider, *supra* note 17.

<sup>34</sup> See Tuttle & Schneider, *supra* note 17.

<sup>35</sup> See dcpolls, *supra* note 5; KIROTV.COM, *supra* note 6.

<sup>36</sup> See dcpolls, *supra* note 5; Tuttle & Schneider, *supra* note 17.

<sup>37</sup> See N.Y. PENAL LAW § 250.00 (McKinney 2008); WASH. REV. CODE § 9.73.030 (2012); *State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992).

<sup>38</sup> See 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); MASS. GEN. LAWS ch. 272, § 99 (2010); *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir.), *cert. denied*, 133 S. Ct. 651 (2012); *Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001).

fects them from being recorded without their consent, or at least their knowledge, even when in public and on-duty.<sup>39</sup>

Laws preventing the legal recording of on-duty police officers undermine police accountability.<sup>40</sup> Surreptitious recordings of police misconduct, especially those with racial overtones, have worked as an effective safeguard against institutionalized racism at the hands of the police.<sup>41</sup> By criminalizing such recordings, however, the laws are acting instead to protect racist police officers.<sup>42</sup> Thus, in order to ensure that racist actions by the police are not hidden from the public eye, it is necessary to permit these recordings without the consent or knowledge of the police.<sup>43</sup>

This Note argues that in order to fully protect citizens, particularly those in minority communities, from police misconduct, laws that prohibit surreptitious recordings of on-duty police should be changed to allow such recordings. Part I of this Note will discuss the background of laws prohibiting surreptitious recordings of on-duty police officers, including their purpose and the legal issues that arise therefrom. Part II will establish the fact that police misconduct is still prevalent in the United States, particularly against racial minorities. Part III will discuss how the ability to secretly record on-duty police has been integral in raising awareness of police misconduct and improving officer behavior. Finally, Part IV will suggest that in order to more effectively protect people from racist police actions, changes must be made to the laws prohibiting surreptitious recordings so that citizens may legally record on-duty police officers without their consent or knowledge. Ultimately, this Note advocates that state legislatures are in the best position to protect their citizens from police misconduct by adding exceptions to their

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<sup>39</sup> See Stephanie Claiborne, Comment, *Is It Justice or a Crime to Record the Police?: A Look at the Illinois Eavesdropping Statute and Its Application*, 45 J. MARSHALL L. REV. 485, 496–97 (2012); Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 298–300 (2011).

<sup>40</sup> See Kies, *supra* note 39, at 301–03; Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1003–04 (2009).

<sup>41</sup> See *Hyde*, 750 N.E.2d at 971–72 (Marshall, C.J., dissenting) (referencing the role that the video recording of Rodney King’s beating played in concluding that police misconduct was a serious problem within the Los Angeles Police Department); Carly Humphrey, Comment, *Keep Recording: Why On-Duty Police Officers Do Not Have a Protected Expectation of Privacy Under Maryland’s State Wiretap Act*, 19 GEO. MASON L. REV. 775, 806 (2012); Skehill, *supra* note 40, at 998–1000.

<sup>42</sup> See Humphrey, *supra* note 41, at 806; Kies, *supra* note 39, at 301–03; Skehill, *supra* note 40, at 999–1000.

<sup>43</sup> See Humphrey, *supra* note 41, at 806; Kies, *supra* note 39, at 301–03; Skehill, *supra* note 40, at 999–1000.

wiretapping laws that allow for the surreptitious recording of on-duty police officers.

## I. THE EXPANDED USE OF WIRETAPPING & EAVESDROPPING LAWS

The federal government and nearly all states have wiretapping or eavesdropping statutes dictating when and how conversations can be recorded.<sup>44</sup> The relative laws in Massachusetts and Illinois, however, set a much higher threshold compared to all other states for when a conversation can be legally recorded.<sup>45</sup> These laws leave residents in those states unable to legally record on-duty police officers surreptitiously without their knowledge or consent.<sup>46</sup>

### A. *The Birth of the Right to Privacy in Public*

In 1967, the Supreme Court decided the landmark case of *Katz v. United States*.<sup>47</sup> In *Katz*, the defendant argued that his right to privacy had been violated when the government used evidence against him that was collected without a warrant by listening in on telephone conversations he had from a public phone booth.<sup>48</sup> The Court ultimately held that “the Fourth Amendment protects people, not places” and therefore, *Katz* was entitled to a right to privacy when having private conversations in a public phone booth.<sup>49</sup>

The following year, Congress passed a wiretapping statute to codify this newly recognized right to privacy.<sup>50</sup> In the Omnibus Crime Control & Safe Streets Act of 1968, Congress prohibited the interception of any oral, wire, or electronic communication, unless one party to the com-

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<sup>44</sup> See Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2006); see, e.g., CAL. PENAL CODE § 632 (West 2010); N.Y. PENAL LAW § 250.00 (McKinney 2008); WASH. REV. CODE § 9.73.030 (2012); see J. Peter Bodri, Articles Comments, *Tapping into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U.J. GENDER SOC. POL’Y & L. 1327, 1332–34 (2011); Skehill, *supra* note 40, at 990.

<sup>45</sup> See 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); MASS. GEN. LAWS ch. 272, § 99 (2010); Kies, *supra* note 39, at 285–90; Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 395 (2012).

<sup>46</sup> See Kies, *supra* note 39, at 285–90; Triano, *supra* note 45, at 395.

<sup>47</sup> Bodri, *supra* note 44, at 1331; see *Katz v. United States*, 389 U.S. 347, 351, 359 (1967).

<sup>48</sup> See *Katz*, 389 U.S. at 349–51; Skehill, *supra* note 40, at 988.

<sup>49</sup> *Katz*, 389 U.S. at 351–52; Skehill, *supra* note 40, at 988.

<sup>50</sup> See Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2006); Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 493 (2011); Skehill, *supra* note 40, at 989.

munication consents to the recording.<sup>51</sup> The statute requires that the conversation demonstrates what society would consider to be both an objective and subjective expectation of privacy.<sup>52</sup> This means that surreptitiously recording a conversation taking place in a public setting would not violate the federal wiretapping statute because there is no reasonable expectation of privacy in a public place.<sup>53</sup>

Since the federal wiretapping statute preempts state wiretapping laws, states can only enact laws that are at least equally restrictive.<sup>54</sup> Many states, however, have chosen to pass more restrictive wiretapping and eavesdropping laws in an effort to further protect their citizens' right to privacy.<sup>55</sup> Most state laws adhere to the more lenient requirement that only one party must consent for the conversation to be legally recorded.<sup>56</sup> A minority of states, however, have opted to pass the more restrictive requirement of all-party consent.<sup>57</sup> Of those states, all but two require that the parties involved in the conversation have a reasonable expectation to privacy.<sup>58</sup> Massachusetts and Illinois are the only states with all-party consent statutes that do not also require this reasonable expectation to privacy.<sup>59</sup>

When a wiretapping or eavesdropping statute does not require there to be a reasonable expectation of privacy, one may violate the statute even if the recorded conversation occurs openly in public.<sup>60</sup> The lack of this requirement therefore greatly expands the scope of the statute since it prohibits public conversations from being recorded as well.<sup>61</sup> When the statute criminalizes recording public conversations, it

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<sup>51</sup> See 18 U.S.C. § 2511; Bodri, *supra* note 44, at 1333; Skehill, *supra* note 40, at 989.

<sup>52</sup> See Alderman, *supra* note 50, at 492–93; Skehill, *supra* note 40, at 989.

<sup>53</sup> See 18 U.S.C. §§ 2510–2522; Alderman, *supra* note 50, at 492–93; Kies, *supra* note 39, at 280–82.

<sup>54</sup> Alderman, *supra* note 50, at 495; Kies, *supra* note 39, at 280–81; see *People v. Conklin*, 522 P.2d 1049, 1057 (Cal. 1974) (stating that the legislative history of the federal wiretapping statute “reveals that Congress intended that the states be allowed to enact more restrictive laws designed to protect the right of privacy”).

<sup>55</sup> See *Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001); Alderman, *supra* note 50, app. 1, at 533–45 (categorizing all of the states' types of wiretapping and eavesdropping statutes); Kies, *supra* note 39, at 280–81.

<sup>56</sup> See Kies, *supra* note 39, at 280–82; Triano, *supra* note 45, at 394.

<sup>57</sup> See Claiborne, *supra* note 39, at 499; Humphrey, *supra* note 41, at 781–82; Triano, *supra* note 45, at 394–95.

<sup>58</sup> See 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); MASS. GEN. LAWS ch. 272, § 99 (2010); Triano, *supra* note 45, at 395.

<sup>59</sup> See 720 ILCS § 5/14-1 to -3; ch. 272, § 99; Triano, *supra* note 45, at 395.

<sup>60</sup> See *Hyde*, 750 N.E.2d at 965–66; Claiborne, *supra* note 39, at 493.

<sup>61</sup> See *ACLU v. Alvarez*, 679 F.3d 583, 605–06 (7th Cir.), *cert. denied*, 133 S. Ct. 651 (2012); *Hyde*, 750 N.E.2d at 967–68, 971.



is no longer within the policy scope of protecting peoples' privacy rights since no reasonable privacy interests exist when the conversation is open to the public.<sup>62</sup>

### B. *The Massachusetts Wiretapping Statute*

Prior to 1968, Massachusetts had a wiretapping law that required only the consent of one party to legally record a conversation.<sup>63</sup> Out of a growing concern over the proliferation of devices capable of intercepting wire and oral communications, however, the Massachusetts legislature set up a special commission on electronic eavesdropping to create a stricter law.<sup>64</sup> The legislature was particularly concerned about the potential invasion of privacy posed by these interception devices.<sup>65</sup>

As recommend by the commission's report, the legislature passed amendments to the Massachusetts wiretapping statute that created a more stringent law.<sup>66</sup> The statute now prohibits intentional interception of both private and public oral communication.<sup>67</sup> Interception is defined as "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 . . .*"<sup>68</sup> The Massachusetts legislature therefore transformed its one-party consent statute to an all-party consent statute that was strong enough to criminalize secret recordings of both private and public conversations.<sup>69</sup>

In Massachusetts, a recording is considered "secret" unless the recorded person has actual knowledge of the recording, which can be proven by objective manifestations.<sup>70</sup> Whether there is an objective manifestation of knowledge turns on whether the person had notice of the recording.<sup>71</sup> Therefore, by simply holding a known recording de-

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<sup>62</sup> See ch. 272, § 99; *Alvarez*, 679 F.3d at 605–06; *Hyde*, 750 N.E.2d at 967–68.

<sup>63</sup> *Hyde*, 750 N.E.2d at 967; see 1959 Mass. Acts 400–02.

<sup>64</sup> *Hyde*, 750 N.E.2d at 966–67.

<sup>65</sup> *Id.* at 967.

<sup>66</sup> See MASS. GEN. LAWS ch. 272, § 99 (2010); *Hyde*, 750 N.E.2d at 966–67.

<sup>67</sup> See ch. 272, § 99; *Hyde*, 750 N.E.2d at 966.

<sup>68</sup> Ch. 272, § 99 (emphasis added); *Hyde*, 750 N.E.2d at 966.

<sup>69</sup> See 1968 Mass. Acts 632–44; *Hyde*, 750 N.E.2d at 966–68.

<sup>70</sup> *Glik v. Cunniffe*, 655 F.3d 78, 86–87 (1st Cir. 2011) (citing *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976)); see *Hyde*, 750 N.E.2d at 967, 971.

<sup>71</sup> *Glik*, 655 F.3d at 86–87; *Hyde*, 750 N.E.2d at 967, 971.

vice in plain view of the person being recorded, the recording is no longer secret and does not violate the statute.<sup>72</sup>

Since the Supreme Judicial Court (“SJC”) has recognized that the Massachusetts wiretapping statute is carefully worded and unambiguous, it has interpreted the statute by the plain meaning of its language.<sup>73</sup> Accordingly, since the statute lists various exceptions to the rule, the SJC will not read additional exceptions into the statute.<sup>74</sup> There is no exception in the statute for private citizens who secretly record on-duty public officials, and therefore it is illegal to secretly record an on-duty police officer, even if he is publicly using racially charged language and excessive or illegal force.<sup>75</sup>

The preamble of the Massachusetts wiretapping statute states that the intent of the statute is to protect the privacy of all citizens.<sup>76</sup> Since the SJC looks solely at the plain language of the statute, however, there is actually no requirement that the conversation be private at all.<sup>77</sup> Thus, protecting public speech as well as private speech under the statute’s wide scope needlessly prohibits more than the statute’s asserted intent.<sup>78</sup> While the SJC has recognized this inherent contradiction between the text of the statute and the preamble, it nevertheless has held that the plain language of the statute is the best indication of the legislature’s ultimate policy goals.<sup>79</sup>

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<sup>72</sup> See *Glik*, 655 F.3d at 86–87; *Hyde*, 750 N.E.2d at 967, 971.

<sup>73</sup> *Hyde*, 750 N.E.2d at 966–67.

<sup>74</sup> *Id.* at 966; see MASS. GEN. LAWS ch. 272, § 99 (2010).

<sup>75</sup> See ch. 272, § 99; *Hyde*, 750 N.E.2d at 966, 971. While it is illegal to surreptitiously record on-duty police officers, it should be noted that the First Circuit in *Jean v. Mass. State Police* held that disseminating illegally recorded materials was protected by the First Amendment. See 492 F.3d 24, 25 (1st Cir. 2007); Skehill, *supra* note 40, at 1002. While this decision properly recognizes that disseminating recordings of police misconduct is important enough to the public to grant constitutional protections, it failed to recognize the act of recording the misconduct itself as having an equivalent amount of public importance. See *Jean*, 492 F.3d at 33; Skehill, *supra* note 40, at 1002.

<sup>76</sup> See ch. 272, § 99(A); *Hyde*, 750 N.E.2d at 967–68. In outlining the statute’s policy purpose, the preamble of the Massachusetts wiretapping statute states that “the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited.” Ch. 272, § 99(A). The statute, however, does not require that an intercepted conversation have an expectation of privacy. See ch. 272, § 99(C)(1).

<sup>77</sup> See ch. 272, § 99; *Hyde*, 750 N.E.2d at 967–68.

<sup>78</sup> See ch. 272, § 99; *Hyde*, 750 N.E.2d at 967–68.

<sup>79</sup> See *Hyde*, 750 N.E.2d at 967–68. The court stated that:

While [the court] recognize[s] that G.L. c. 272, § 99, was designed to prohibit the use of electronic surveillance devices by private individuals because of the serious threat they pose to the ‘privacy of all citizens,’ the plain language of

In 2011, the First Circuit Court of Appeals questioned the Massachusetts statute in *Glik v. Cunniffe*, but the decision fell short of declaring the statute unconstitutional.<sup>80</sup> The *Glik* case stems from an incident where the plaintiff, Glik, was arrested for openly recording the Boston police arresting another young man.<sup>81</sup> Glik recorded the arrest taking place about ten feet from him because he felt the police were using excessive force, including punching the arrestee.<sup>82</sup> After placing the other individual under arrest, the police confronted Glik, who then told the officers that he was video and audio recording the incident.<sup>83</sup> The police arrested and booked Glik, then charged him with violating the Massachusetts wiretapping statute, disturbing the peace, and aiding in the escape of a prisoner.<sup>84</sup>

The criminal charges against Glik were subsequently dismissed, but Glik sued his arresting officers and the City of Boston for violating his First and Fourth Amendment rights, his state law civil rights, and for malicious prosecution.<sup>85</sup> The decision in *Glik* ultimately fell on the issue of whether the officers were entitled to qualified immunity.<sup>86</sup> The First Circuit held that the officers were not entitled to qualified immunity since Glik had a clearly established right to openly film the police officers in a public space.<sup>87</sup> The court reasoned that, while not unqualified, openly filming on-duty police officers in public was a safeguarded right under the First Amendment.<sup>88</sup>

The First Circuit in *Glik*, however, avoided a broad-sweeping reform of Massachusetts's wiretapping law by clearly stating that the right to film is not without limitations nor is it unqualified.<sup>89</sup> The court mentioned that the right to film is subject to reasonable restrictions, including limitations on the "manner" of recording.<sup>90</sup> Nevertheless, the court did not address the issue of surreptitious recordings nor did it specify as

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the statute, which is the best indication of the Legislature's ultimate intent, contains nothing that would protect, on the basis of privacy rights, the recording that occurred here.

*Id.*

<sup>80</sup> See *Glik*, 655 F.3d at 78, 85, 88.

<sup>81</sup> *Id.* at 79–80.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 80.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 79.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 84, 85.

<sup>89</sup> See *id.*

<sup>90</sup> *Id.* at 84.

to whether recording surreptitiously is a reasonable manner restriction.<sup>91</sup> Since Glik was recording the police openly and with notice, the court felt that it did not have the occasion to decide whether recording surreptitiously was a manner of recording also protected by the First Amendment, or whether that reasonably violated one's privacy rights.<sup>92</sup> Thus, the Massachusetts statute that prohibits surreptitiously recording on-duty police officers still remains in effect.<sup>93</sup>

### C. *Illinois Eavesdropping Statute*

Prior to May 2012, the eavesdropping law in Illinois was much more restrictive than its Massachusetts counterpart.<sup>94</sup> Like Massachusetts, Illinois's statute requires all-party consent to legally record a conversation.<sup>95</sup> Also like Massachusetts, the Illinois statute does not require that the parties have any expectation that their conversation be private; in fact, the statute expressly states that privacy is not a requirement.<sup>96</sup> In addition, an individual found guilty of eavesdropping in Illinois faces fifteen years of imprisonment if the recorded party is an on-duty police officer, a sentence comparable to that for a second-degree murder conviction in the state.<sup>97</sup> The Illinois eavesdropping statute further restricts

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<sup>91</sup> *See id.*

<sup>92</sup> *See id.* (stating that "the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions. We have no occasion to explore those limitations here, however") (citations omitted).

<sup>93</sup> *See* MASS. GEN. LAWS ch. 272, § 99 (2010); *Glik*, 655 F.3d at 79, 85.

<sup>94</sup> *See* 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); ch. 272, § 99; *Alvarez*, 679 F.3d at 586–87 (reasoning that the Illinois eavesdropping statute was likely too restrictive of First Amendment rights, in that it did not permit openly recording on-duty police officers); Kies, *supra* note 39, at 287 (recognizing the Illinois statute, in 2011, as "the most restrictive wiretapping law in the country").

<sup>95</sup> *See* 720 ILCS § 5/14-2(a)(1); ch. 272, § 99(B)(4); Alderman, *supra* note 50, at 500, 503.

<sup>96</sup> *See* 720 ILCS § 5/14-1(d); ch. 272, § 99; Alderman, *supra* note 50, at 500, 503. In 1986, the Supreme Court of Illinois decided *People v. Beardsley*, which reversed an eavesdropping conviction. 503 N.E.2d 346, 352 (Ill. 1986); *see* Alderman, *supra* note 50, at 501–02. The defendant had been arrested and placed in the back of the squad car, from where he secretly recorded a conversation between two police officers who sat in the front seats. *Beardsley*, 503 N.E.2d at 347–48. The Illinois Supreme Court interpreted the statute, calling for a requirement that the conversations have an expectation of privacy. *Id.* at 349–50. The Illinois legislature later revised the state's eavesdropping statute to overturn the *Beardsley* decision by specifically defining a "conversation" as "any oral communication between 2 or more persons *regardless* of whether one or more parties intended their communication to be of a private nature . . ." 720 ILCS § 5/14-1(d) (emphasis added); *Hyde*, 750 N.E.2d at 970 n.10; Alderman, *supra* note 50, at 502.

<sup>97</sup> *See* 720 ILCS § 5/14-4; 730 ILL. COMP. STAT. § 5/5-4.5-30(a) (2012); *Alvarez*, 679 F.3d at 586; Claiborne, *supra* note 39, at 490–91.

recording conversations by not limiting the prohibition to surreptitious recordings.<sup>98</sup> While an individual in Massachusetts may legally record his own conversation with the police as long as he provides notice, an individual in Illinois, until recently, was still breaking the law even if he were openly recording his own interaction with the police officer.<sup>99</sup>

The Seventh Circuit's decision in *ACLU of Illinois v. Alvarez* drastically changed the scope of Illinois's eavesdropping statute.<sup>100</sup> In May 2012, the American Civil Liberties Union (ACLU) of Illinois won an injunction limiting the enforcement of the statute.<sup>101</sup> The case grew out of the ACLU's intent to begin a police accountability program where its members would openly make audio-visual recordings of police officers at demonstrations without the officers' consent.<sup>102</sup> Under the ACLU's plan, members would only openly record the police when the officers were: (1) performing their public duties, (2) while in a public place, (3) while speaking at a volume audible to the unassisted human ear, and (4) in a manner where the recording was otherwise lawful.<sup>103</sup>

Because it feared that its members would be arrested and prosecuted for carrying out the intended program, the ACLU filed a lawsuit against Anita Alvarez, the Cook County State's Attorney, seeking declaratory and injunctive relief against enforcement of Illinois's eavesdropping statute.<sup>104</sup> The ACLU challenged the statute's constitutionality based on a violation of the First Amendment's guarantee of rights to free speech and free press.<sup>105</sup> The Seventh Circuit agreed with the ACLU, stating that the eavesdropping statute does in fact "restrict[] a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process."<sup>106</sup> The court found that as applied to the program the ACLU was seeking to carry out, the statute interfered with both rights to free speech and free press.<sup>107</sup>

After finding that the eavesdropping statute did in fact restrict First Amendment rights, the Seventh Circuit then analyzed the statute under intermediate scrutiny to ascertain whether the law represented a rea-

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<sup>98</sup> See 720 ILCS § 5/14-1 to -3; Alderman, *supra* note 50, at 502.

<sup>99</sup> See *Alvarez*, 679 F.3d at 605–06; *Glik*, 655 F.3d at 86–87.

<sup>100</sup> See 679 F.3d, at 586–87; Triano, *supra* note 45, at 404.

<sup>101</sup> *Alvarez*, 679 F.3d at 583, 586.

<sup>102</sup> *Id.* at 588.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.* at 586.

<sup>105</sup> *Id.* at 588.

<sup>106</sup> *Id.* at 600.

<sup>107</sup> *Id.*

sonable means to protect privacy.<sup>108</sup> The court noted that when police officers are performing their duties in public places and speaking at volumes audible to bystanders, there are simply no privacy concerns that the government could be seeking to protect.<sup>109</sup>

The Seventh Circuit, however, made a distinction between the ACLU's program of openly recording police officers and surreptitiously recording private conversations.<sup>110</sup> The court suggested that the difference between recording openly or surreptitiously could potentially change whether a privacy interest existed, and thus whether the state had a legitimate interest in protecting it.<sup>111</sup> The ultimate holding of the case only applies to openly recording on-duty police officers; therefore, surreptitiously recording on-duty police officers in Illinois is still illegal.<sup>112</sup> Furthermore, since the court did not address the effect that all-party consent has on surreptitious recordings, it remains illegal in Illinois to surreptitiously record your own conversations with a police officer, even in a private setting.<sup>113</sup>

## II. A DEEPLY INGRAINED CULTURE OF POLICE ABUSE FOR PEOPLE OF COLOR

Police misconduct is still pervasive throughout the United States, particularly with respect to racial minorities.<sup>114</sup> Recent evidence dem-

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<sup>108</sup> *See id.* at 604–06. The court used an intermediate scrutiny standard since the law imposed a content-neutral restriction. *See id.* at 586.

<sup>109</sup> *See id.* at 606–07.

<sup>110</sup> *See id.* at 605–06.

<sup>111</sup> *See id.* (stating that, “*surreptitiously* accessing the private communications of another . . . clearly implicates recognized privacy expectations . . .,” but that these privacy interests are not at issue since “[t]he ACLU wants to *openly* audio record police officers . . .”) (emphasis added).

<sup>112</sup> *See id.* at 586, 608.

<sup>113</sup> *See* 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); *Alvarez*, 679 F.3d at 608; Triano, *supra* note 45, at 395.

<sup>114</sup> *See* DAVID A. HARRIS, AMERICAN CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS 14–26 (1999), available at <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways> (referring to dozens of cases throughout the United States of the racial profiling of drivers); Anthony Punt, *Occupy Movement Shines Light on Systematic Police Brutality*, POLICYMIC (Nov. 23, 2011), <http://www.policymic.com/articles/2549/occupy-movement-shines-light-on-systematic-police-brutality> (mentioning that the recent Occupy Movement has exposed systematic police brutality against protesters in the United States); *DOJ Investigating 17 Police, Sheriff Departments*, CBS NEWS (Apr. 18, 2012), [http://www.cbsnews.com/8301-505263\\_162-57415638/doj-investigating-17-police-sheriff-departments/](http://www.cbsnews.com/8301-505263_162-57415638/doj-investigating-17-police-sheriff-departments/) [hereinafter *DOJ Investigating Departments*] (stating that there are more investigations of police departments for civil rights violations than ever before).

onstrates a need to change the law so as to provide additional safeguards against this misconduct.<sup>115</sup> The widespread police misconduct that took place across the country at “Occupy Wall Street” demonstrations shows how many police departments still commit blatant acts of brutality against innocent people.<sup>116</sup> In addition, the culture of police misconduct, which is prevalent in police departments throughout the United States, often takes the form of racist police practices.<sup>117</sup> Recent DOJ investigations of various police departments shed light on this unfortunate reality.<sup>118</sup>

#### A. “Occupy” Protests Expose Systematic Police Brutality

The Occupy Wall Street protests began in September of 2011 and eventually drew wide media attention.<sup>119</sup> The demonstration’s purpose was to take a stand against what protesters saw as corporate greed and corruption perpetuated by America’s wealthiest one percent.<sup>120</sup> With their populist slogan of “We are the 99%,” the protests evolved into a national “Occupy” movement with similar demonstrations springing up throughout dozens of U.S. cities and college campuses.<sup>121</sup> While the ultimate success of the Occupy movement has been marginal at best,

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<sup>115</sup> See Skehill, *supra* note 40, at 1003–04; Punt, *supra* note 114; Seattle Times Staff, *supra* note 4.

<sup>116</sup> See Eric W. Dolan, *Lawrence O’Donnell Rips ‘Unprovoked Police Brutality’ at ‘Occupy Wall Street,’* RAW STORY (Sept. 26, 2011), <http://www.rawstory.com/rawreplay/2011/09/lawrence-odonnell-rips-unprovoked-police-brutality-at-occupy-wall-street/>; Punt, *supra* note 114.

<sup>117</sup> See HARRIS, *supra* note 114, at 14–26; Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 442 (2004); DOJ *Investigating Departments*, *supra* note 114.

<sup>118</sup> See Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to Bill Montgomery, County Attorney, Maricopa County, at 4 (Dec. 15, 2011), available at [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) [hereinafter MCSO Investigation] (discussing the United States’ investigation of the Maricopa County Sheriff’s Office); Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to Joseph Maturo, Jr., Mayor, Town of East Haven, at 2–3 (Dec. 19, 2011), available at [http://www.justice.gov/crt/about/spl/documents/easthaven\\_findletter\\_12-19-11.pdf](http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf) [hereinafter EHPD Investigation] (detailing investigation of the East Haven Police Department); DOJ *Investigating Departments*, *supra* note 114.

<sup>119</sup> See *Occupy Movement (Occupy Wall Street)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy\\_wall\\_street/index.html?8qa](http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy_wall_street/index.html?8qa) (last updated Sept. 17, 2012) [hereinafter *Occupy Movement*].

<sup>120</sup> *Occupy Movement*, *supra* note 119; Occupy Wall Street, About, <http://occupywallst.org/about/> (last visited Feb. 11, 2014).

<sup>121</sup> *Occupy Movement*, *supra* note 119.

the demonstrations became well known for exposing police brutality throughout the country.<sup>122</sup>

There were several incidents of police brutality at Occupy demonstrations across the country involving the unprovoked use of pepper spray against peaceful protesters.<sup>123</sup> At an “Occupy Cal” demonstration at the University of California, Davis, campus police officer Lt. John Pike infamously doused protesters with pepper spray without any provocation as they sat peacefully in the quad.<sup>124</sup> One of Lt. Pike’s victims even had to be transported to the hospital to be treated for chemical burns.<sup>125</sup> In Seattle, police pepper sprayed peaceful protesters, including a priest, a pregnant teenager, and an eighty-four-year-old woman.<sup>126</sup> In New York City, one videographer captured a high-ranking officer approach a group of female protesters, immediately pepper-spray them with absolutely no provocation, and then casually walk

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<sup>122</sup> See *Occupy Movement*, *supra* note 119; Punt, *supra* note 114. While the movement at its peak produced a huge amount of media attention, the ultimate success of the movement in implementing policy changes was largely hindered by a lack of leadership structure to effectively engage in political discourse. *Occupy Movement*, *supra* note 119; Punt, *supra* note 114. Furthermore, not only was the movement hindered from achieving its goals by the absence of a leadership structure, but the goals of the movement itself were somewhat up for debate. See *Occupy Movement*, *supra* note 119; *Occupy Wall Street*, *supra* note 120 (referencing various documents “well received by the movement” but lacking an agreed upon platform).

<sup>123</sup> See Dolan, *supra* note 116; Punt, *supra* note 114.

<sup>124</sup> See Jason Cherkis, *UC Davis Police Pepper-Spray Seated Students in Occupy Dispute (VIDEO) (UPDATES)*, HUFFINGTON POST, [http://www.huffingtonpost.com/2011/11/19/uc-davis-police-pepper-spray-students\\_n\\_1102728.html](http://www.huffingtonpost.com/2011/11/19/uc-davis-police-pepper-spray-students_n_1102728.html) (last visited Feb. 11, 2014); Punt, *supra* note 114. While several people took footage of this incident, arguably the most famous was recorded by Thomas Fowler and can be seen on YouTube. See Cherkis, *supra*; Thomas Fowler, *Police Pepper Spraying and Arresting Students at UC Davis*, YOUTUBE (Nov. 18, 2011), <http://www.youtube.com/watch?v=WmJmmnMkuEM>.

<sup>125</sup> See Cherkis, *supra* note 124.

<sup>126</sup> See Maura Judkis, *Occupy’s 84-Year-Old Pepper Spray Victim: Is This the Most Iconic Image of the Movement?*, WASH. POST, [http://www.washingtonpost.com/blogs/arts-post/post/occupys-84-year-old-pepper-spray-victim-is-this-the-most-iconic-image-of-the-movement/2011/11/16/gIQAzateRN\\_blog.html](http://www.washingtonpost.com/blogs/arts-post/post/occupys-84-year-old-pepper-spray-victim-is-this-the-most-iconic-image-of-the-movement/2011/11/16/gIQAzateRN_blog.html) (last visited Feb. 11, 2014). To view the haunting picture of the 84-year-old community activist, Dorli Rainey, after being pepper-sprayed by the police, visit the Judkis article cited. *Id.* Since the Occupy Seattle protests coincided with the DOJ’s investigation into the Seattle Police Department for civil rights violations, the DOJ specifically noted these recent incidents involving pepper spray (or Oleoresin Capsicum spray). See SPD Investigation, *supra* note 15, at 5. While these incidents at Occupy Seattle were outside the scope of the DOJ’s investigation, they were noted, in part, because of prior criticism of the SPD in mishandling the World Trade Organization demonstrations in 1999. See *id.*



away.<sup>127</sup> These incidents are just a few examples of how the police used brutal tactics against the Occupy demonstrators.<sup>128</sup>

The reason the Occupy movement became associated with police brutality can largely be attributed to the increased ability to capture video and pictures and to disseminate them on social networking platforms.<sup>129</sup> Videos and photos widely viewed on social networking sites like Facebook, Twitter, and YouTube were frequently picked up by national media outlets, where they received even greater attention.<sup>130</sup>

The Occupy movement exposed several police departments' systematic abuse of nonviolent protesters.<sup>131</sup> The openness of this brutality against peaceful protesters in the presence of other police officers and hundreds of camera-wielding witnesses demonstrates that there is a culture of acceptance for this type of behavior in police departments.<sup>132</sup> Had the officers felt threatened by punishment, they likely would not have openly used excessive force in front of their co-workers or numerous cameras.<sup>133</sup>

### B. Police Misconduct in the Form of Racist Police Practices

In addition to excessive force, police misconduct often comes in the form of racial profiling.<sup>134</sup> Racial profiling is the discriminatory practice utilized by law enforcement to target certain individuals based on their race, ethnicity, or national origin for suspicion of a crime.<sup>135</sup> An underlying presumption of racial profiling is that persons of color are more likely to commit crimes, thus law enforcement should target

<sup>127</sup> See Dolan, *supra* note 116 (incorporating a video depicting the incident).

<sup>128</sup> See Jason Cherkis, *Occupy Wall Street: Video Allegedly Shows NYPD Officer Striking Protesters with Baton (Photos)*, HUFFINGTON POST, [http://www.huffingtonpost.com/2011/10/05/occupy-wall-street-nypd-police-brutality-video\\_n\\_997414.html](http://www.huffingtonpost.com/2011/10/05/occupy-wall-street-nypd-police-brutality-video_n_997414.html) (last visited Feb. 11, 2014) (describing and showing video footage of NYPD officers attacking Occupy demonstrators with batons); Punt, *supra* note 114.

<sup>129</sup> See *Occupy Movement*, *supra* note 119; Punt, *supra* note 114.

<sup>130</sup> See *Occupy Movement*, *supra* note 119; Punt, *supra* note 114.

<sup>131</sup> See Punt, *supra* note 114.

<sup>132</sup> See Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1554 (2008); Skehill, *supra* note 40, at 1003; SPD Investigation, *supra* note 15, at 27 (noting that an officer's "failure to immediately report [misconduct] could be seen as a reflection of a hardened culture" of acceptance to that kind of behavior); Dolan, *supra* note 116.

<sup>133</sup> See Mishra, *supra* note 132, at 1554; Skehill, *supra* note 40, at 1003; SPD Investigation, *supra* note 15, at 27; Dolan, *supra* note 116.

<sup>134</sup> See HARRIS, *supra* note 114, at 5, 14; Weatherspoon, *supra* note 117, at 442.

<sup>135</sup> See Lupe S. Salinas & Fernando Colon-Navarro, *Racial Profiling as a Means of Thwarting the Alleged Latino Security Threat*, 37 T. MARSHALL L. REV. 5, 8 (2011); Weatherspoon, *supra* note 117, at 442.

those minority groups in order to most effectively fight crime, particularly drug related crime.<sup>136</sup> Although the underlying premise of racial profiling is factually untrue, the over-surveillance of minorities leads to somewhat of a self-fulfilling prophecy.<sup>137</sup> For example, since police stop and search African Americans and Latinos more often for drugs, they end up quantitatively finding drugs more often on members of these groups than on white Americans.<sup>138</sup>

Racial profiling not only results in more frequent punishment of minorities within the criminal justice system, but also severely harms entire communities.<sup>139</sup> When police target people for no reason other than race, it leaves many in the community feeling stigmatized, ostracized, humiliated, and less willing to cooperate with authorities.<sup>140</sup> Ultimately, racial profiling undermines both the faith in the perceived fairness of the justice system, as well as constitutional principles the system is meant to uphold.<sup>141</sup>

As addressed earlier, New York City has implemented a “Stop-and-Frisk” program resulting in police stopping hundreds of thousands of New Yorkers each year.<sup>142</sup> The program has been criticized for its racially biased application and for leading to excessive use of force.<sup>143</sup> In 2011, the New York Police Department (NYPD) performed 680,000 stops; more than eighty percent of which were performed on blacks and Latinos.<sup>144</sup> The police also used physical force in more than twenty percent of the stops.<sup>145</sup> In the West Bronx, physical force was used in over forty percent of the stops, yet the increased amount of force did not translate proportionally into higher arrest rates, leading to questions as to why force was used in the first place.<sup>146</sup> These statistics, as well as stories like Alvin’s, help to explain why black and Latino com-

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<sup>136</sup> See HARRIS, *supra* note 114, at 5, 11; Weatherspoon, *supra* note 117, at 442.

<sup>137</sup> See HARRIS, *supra* note 114, at 5, 11; Robert L. Carter, *Discrimination in the New York Criminal Justice System*, 3 N.Y. CITY L. REV. 267, 271–72 (2000).

<sup>138</sup> See HARRIS, *supra* note 114, at 5, 11; Carter, *supra* note 137, at 271–72.

<sup>139</sup> See HARRIS, *supra* note 114, at 5; Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas”*, 63 HASTINGS L.J. 179, 217 (2011).

<sup>140</sup> See HARRIS, *supra* note 114, at 5, 37; Ferguson, *supra* note 139, at 216–17.

<sup>141</sup> See HARRIS, *supra* note 114, at 5, 37; Ferguson, *supra* note 139, at 217.

<sup>142</sup> Rivera, *supra* note 31, at A17.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *id.* After the *New York Times* made this finding regarding the use of force, police officials down-played the issue by contending that officers were over-reporting force in that they described basic frisks or guiding suspects to the sidewalk as “hands on suspect,” which was not required. *Id.*

munities in New York City distrust and feel alienated by those who are supposed to protect them.<sup>147</sup>

Nowhere is racial profiling seen more clearly than in traffic stops executed by police.<sup>148</sup> The acronym DWB, standing for “Driving While Black/Brown,” is a commonly used adage referring to when police stop individuals solely on the basis of their race.<sup>149</sup> The racial profiling of drivers is pervasive in both large and small police departments across the United States.<sup>150</sup>

Studies looking at the number of encounters and arrests the police make are not completely consistent with an existence of racially biased policing.<sup>151</sup> Some studies have shown no racial differences, while others demonstrate substantial racial disparities.<sup>152</sup> It should be noted, however, that the data on racial demographics of those who have encounters with police is collected by the very same police officers that the data would incriminate as acting racially biased, thus leading to potentially false data collection.<sup>153</sup> What is clear, though, is that many people in minority communities often feel that they are being racially profiled

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<sup>147</sup> See Tuttle & Schneider, *supra* note 17; Editorial, *Stop-and-Frisk in New York City*, N.Y. TIMES, Aug. 9, 2012, at A22, available at [http://www.nytimes.com/2012/08/09/opinion/stop-and-frisk-in-new-york-city.html?\\_r=0](http://www.nytimes.com/2012/08/09/opinion/stop-and-frisk-in-new-york-city.html?_r=0). The court in *Floyd v. City of New York* also noted those who were subjected to the NYPD’s stop-and-frisk program felt unwelcome in parts of the city and distrusted police. 2013 WL 4046209, at \*2 (S.D.N.Y. Aug. 12, 2013).

<sup>148</sup> See HARRIS, *supra* note 114, at 5; Weatherspoon, *supra* note 117, at 451.

<sup>149</sup> See Robert D. Crutchfield et al., *Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 920 (2010); Weatherspoon, *supra* note 117, at 440.

<sup>150</sup> See HARRIS, *supra* note 114, at 14–26 (detailing numerous examples from twenty-four different states of drivers being racially profiled).

<sup>151</sup> See Crutchfield et al., *supra* note 149, at 904.

<sup>152</sup> *Id.*

<sup>153</sup> See *Floyd*, 2013 WL 4046209, at \*4 (noting the central flaw in the database of recorded stop-and-frisks performed by the NYPD is that the officers control the record and skew the number of unconstitutional stops that occur); Dasha Kabakova, Note, *The Lack of Accountability for the New York Police Department’s Investigative Stops*, 10 CARDOZO PUB. L. POL’Y & ETHICS J. 539, 547–48 (2012) (noting that NYPD officers are required to fill out a “Stop, Question and Frisk Report Worksheet,” which includes recording the individual’s description, after conducting a stop); see also Complaint, *supra* note 1, at 3, 6 (mentioning that after the plaintiff was threatened with racially charged language and then stomped on by two different Seattle police officers, none of the several officers that witnessed or partook in the incident reported the use of force or other misconduct); HARRIS, *supra* note 114, at 21 (describing an incident where officers in New Jersey were indicted for falsely recording black motorists as white); EHPD Investigation, *supra* note 118, at 3 (reporting findings that included police officers failing to collect and report traffic stop data in order to cover up the intentional disparate treatment of Latino drivers).

and that police brutality is widespread, or have experienced such abuse firsthand.<sup>154</sup>

### *C. DOJ Investigations Shed More Light on the Culture of Racist Policing*

Assistant Attorney General Thomas E. Perez has led the Civil Rights Division of the DOJ to investigate more major police and sheriff's departments for discriminatory patterns and practices than ever before.<sup>155</sup> While these investigations are often sparked by isolated incidents of misconduct, they have exposed several police departments for harboring a culture of racially discriminatory practices.<sup>156</sup> The conclusions of these investigations provide further evidence that racist policing is not just carried out by "a few bad apples," but rather that it is a pervasive issue that must be addressed.<sup>157</sup>

#### 1. Maricopa County Sheriff's Office

In March of 2009, the DOJ formally began an investigation into the Maricopa County Sheriff's Office ("MCSO") in Arizona, which is led by the infamous Sheriff Joe Arpaio.<sup>158</sup> The investigation was aimed at uncovering racially discriminatory practices in violation of the Constitution.<sup>159</sup> What the DOJ found was that the MCSO was engaging in unconstitutional police practices that not only included racial discrimi-

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<sup>154</sup> See Carter, *supra* note 137, at 276; Tuttle & Schneider, *supra* note 17.

<sup>155</sup> See *DOJ Investigating Departments*, *supra* note 114.

<sup>156</sup> See *id.*; Seattle Times Staff, *supra* note 4; EHPD Investigation, *supra* note 118, at 2–3.

<sup>157</sup> See HARRIS, *supra* note 114, at 14–26 (referencing incidents of racial profiling throughout the United States). Compare *DOJ Investigating Departments*, *supra* note 114 (implying that 99% of police officers do not engage in misconduct), with EHPD Investigation, *supra* note 118, at 2 (finding that a culture of discriminatory policing was "deeply rooted" in the EHPD), and MCSO Investigation, *supra* note 118, at 4 (finding that the "pervasive nature of . . . discriminatory treatment of Latinos reflects a general culture of bias within [the] MCSO"), and Punt, *supra* note 114 (arguing that Occupy movement exposed systematic pattern of misconduct aimed at protesters).

<sup>158</sup> See MCSO Investigation, *supra* note 118, at 1, 5. An initial inquiry into the Maricopa County Sheriff's Office began in June of 2008. *Id.* at 1. After the investigation formally began in March 2009, the MCSO repeatedly refused to cooperate with the DOJ by not providing pertinent information. *Id.* at 1 n.1. It was not until after the United States filed a lawsuit against the MCSO that all the information was provided in June 2011 under a court-enforceable agreement. *Id.* at 5. When asked what he thought about the investigation into discriminatory practices of his office against Latinos, Sheriff Arpaio responded, "I'm not a social worker. I'm a cop . . ." *DOJ Investigating Departments*, *supra* note 114 (internal quotation marks omitted).

<sup>159</sup> See MCSO Investigation, *supra* note 118, at 1.

nation, but also a number of incidents involving excessive force against Latinos.<sup>160</sup>

Most startling about the DOJ's findings is that the discriminatory treatment of Latinos was not the product of a few rogue officers, but rather stemmed from a culture of bias against Latinos within the MCSO.<sup>161</sup> The DOJ found that the discriminatory culture was well ingrained into the agency and perpetuated by Sheriff Arpaio himself.<sup>162</sup> Arpaio was found to have nurtured the culture of bias against Latinos by endorsing and distributing racially charged constituent letters.<sup>163</sup> Despite the letters not containing any meaningful descriptions of criminal activity—rather, just crude, derogatory language about Latinos—Arpaio would treat them as relevant intelligence and directed his staff to further investigate the information.<sup>164</sup>

## 2. New Orleans Police Department

In May 2010, the mayor of New Orleans sought the DOJ's assistance to transform the New Orleans Police Department ("NOPD") so that it would comport with constitutional requirements.<sup>165</sup> Soon thereafter, the DOJ initiated an investigation that uncovered startling disparities in the department's treatment of whites and African Americans.<sup>166</sup> The DOJ found that while nationally African Americans under age seventeen were three times as likely to be arrested for a serious crime, in New Orleans, this jumped to sixteen times more likely.<sup>167</sup>

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<sup>160</sup> *Id.* at 2. The investigation found discriminatory police practices which included performing traffic stops on Latino drivers four to nine times more often than similarly situated non-Latino drivers, individual accounts of racial profiling, and initiating immigration-related crime suppression activities based on citizen complaints of individuals with "dark skin" or who spoke Spanish. *Id.* at 3.

<sup>161</sup> *See id.* at 20.

<sup>162</sup> *See id.* at 8, 11, 20. Sheriff Arpaio was also found to retaliate against those who publicly opposed his policies and practices. *Id.* at 13–14.

<sup>163</sup> *Id.* at 11.

<sup>164</sup> *Id.* at 11.

<sup>165</sup> *See* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Hon. Mitchell J. Landrieu, Mayor, City of New Orleans, at 1 (Mar. 16, 2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_letter.pdf](http://www.justice.gov/crt/about/spl/nopd_letter.pdf) [hereinafter NOPD Findings Letter] (regarding the investigation of the New Orleans Police Department).

<sup>166</sup> *See* Investigation of the New Orleans Police Department at ix–x, *United States v. New Orleans City*, No. 2:12-cv-01924-SM-JCW (E.D. La. Mar. 16, 2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf) [hereinafter NOPD Investigation].

<sup>167</sup> *Id.* at x.

In addition, the data on use of force exposed incredibly disparate treatment towards African Americans.<sup>168</sup> The DOJ found that eighty-four percent of those subjected to force in resisting arrest reports were African American.<sup>169</sup> Also, between January 2009 and May 2010, of the 27 incidents where a NOPD officer intentionally discharged his firearm at someone, all of those subjected to the deadly force were African American.<sup>170</sup>

The DOJ ultimately found that the NOPD had in fact been systematically violating the Constitution.<sup>171</sup> The DOJ concluded that the NOPD had deeply rooted problems involving the excessive use of force, unconstitutional stops, searches, and arrests, and practiced racially discriminatory policing.<sup>172</sup>

### 3. East Haven Police Department

In September 2009, after receiving several complaints that police were harassing Latino residents in the small town of East Haven, Connecticut, the DOJ launched an investigation into possible racially discriminatory practices.<sup>173</sup> This was not the first time the town of East Haven dealt with concerns about race relations.<sup>174</sup> In 1997, an East Haven police officer shot an unarmed black motorist suspected of speeding four times at close range in somewhat suspicious circumstances.<sup>175</sup> More recently, in April 2012, four officers were indicted on federal charges stemming from abuses against those in the Latino community.<sup>176</sup> When the mayor of East Haven, Joseph Maturo Jr., was asked what he'd do for the Latino community in light of the allegations

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<sup>168</sup> *See id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at vi.

<sup>172</sup> NOPD Findings Letter, *supra* note 165, at 2–3.

<sup>173</sup> *See* Peter Applebome, *Behind Arrest of 4 Officers, Latinos Who Took a Stand*, N.Y. TIMES, Feb. 3, 2012, at A21; *Pact on Police Bias Against Latinos*, N.Y. TIMES, Oct. 24, 2012, at A23.

<sup>174</sup> *See* Applebome, *supra* note 173; Melinda Tuhus, *Tangled Aftermath of a Killing by Police*, N.Y. TIMES, Aug. 17, 1997, at CN1.

<sup>175</sup> *See* Applebome, *supra* note 173; Tuhus, *supra* note 174. Officer Robert Flodquist killed twenty-one-year-old Malik Jones in 1997 by shooting Jones at close range four times. Tuhus, *supra* note 174. After Jones was alleged to have been driving erratically, he pulled over and was boxed in by police vehicles. *Id.* Officer Flodquist reported that after Jones backed into his vehicle, and in fear that Jones would do so again, he approached the driver's side window, broke the window with his gun, and fired several shots at Jones from point blank range. *Id.*

<sup>176</sup> *See* Applebome, *supra* note 173.

against his town's officers, he responded, "I might have tacos when I go home. I'm not sure yet."<sup>177</sup>

With a mayor like Maturro Jr., who has the power to appoint the chief of police, it may not have been such a surprise that the DOJ's investigation into the town's police practices revealed a "deeply rooted" culture of racist policing.<sup>178</sup> The DOJ found that the East Haven Police Department systematically engaged in discriminatory policing by intentionally targeting Latinos for traffic stops, treating Latino drivers more harshly after being stopped, and then intentionally failing to design and implement a system to track this kind of misconduct.<sup>179</sup>

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These examples and statistics reveal that not only is police misconduct prevalent in the United States, but that it often takes the form of racist police practices.<sup>180</sup> These practices are more than just isolated incidents involving a rogue officer, but rather are deeply ingrained in the culture of the departments.<sup>181</sup> While surely not every officer partakes in overt misconduct within the departments where such a culture exists, several officers knowingly allow the misconduct to happen, which equally harms the communities they are sworn to protect.<sup>182</sup> This culture of racial discrimination helps demonstrate why the public should have every safeguard at its disposal to combat this misconduct, including the right to surreptitiously record on-duty police officers.<sup>183</sup>

### III. HISTORICAL EFFECTIVENESS OF SURREPTITIOUS RECORDINGS IN RAISING AWARENESS & CURBING POLICE MISCONDUCT

There are several benefits to allowing the recording of on-duty police conduct.<sup>184</sup> Whether taken surreptitiously or openly, such videos have the power to turn public attention towards police misconduct and initiate change.<sup>185</sup> These recordings increase efficiency in the admini-

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<sup>177</sup> Peter Applebome, *After Charges of Latino Abuse, Anger Shifts to a Mayor for His 'Taco' Remark*, N.Y. TIMES, Jan. 26, 2012, at A23 (internal quotation marks omitted).

<sup>178</sup> See Applebome, *supra* note 173; EHPD Investigation, *supra* note 118, at 2.

<sup>179</sup> EHPD Investigation, *supra* note 118, at 1–2.

<sup>180</sup> See HARRIS, *supra* note 114, at 12–26, 42; MCSO Investigation, *supra* note 118, at 4; DOJ Investigating Departments, *supra* note 114.

<sup>181</sup> See EHPD Investigation, *supra* note 118, at 2; MCSO Investigation, *supra* note 118, at 4; NOPD Findings Letter, *supra* note 165, at 2–3.

<sup>182</sup> See Complaint, *supra* note 1, at 3, 6; HARRIS, *supra* note 114, at 14, 37; Ferguson, *supra* note 139, at 217; DOJ Investigating Departments, *supra* note 114.

<sup>183</sup> See HARRIS, *supra* note 114, at 42; Skehill, *supra* note 40, at 1004.

<sup>184</sup> See Kies, *supra* note 39, at 303–04; Skehill, *supra* note 40, at 1003–04.

<sup>185</sup> See Skehill, *supra* note 40, at 1003–04; Seattle Times Staff, *supra* note 4.

stration of justice, promote police accountability, and act as a safeguard against police misconduct.<sup>186</sup> Because surreptitious recordings have previously proven to be an effective safeguard against racist police practices, the right to secretly record must be protected.<sup>187</sup>

#### A. *The Benefits of Video Recordings*

A simple search on Google or YouTube for “police brutality” will bring up more stories and videos than one can imagine.<sup>188</sup> Many of these videos depicting police misconduct are recorded by bystanders on cell phone cameras.<sup>189</sup> The advent and proliferation of cell phone cameras makes recording on-duty police officers much easier for the average citizen.<sup>190</sup> Smart phones equipped with cameras also simplify the worldwide distribution of those videos.<sup>191</sup> Many cell phones have the capability to upload the footage directly from the phone to a website such as YouTube or Facebook.<sup>192</sup>

The fact that recording police misconduct is becoming more common helps demonstrate that police misconduct is still prevalent in today’s society.<sup>193</sup> In addition, many of the major police brutality stories that have gained media attention are those accompanied by video footage of the incident.<sup>194</sup> Sometimes the video footage is from the police officer’s own recording device, such as one mounted in their cars, but often the footage is shot by a bystander, usually with a cell phone.<sup>195</sup>

Because recordings of police brutality surface regularly on the news and internet, it is vital that this power to capture video of police

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<sup>186</sup> See Kies, *supra* note 39, at 302–03; Skehill, *supra* note 40, at 1003–04.

<sup>187</sup> See *Commonwealth v. Hyde*, 750 N.E.2d 963, 971–72 (Mass. 2001) (Marshall, C.J., dissenting); Skehill, *supra* note 40, at 999–1000, 1003–04; Seattle Times Staff, *supra* note 4.

<sup>188</sup> See Claiborne, *supra* note 39, at 494. Google search for “police brutality” videos yielded about 10,900,000 results. GOOGLE, <https://www.google.com> (last visited Feb. 11, 2014). YouTube search for “police brutality” yielded about 503,000 results. YOUTUBE, <http://www.youtube.com> (last visited Feb. 11, 2014).

<sup>189</sup> See Alderman, *supra* note 50, at 488.

<sup>190</sup> See Steven A. Lutt, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 349–50 (2012); Skehill, *supra* note 40, at 985.

<sup>191</sup> See Lutt, *supra* note 190, at 349–50; Skehill, *supra* note 40, at 985.

<sup>192</sup> See Lutt, *supra* note 190, at 350; Skehill, *supra* note 40, at 985; Triano, *supra* note 45, at 390.

<sup>193</sup> See Skehill, *supra* note 40, at 985, 1003; SPD Investigation, *supra* note 15, at 3.

<sup>194</sup> See Skehill, *supra* note 40, at 998–1000; Seattle Times Staff, *supra* note 4.

<sup>195</sup> See Alderman, *supra* note 50, at 488 (describing the cell phone videos depicting the killing of twenty-two-year-old Oscar Grant by a Bay Area Rapid Transit police officer); Skehill, *supra* note 40, at 985; Seattle Times Staff, *supra* note 4.



misconduct remains in the hands of all citizens.<sup>196</sup> While the police often record their own actions for liability purposes, when the liability falls upon the officer, the videos can sometimes go missing.<sup>197</sup> Police are capable of turning off their cameras or recording over the footage, therefore, it is important that citizens can collect independent video of a controversial incident.<sup>198</sup>

In 2007, for example, an investigative reporter for a Washington, D.C. television station was pulled over by seven county police cars while she was doing a story on the misuse of public funds.<sup>199</sup> She claimed that the police used excessive force which resulted in a dislocated shoulder and torn rotator cuff.<sup>200</sup> Despite winning a settlement from her subsequent lawsuit, she never obtained any video from the officers' dashboard cameras.<sup>201</sup> The county officials maintained that there was no video at the time of the incident because, coincidentally, all seven of the dashboard cameras had simultaneously malfunctioned.<sup>202</sup>

By their very nature, recordings depict exactly what happened, often making them the best and most accurate evidence of an event.<sup>203</sup> Recordings are able to portray events in ways a witness's testimony simply cannot—free of any bias, lies, or bad memory.<sup>204</sup> Both video and audio recordings have proven incredibly useful in criminal and civil cases involving police officers.<sup>205</sup> By providing proof as to what exactly occurred, video or audio recordings can protect police from frivolous claims of abuse as well as protect the victims of police brutality.<sup>206</sup> Also, because juries tend to believe a police officer's word over that of private citizens, a recording helps to ensure that they reach proper verdicts.<sup>207</sup>

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<sup>196</sup> See Skehill, *supra* note 40, at 985, 1003–04; see also Seattle Times Staff, *supra* note 4 (citing several examples of recent videos depicting Seattle police officers using excessive force).

<sup>197</sup> See Kies, *supra* note 39, at 302–03; Radley Balko, *The War on Cameras*, REASON, Jan. 2011, at 33, available at <http://reason.com/archives/2010/12/07/the-war-on-cameras>.

<sup>198</sup> See Kies, *supra* note 39, at 302–03; Balko, *supra* note 197, at 33.

<sup>199</sup> Balko, *supra* note 197, at 33.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See Skehill, *supra* note 40, at 1007–08; Triano, *supra* note 45, at 405–06.

<sup>204</sup> See Skehill, *supra* note 40, at 1007–08; Triano, *supra* note 45, at 405–06.

<sup>205</sup> See Kies, *supra* note 39, at 302; Skehill, *supra* note 40, at 1007–08.

<sup>206</sup> See Kies, *supra* note 39, at 302–03; Skehill, *supra* note 40, at 1007–08.

<sup>207</sup> See Claiborne, *supra* note 39, at 506; Skehill, *supra* note 40, at 1008; Triano, *supra* note 45, at 406.

Police misconduct is often viewed as symbolically worse than typical law violations by civilians because it is carried out on behalf of all citizens under the guise of government authority.<sup>208</sup> Therefore, ensuring that police are held accountable for their actions is extremely important in maintaining the legitimacy of law enforcement.<sup>209</sup> Since the police wield an extraordinary amount of power over all citizens, ensuring that they are held accountable when they abuse that power is an interest shared by all citizens.<sup>210</sup>

Furthermore, there is some indication that the possibility of being recorded may change police behavior.<sup>211</sup> If police know that their actions are subject to recording, “they will be more likely to act in full accordance with the law . . . .”<sup>212</sup> Therefore, the proliferation of cell phone cameras combined with the freedom to surreptitiously record on-duty police officers has the potential to decrease police misconduct.<sup>213</sup>

### B. *Surreptitious Videos That Sparked Change in Police Conduct*

The primary goals behind allowing surreptitious recordings of on-duty police officers are to promote the efficient administration of justice, promote police accountability, and to safeguard the public from police misconduct.<sup>214</sup> While there are other safeguards in place, such as the Exclusionary Rule and 42 U.S.C. § 1983, the ability to record the actual event can allow people to accurately and convincingly substantiate any of their claims of police misconduct.<sup>215</sup> Two such examples of surreptitious recordings have been successful at just that, leading to major changes in both the Los Angeles and Seattle police departments.<sup>216</sup>

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<sup>208</sup> See Kies, *supra* note 39, at 302; Mishra, *supra* note 132, at 1551.

<sup>209</sup> See Kies, *supra* note 39, at 302–03; Skehill, *supra* note 40, at 1005.

<sup>210</sup> See Kies, *supra* note 39, at 301–03; Skehill, *supra* note 40, at 1004.

<sup>211</sup> See Mishra, *supra* note 132, at 1554; Skehill, *supra* note 40, at 1003.

<sup>212</sup> Kies, *supra* note 39, at 302; see Mishra, *supra* note 132, at 1554.

<sup>213</sup> See Kies, *supra* note 39, at 302–03; Skehill, *supra* note 40, at 985.

<sup>214</sup> See Kies, *supra* note 39, at 303; Skehill, *supra* note 40, at 1003–04.

<sup>215</sup> See 42 U.S.C. § 1983 (2006); Skehill, *supra* note 40, at 994–96, 998; Triano, *supra* note 45, at 405–06. Section 1983 creates a civil action for deprivation of one’s constitutional rights, which is often used as a remedy for citizens who fall victim to police misconduct. See § 1983; Skehill, *supra* note 40, at 995–96. The Exclusionary Rule is a legal doctrine created by the U.S. Supreme Court to help deter police misconduct by excluding evidence obtained in violation of the defendant’s constitutional rights. See *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961); Skehill, *supra* note 40, at 994–95.

<sup>216</sup> See Skehill, *supra* note 40, at 999–1000; SPD Investigation, *supra* note 15, at 3; Seattle Times Staff, *supra* note 4.

### 1. George Holliday's Infamous Recording of the Rodney King Attack

The most infamous surreptitiously recorded video of on-duty police misconduct was filmed by George Holliday early in the morning of March 3, 1991.<sup>217</sup> Holliday was awoken by noise outside his apartment and decided to videotape what he saw.<sup>218</sup> He captured on video the ruthless beating of Rodney King by several police officers in Los Angeles.<sup>219</sup> The video of the horrifying incident was seen all over the country and sparked a national debate on police brutality and racist practices.<sup>220</sup>

Despite the blatant evidence of police wrongdoing captured by Holliday, four of the involved officers were acquitted of assault with a deadly weapon and excessive force charges.<sup>221</sup> The United States then saw some of the worst riots in the nation's history in response to the officers' acquittals.<sup>222</sup> The videotape of the beating, however, was instrumental in obtaining subsequent convictions for two of the officers in federal court.<sup>223</sup>

The surreptitiously recorded video of Rodney King's assault by the Los Angeles Police Department (LAPD) not only exposed the reality of police brutality to many Americans, but also brought about reform in police training and discipline.<sup>224</sup> Specifically, an independent commission was charged with investigating the practices of LAPD officers and implementing necessary changes.<sup>225</sup> The commission, called the Christopher Commission, instituted an early intervention system promoting improved officer discipline and early identification of problematic officers.<sup>226</sup> The reforms also focused on moving policing tactics from a "suppression" model to a "community-policing" model, which is in-

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<sup>217</sup> See *Hyde*, 750 N.E.2d at 971–72 (Marshall, C.J., dissenting); Alderman, *supra* note 50, at 506.

<sup>218</sup> *Hyde*, 750 N.E.2d at 971 (Marshall, C.J., dissenting).

<sup>219</sup> See *id.*

<sup>220</sup> *Id.* at 971–72; Skehill, *supra* note 40, at 998–99.

<sup>221</sup> See Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER J. 67, 67 (1993); Skehill, *supra* note 40, at 999.

<sup>222</sup> See Davis, *supra* note 221, at 68 (referring to the riots as the worst in American history, resulting in sixty deaths, over two thousand people injured, and one billion dollars of estimated property damage over the course of five days); Skehill, *supra* note 40, at 999.

<sup>223</sup> Skehill, *supra* note 40, at 999; 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).

<sup>224</sup> See Alderman, *supra* note 50, at 506; Skehill, *supra* note 40, at 999–1000.

<sup>225</sup> See Skehill, *supra* note 40, at 1000 n.146; Steve Miletich & Mike Carter, *Stakes Large in Reshaping Seattle Police, Monitor Says*, SEATTLE TIMES, Oct. 31, 2012, at B1.

<sup>226</sup> Skehill, *supra* note 40, at 1000 n.146.

tended to foster more cooperation between the police and the public.<sup>227</sup>

When all was said and done, George Holliday was praised for exposing the horrendous actions by the LAPD, rather than punished as a criminal for surreptitiously recording the incident.<sup>228</sup> Had there been laws discouraging him from secretly recording the police that beat Mr. King, like the wiretapping laws in Massachusetts or Illinois, the much needed reforms in the LAPD may never have been initiated.<sup>229</sup>

## 2. Recordings Spark DOJ Investigation into SPD Civil Rights Violations

The DOJ began an investigation of the SPD after several videos of Seattle police officers using excessive force surfaced.<sup>230</sup> The surreptitiously filmed video of Martin Monetti Jr. being stomped on and subjected to overtly racist threats, discussed above, was cited as particularly troubling in the DOJ's report.<sup>231</sup>

The DOJ's findings included that the "SPD engages in a pattern or practice of using unnecessary or excessive force, in violation of the Fourth Amendment . . . ."<sup>232</sup> The findings were based on hundreds of hours of videos, voluminous documents, police reports, policy manuals, and SPD records regarding its use of force and policing practices.<sup>233</sup> The investigation also discovered that in approximately twenty percent of the instances in which SPD officers used force, they did so in an unconstitutional manner.<sup>234</sup> In particular, SPD officers resorted to the use of impact weapons too quickly, and fifty-seven percent of the time batons were used, they were either unnecessary or excessive.<sup>235</sup>

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<sup>227</sup> See Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U.L. REV. 1, 15 (2001); Miletich & Carter, *supra* note 225. A "suppression" or "professional" model of policing often results in "a strained relationship between the police and the community" because police emphasize crime-fighting and have little contact with the public outside of that role. See Levenson, *supra*; Miletich & Carter, *supra* note 225. A "community-policing" model emphasizes partnership with the public to develop solutions to the community's problems and build trust in the police. See Levenson, *supra*; Community Oriented Policing Services, U.S. DEP'T OF JUSTICE, <http://www.cops.usdoj.gov/Default.asp?Item=36> (last visited Feb. 11, 2014).

<sup>228</sup> See *Hyde*, 750 N.E.2d at 972 (Marshall, C.J., dissenting); Alderman, *supra* note 50, at 506.

<sup>229</sup> See 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); MASS. GEN. LAWS ch. 272, § 99 (2010); Alderman, *supra* note 50, at 506; Skehill, *supra* note 40, at 998-1000, 1000 n.146.

<sup>230</sup> See SPD Investigation, *supra* note 15, at 3; Seattle Times Staff, *supra* note 4.

<sup>231</sup> See SPD Investigation, *supra* note 15, at 27; KIROTV.COM, *supra* note 6.

<sup>232</sup> SPD Investigation, *supra* note 15, at 3.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 4.

<sup>235</sup> *Id.* An impact weapon may include items such as a baton or a flashlight. *Id.*

While the DOJ was unable to make a finding of discriminatory policing reaching the level of unconstitutionality, they did note serious concerns about how the other unconstitutional practices of the SPD were disproportionately impacting minority communities.<sup>236</sup> The DOJ's investigation revealed that over fifty percent of cases found to involve unnecessary or excessive force were committed against minorities.<sup>237</sup> In addition, numerous individuals reported the police's use of racially charged language and recalled being singled out because of their race.<sup>238</sup> The infamous incident involving Mr. Monetti Jr. also suggested the department's culture of acceptance regarding the use of overtly racist language, since the surrounding officers had no reaction to the racially charged threat.<sup>239</sup>

After the investigation deemed the SPD's behavior unconstitutional, the City of Seattle entered into a settlement agreement with the DOJ.<sup>240</sup> The city was forced to implement changes in its policing practices related to the excessive use of force and biased policing.<sup>241</sup> Merrick Bobb, who served as the Deputy General Counsel on the Christopher Commission investigating the LAPD after the Rodney King beating, was appointed by a U.S. District Court judge to oversee the reforms.<sup>242</sup> The City of Seattle has now implemented what it is calling the "20/20" plan, where twenty policing reform initiatives are implemented over twenty months.<sup>243</sup> The initiatives are aimed at changing police recruitment training, transparency, community outreach, and data collection.<sup>244</sup>

Had it been illegal in Washington to surreptitiously record the officers threatening and stomping on Mr. Monetti Jr., it is possible that the recording, which helped spark much needed reforms of the SPD's unconstitutional practices, would have never been made.<sup>245</sup> Luckily, the power of recording on-duty police officers surreptitiously was protected

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<sup>236</sup> *See id.* at 6.

<sup>237</sup> *See id.*

<sup>238</sup> *Id.* at 27.

<sup>239</sup> *See id.*

<sup>240</sup> *See* Miletich & Carter, *supra* note 225; SPD Investigation, *supra* note 15, at 3.

<sup>241</sup> *See* Miletich & Carter, *supra* note 225.

<sup>242</sup> *See id.* Merrick Bobb performed similar work reforming the police practices of the Los Angeles County Sheriff's Department and the Detroit Police Department. *Id.*

<sup>243</sup> Jennifer Sullivan, *Mayor Says Significant Progress Made on '20/20' Police Overhaul*, SEATTLE TIMES, Feb. 15, 2013, at B1.

<sup>244</sup> *See id.*

<sup>245</sup> *See* SPD Investigation, *supra* note 15, at 3; Seattle Times Staff, *supra* note 4.

both here and in the case of Rodney King.<sup>246</sup> These examples prove that the ability to record surreptitiously is an effective safeguard against police misconduct.<sup>247</sup>

#### IV. ENSURING THAT THE RIGHT TO RECORD IS PROTECTED

As the court in *Floyd v. City of New York* noted, “[f]ostering trust and confidence between the police and the community would be an improvement for everyone.”<sup>248</sup> In order to fully safeguard citizens from police misconduct, it is vital that people are legally permitted to surreptitiously record on-duty police officers.<sup>249</sup> Because Massachusetts and Illinois are the only states that do not currently permit people to surreptitiously record on-duty police, changes in the law should be made in those states.<sup>250</sup> While the law in both Massachusetts and Illinois has been moving in the direction of permitting surreptitious recordings of the police in recent years, it is well past the time for the laws barring such recordings to be abolished.<sup>251</sup> Legislatures in Massachusetts and Illinois should adopt exceptions to their wiretapping and eavesdropping laws that allow for secretly recording on-duty police officers.<sup>252</sup>

##### A. Courts Protecting the Right to Record

One option to abolish the laws preventing surreptitious recordings of the police is to have courts, either federal or state, hold the laws unconstitutional on First Amendment grounds.<sup>253</sup> While the reasoning of the courts in *Glik* and *Alvarez* suggests that this is a viable option, those courts were hesitant to directly confront the wiretapping laws with regards to surreptitious recordings.<sup>254</sup> Since the courts in those cases

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<sup>246</sup> See *Hyde*, 750 N.E.2d at 972 (Marshall, C.J., dissenting); *State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992).

<sup>247</sup> See *Hyde*, 750 N.E.2d at 972 (Marshall, C.J., dissenting); Skehill, *supra* note 40, at 999–1000; SPD Investigation, *supra* note 15, at 3.

<sup>248</sup> 2013 WL 4046209, at \*2 (S.D.N.Y. Aug. 12, 2013).

<sup>249</sup> See *Humphrey*, *supra* note 41, at 806; Skehill, *supra* note 40, at 1004.

<sup>250</sup> See 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); MASS. GEN. LAWS ch. 272, § 99 (2010); Skehill, *supra* note 40, at 1004.

<sup>251</sup> See *ACLU v. Alvarez*, 679 F.3d 583, 586–87 (7th Cir.), *cert. denied*, 133 S. Ct. 651 (2012); *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

<sup>252</sup> See Skehill, *supra* note 40, at 1004; Triano, *supra* note 45, at 423–24.

<sup>253</sup> Claiborne, *supra* note 39, at 513; Triano, *supra* note 45, at 425.

<sup>254</sup> See *Alvarez*, 679 F.3d at 586–87 (holding that the right to record was limited to just the open recordings that the ACLU was planning on performing); *Glik*, 655 F.3d at 79, 84 (holding that the defendant had a First Amendment right to record officers openly in public, but not whether the recording could be done surreptitiously).

chose to exercise judicial restraint in protecting First Amendment rights, a binding decision overturning the wiretapping laws on constitutional grounds has yet to occur.<sup>255</sup>

One benefit to judicially abolishing these laws is that if the right to surreptitiously record under the First Amendment becomes widely accepted throughout the United States, then people who are prevented from doing so will have civil remedies under federal law.<sup>256</sup> The police would be stripped of qualified immunity from lawsuits, thus discouraging them from enforcing state laws that may still prohibit such recording.<sup>257</sup> Currently, legislatures may view these laws as protecting the police's right to privacy, and therefore may be hesitant to make the necessary statutory changes.<sup>258</sup> If there were wide-spread acceptance by courts of a citizen's right to record police surreptitiously, however, there would be pressure on state legislatures to pass laws conforming with the courts' interpretation of First Amendment rights.<sup>259</sup>

The down side to a judicial solution is that more time, expense, and litigation must occur in order for the courts to find the proper cases in which to assert this right.<sup>260</sup> It also does not solve the immediate threat of police still enforcing the laws on the books to arrest those who record them.<sup>261</sup> Unfortunately, that threat will still act as a deterrent for individuals to exercise the right to record.<sup>262</sup>

### B. Legislatures Protecting the Right to Record

The best option to protect people's right to surreptitiously record the police would be for the state legislatures to explicitly permit such recordings.<sup>263</sup> While a federal legislative solution could ensure the right to record police uniformly across the United States, state legislatures are the more sensible option.<sup>264</sup> Moreover, this solution would ensure that state laws encourage this safeguard against police misconduct.<sup>265</sup>

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<sup>255</sup> See *Alvarez*, 679 F.3d at 586–87, 605; *Glik*, 655 F.3d at 79, 84.

<sup>256</sup> See 42 U.S.C. § 1983 (2006); Triano, *supra* note 45, at 425.

<sup>257</sup> See Triano, *supra* note 45, at 425.

<sup>258</sup> See *id.* at 422–23.

<sup>259</sup> See *id.* at 425.

<sup>260</sup> See Bodri, *supra* note 44, at 1348.

<sup>261</sup> See *id.*; Triano, *supra* note 45, at 425.

<sup>262</sup> See Bodri, *supra* note 44, at 1348; Triano, *supra* note 45, at 425.

<sup>263</sup> See Bodri, *supra* note 44, at 1348; Triano, *supra* note 45, at 422, 425.

<sup>264</sup> See Triano, *supra* note 45, at 423; cf. Kies, *supra* note 39, at 307–08 (proposing an amendment to the federal wiretap law).

<sup>265</sup> See Bodri, *supra* note 44, at 1348; Skehill, *supra* note 40, at 1004; Triano, *supra* note 45, at 425.

Since the purpose of the federal wiretapping statute is to protect the right to privacy, states may further expand on that right.<sup>266</sup> In fact, states have already done so by requiring all party consent or excluding the requirement of a reasonable expectation to privacy, which in turn has expanded the right to privacy to cover public conversations.<sup>267</sup> Therefore, a federal statute attempting to balance protections between a right to record under the First Amendment and a right to privacy may inherently lead to further litigation on which right supersedes the other.<sup>268</sup> Since state legislatures were the ones who already expanded privacy rights, they should be the ones to cut back on their own laws when it comes to recording on-duty police officers.<sup>269</sup>

Massachusetts and Illinois have already made the policy decision to further protect their citizens' privacy rights by excluding a reasonable expectation of privacy from their wiretapping and eavesdropping laws.<sup>270</sup> By creating an exception to their laws that permits the surreptitious recording of on-duty police, they can maintain those protections for civilians while also providing the necessary safeguards against excessive force and racially discriminatory police misconduct.<sup>271</sup> An explicit exception allowing both secret and open recordings of on-duty police makes it perfectly clear that police may not use the law to deter citizens from capturing footage of potential misconduct.<sup>272</sup>

In order to fully safeguard the public from police misconduct, the laws in Massachusetts and Illinois must unambiguously state that surreptitiously recording on-duty police is a legal practice.<sup>273</sup> While establishing the right to surreptitiously record on-duty police is viable through both judicial and legislative routes, state legislatures are in the best position to make the right explicit and to ensure that citizens are not deterred from exercising that right.<sup>274</sup>

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<sup>266</sup> Alderman, *supra* note 50, at 495; Kies, *supra* note 39, at 280–81.

<sup>267</sup> See *Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001); Kies, *supra* note 39, at 280–82.

<sup>268</sup> See Kies, *supra* note 39, at 308; Lutt, *supra* note 190, at 377–78; Triano, *supra* note 45, at 423–24.

<sup>269</sup> See Triano, *supra* note 45, at 423–24.

<sup>270</sup> See 720 ILL. COMP. STAT. § 5/14-1 to -3 (2012); MASS. GEN. LAWS ch. 272, § 99 (2010); *Hyde*, 750 N.E.2d at 971.

<sup>271</sup> See Skehill, *supra* note 40, at 1004; Triano, *supra* note 45, at 423–24.

<sup>272</sup> See Bodri, *supra* note 44, at 1348; Triano, *supra* note 45, at 422–25.

<sup>273</sup> See Mishra, *supra* note 132, at 1555; Skehill, *supra* note 40, at 1004; Triano, *supra* note 45, at 422–25.

<sup>274</sup> See Claiborne, *supra* note 39, at 513–14; Triano, *supra* note 45, at 423–25.



## CONCLUSION

As a result of technological advancements, recording police misconduct surreptitiously and widely disseminating the footage is easier now than ever before. With police misconduct so prevalent in today's society, every safeguard must be made available to citizens. For those in minority communities, who are often targeted and abused by racist police practices, protecting themselves is of utmost importance. In addition, surreptitious recordings of racist police misconduct have caught the attention of both the public at large and the DOJ, leading to investigations and reforms in police practices.

Unfortunately, in Massachusetts and Illinois, the inability of the citizens to legally record police surreptitiously presents the risk of having racist police practices going undetected and unaddressed. It is imperative that changes in the law be made so that people in those states can take advantage of this important safeguard against police misconduct. The state legislatures in Massachusetts and Illinois should pass legislation carving out an exception in their wiretapping and eavesdropping laws that expressly allows for citizens to legally record on-duty police officers surreptitiously.