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Policing the Police: Establishing the Right to Record and Civilian Oversight Boards to Oversee America's Police

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Policing the Police

UTILIZING THE RIGHT TO RECORD AND CIVILIAN OVERSIGHT BOARDS TO MONITOR POLICE ACTIVITY IN THE UNITED STATES

“If the broad light of day could be let in upon men’s actions, it would purify them as the sun disinfects.”—Louis D. Brandeis¹

INTRODUCTION

On June 25, 2021, former Minneapolis police officer Derek Chauvin was sentenced to twenty-two and a half years in prison for the murder of George Floyd, which was caught on film.² Bystander video footage captured former Minneapolis police officer Derek Chauvin kneeling on Mr. Floyd’s neck for several minutes and pinning him to the pavement, as Mr. Floyd begged for air and cried that he could not breathe.³ Ultimately, the disturbing video spurred racial justice protests across the world,⁴ inspired both state and federal policy proposals,⁵ and played a crucial role in the trial that sent Chauvin to prison.⁶

¹ Andrew Berger, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. (May 26, 2009, 10:47 AM), <https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/> [<https://perma.cc/YZ8J-CWXC>].

² Derek Chauvin was found guilty on charges “of second- and third-degree murder, as well as second-degree manslaughter.” Janelle Griffith, *Derek Chauvin Sentenced to 22.5 Years for the Murder of George Floyd*, NBC NEWS (June 25, 2021, 10:04 AM), <https://www.nbcnews.com/news/us-news/derek-chauvin-be-sentenced-murder-death-george-floyd-n1272332> [<https://perma.cc/9FWA-98QS>]; Sentencing Order and Memorandum Opinion, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (D. Minn. June 25, 2021).

³ *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/RN4T-EC2X>].

⁴ *Id.*

⁵ See generally *George Floyd Justice in Policing Act of 2021*, H.R. 1280, 117th Cong. (2021) (establishing a framework to remedy racial profiling by holding law enforcement accountable, limiting unnecessary use of force, and banning the use of certain police techniques, such as chokeholds, no-knock warrants, and carotid holds); see also *SAFE-T Act*, H.B. 3653, Public Act 101-652 (2021) (banning chokeholds (or other neck restraints), restricting force used upon or shooting at fleeing suspects or vehicles (or to prevent escape), restricting use of less lethal weapons during protests or arrest, changing and clarifying fatal use of force policy, requiring use of force reporting to the state, requiring use of force reporting to the federal government).

⁶ Bill Keveney, *Video Remains ‘Star Witness’ in Derek Chauvin Trial Closing Arguments*, *TV’s Analysis*, USA TODAY (Apr. 20, 2021, 9:31 PM),

This instance of police brutality is reminiscent of that inflicted upon Rodney King in Los Angeles.⁷ That recording of Los Angeles police officers brutally beating Mr. King was particularly impactful because it was captured at a time where police officer interactions were rarely caught on camera.⁸ Since the release of the King footage, these powerful civilian recordings have become more commonplace, thanks to technological advances.⁹ In response, police officers have tried to suppress citizen recordings.¹⁰ Civilians who want to record such interactions often face obstacles to successfully capturing recordings. It is common for officers to confront and retaliate against bystanders who record,¹¹ jurisdictions differ in the legal application of wiretap laws,¹² and the Supreme Court has not explicitly established that the First Amendment protects civilians' right to record.¹³

Recording the police is incredibly important especially given the high volume of police shootings.¹⁴ Police have killed approximately one thousand civilians per year from 2016 to 2020.¹⁵ Of these killings, approximately 1 percent ended with criminal charges and, from 2018 to 2020, only 0.1 percent resulted in conviction.¹⁶ If these statistics are not shocking

<https://www.usatoday.com/story/entertainment/tv/2021/04/19/derek-chauvin-trial-video-star-witness-george-floyd-death/7295124002/> [<https://perma.cc/8U7K-ZXD3>] (Sunny Hostin, legal analyst for ABC News, said the video was “the star witness” and that the video is the strongest “evidence [she has] ever seen in a case against a police officer.”).

⁷ *LAPD Officers Beat Rodney King on Camera*, HISTORY.COM (Mar. 2, 2021), <https://www.history.com/this-day-in-history/police-brutality-caught-on-video> [<https://perma.cc/RQ67-6VT4>].

⁸ *See id.*

⁹ Steven A. Lutt, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 354–55 (2012).

¹⁰ Abby Ohlheiser, *The Tactics Police Are Using to Prevent Bystander Video*, MIT TECH. REV. (Apr. 30, 2021), <https://www.technologyreview.com/2021/04/30/1024325/police-video-filming-prevention-tactics/> [<https://perma.cc/KS4C-X74Y>].

¹¹ *See Garcia v. Montgomery Cnty.*, No. CIV. JFM-12-3592, 2013 WL 4539394, at *1 (D. Md. Aug. 23, 2013).

¹² *See generally* Carol M. Bast, *Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers*, 5 U. DENV. CRIM. L. REV. 61, 104–21 (2015) (describing and quoting the federal wiretap statute and all states' wiretap statutes).

¹³ *Frasier v. Evans*, 992 F.3d 1003, 1023 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (Nov. 1, 2021).

¹⁴ *Fatal Force*, WASH. POST (Oct. 7, 2022), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/JU7B-WTBM>] (“Despite the unpredictable events that lead to fatal shootings, police nationwide have shot and killed almost the same number of people annually—nearly 1,000—since The Post began its project.”).

¹⁵ *Police Brutality Statistics & Analysis for Cities and States: 2013-2021*, SECURITY.ORG (June 15, 2021), www.security.org/resources/police-brutality-statistics/ [<https://perma.cc/YA7R-MFHG>].

¹⁶ *Id.*

enough, while police shot and killed 5,589 people between 2016 and 2020, “in 99 percent of cases, prosecutors did not bring charges [against the officers].”¹⁷ Meanwhile, the number of citizens being arrested for violent offenses is at its lowest point over the past couple decades.¹⁸ In short, violent crime is decreasing, but police killings are consistently occurring, while just a minuscule percentage of offending officers face consequences.¹⁹ We have seen the role that video footage can play in delivering justice.²⁰ To address these appalling statistics, Congress must now affirm the right to record these atrocities.

Today, civilians’ right to record is not absolute by any means. Even though states have generally not been successful in banning the act of recording the police, officers often try to avoid being filmed, or retaliate.²¹ Furthermore, all-party consent wiretap statutes can criminalize filming police in many instances without explicitly banning the practice. However, civilian recordings are not banned in all states; and, in fact, many courts recognize it as a right. The First, Third, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuit courts of appeals have directly established the right to openly film the police while they are performing their official duties in public.²² That said, police do not always abuse their power in plain view of the public, where a bystander can catch the act on tape.²³ Further, police officers have retaliated against those who record by snatching the recording device from the bystander to delete

¹⁷ *Id.*

¹⁸ Statista Research Department, *USA—Number of Arrests for Violent Offenses 1990-2020*, STATISTA (Sept. 29, 2021), <https://www.statista.com/statistics/191283/number-of-arrests-for-violent-offenses-in-the-us-since-1990/> [<https://perma.cc/8Q3L-KQHJ>]; Statista Research Department, *USA—Arrest Rate for Violent Offenses 1990-2020*, STATISTA (Sept. 29, 2021), <https://www.statista.com/statistics/191644/arrest-rate-for-violent-offenses-in-the-us-since-1990/> [<https://perma.cc/5MV4-LZ9Q>].

¹⁹ *Fatal Force*, *supra* note 14.

²⁰ Keveney, *supra* note 6.

²¹ Ohlheiser, *supra* note 10; *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-3732 (2023) (held unconstitutional by Ariz. Broads. Ass’n v. Brnovich, No. CV-22-01431-PHX-JJT, 2022 WL 4121198 (D. Ariz. Sept. 9, 2022)).

²² Project Veritas Action Fund v. Rollins, 982 F.3d 813, 817–18, 825, 827–28, 830–31, 833, 836–37, 840 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021); Fields v. City of Phila., 862 F.3d 353, 355–56, 359–60 (3d Cir. 2017); Sharpe v. Winterville Police Dep’t, 59 F.4th 674 (4th Cir. 2023); Turner v. Lieutenant Driver, 848 F.3d 678, 688, 690 (5th Cir. 2017); Am. C.L. Union of Ill. V. Alvarez, 679 F.3d 583, 586, 592, 595 (7th Cir. 2012); Fordyce v. City of Seattle, 55 F.3d 436, 440 (9th Cir. 1995); Irizarry v. Yehia, 38 F.4th 1282, 1288–89, 1297 (10th Cir. 2022); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

²³ *See* Ashley Southall, Ali Watkins & Blacki Migliozi, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html> [<https://perma.cc/KS4C-X74Y>].

the footage, and fear of retaliation can stop would-be recorders from reaching for the camera.²⁴

In contrast, police officers enjoy a broad right to surveil the public.²⁵ Police utilize many forms of technology to surveil the population, including body-worn cameras, Automated License-Plate Tracker devices, facial recognition technology, aerial cameras, drones, and even street surveillance cameras.²⁶ The extent of surveillance was perfectly illustrated by journalist Jon Fasman, who—when discussing New York City’s police surveillance system—said that he lives approximately fifty miles to the north of Newark, New Jersey, and can log in to the computer at his desk and view the camera feed from any of the 126 cameras that are placed around the city.²⁷ These systems have been widely embraced by politicians and law enforcement agencies in major cities, despite citizens’ privacy concerns.²⁸ Yet, ironically, when courts analyze citizens’ right to secretly record the police, officers’ privacy rights have been invoked.²⁹ The current state of surveillance is not a two-way street, creating an imbalance that disempowers the citizenry.

This power disparity is antithetical to the Fourth Amendment of the United States Constitution.³⁰ However, Supreme Court jurisprudence has failed to strike a proper balance between the government and citizens on the issue of surveillance.³¹ Ultimately, a federal legislative solution is necessary to address the nuances and complex legal doctrines which come into conflict.³² This note calls for a federal regime of civilian oversight of America’s police, establishing civilian

²⁴ Ohlheiser, *supra* note 10; *Should You Record the Police?*, Y-STOP, <https://y-stop.org/news/should-you-record-police> [<https://perma.cc/KS4C-X74Y>].

²⁵ Alan Butler, *Preserving Community Control of Police Surveillance is Essential to Protect Privacy*, ELEC. PRIV. INFO. CTR. (EPIC) (Jan. 17, 2022), <https://epic.org/preserving-community-control-of-police-surveillance-is-essential-to-protect-privacy/> [<https://perma.cc/YC4Y-NFHU>].

²⁶ Harvey Gee, *Surveillance State: Fourth Amendment Law, Big Data Policing, and Facial Recognition Technology*, 21 BERKELEY J. AFR.-AM. L. & POL’Y 43, 54 (2021).

²⁷ Dave Davies, *Surveillance and Local Police: How Technology is Evolving Faster than Regulation*, NPR (Jan. 27, 2021, 12:51 PM), <https://www.npr.org/2021/01/27/961103187/surveillance-and-local-police-how-technology-is-evolving-faster-than-regulation> [<https://perma.cc/35SX-H6WJ>].

²⁸ *Id.*

²⁹ *Gwynn v. City of Phila.*, 866 F. Supp. 2d 473, 482 (E.D. Pa. 2012), *aff’d*, 719 F.3d 295 (3d Cir. 2013) (“[P]olice officers generally have a diminished expectation of privacy compared to other government employees.”).

³⁰ *See infra* Section I.A.2.

³¹ *See* Adam R. Pearlman & Erick S. Lee, *National Security, Narcissism, Voyeurism, and Kyllo: How Intelligence Programs and Social Norms Are Affecting the Fourth Amendment*, 2 TEX. A&M L. REV. 719, 756, 769 (2015).

³² The First and Fourth Amendment, Qualified Immunity, and Wiretap Laws often come into conflict in these cases.

oversight boards geared towards cementing the unfettered right to record police and utilize those findings. Specifically, the legislative solution should (1) establish the right for individuals to record police while “on-duty” or engaged in “official conduct,” both openly and surreptitiously, notwithstanding any officer’s expectation of privacy; and (2) establish a system where independent civilian oversight boards, alongside with corresponding police agencies, process such recordings through citizen complaints, launch investigations, take legal action, and report their findings to the federal government.

This note does not advocate for recording police officers who are not engaged in their official duties. Once a police officer is off the job, they revert from operating as an extension of the government to being a private citizen.³³ Nor does this note advocate for recording police officers’ private conversations. This legislative scheme will not change the fact that hacking or wiretapping police phonelines or computer systems is illegal.³⁴ Rather, it sets forth a federal consensus that recording the police while they are performing their official duties should not fall under the purview of wiretapping, both in the context of express and implicit prohibitions on secret recordings of oral communications. The goal is to protect the public’s interest in documenting and newsgathering, and utilizing the evidence gathered from these methods to conduct independent investigations of police activity. This is not necessarily a comprehensive solution, but rather one that affirms and protects citizens’ constitutional rights and rebalances the application of privacy laws.

Part I of this note provides a background on the pertinent legal doctrines and legislation at play regarding the right to record police and privacy concerns. Part II will discuss the relevant policy considerations, including the various shortcomings of current attempts to monitor police activity and the various ways in which this proposal would benefit society. Finally, Part III proposes a legislative solution that focuses on protecting the right to record and individuals’ privacy interests, as well as establishing a system to utilize such recordings for police reform.

³³ *State v. Brown*, 890 N.W.2d 315, 324 (Iowa 2017) (explaining the two-part test that some courts utilize to determine if an off-duty police officer is acting as a private citizen or in their official capacity includes examining: (1) “the capacity in which the off-duty police officer was functioning when the officer initially confronted the situation” and (2) “the manner in which he or she conducted himself or herself from that point forward”).

³⁴ *See* 18 U.S.C. § 1030 (regulating “[f]raud and related activity in connection with computers”).

The Constitution alone cannot protect an individual's right to monitor government officials given the multitude of complex legal doctrines at play.³⁵ Congress must enact federal legislation to fix the imbalance in surveillance power and reflect the fact that the drafters of the Constitution intended to protect citizens from government abuse.³⁶

I. FREE PRESS V. PRIVACY RIGHTS, WIRETAPPING, AND ANTIRECORDING STATUTES

Recording the conduct and actions of police officers while performing their official duties in public is a form of speech, and citizens may utilize this form of speech to gather and disperse this information of public concern.³⁷ Courts have recognized this general right as protected by the First Amendment—especially when the citizen records openly and in public.³⁸ However, other legal doctrines have frequently restricted individuals' abilities to exercise the right.³⁹

The Fourth Amendment is one of the most frequently used means of restriction. For example, in circuits that have not recognized the general right to record, citizens who record the police have been prosecuted under state wiretapping statutes.⁴⁰ Courts have upheld the use of wiretap statutes against citizens who record the police by invoking the officer's expectation of privacy.⁴¹ Simultaneously, in many circuits, police officers who

³⁵ As will be discussed below, the Fourth Amendment, qualified immunity, and wiretap laws, among others, are factors that can combat one exercising their First Amendment right to record.

³⁶ *What Does the Fourth Amendment Mean?*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0> [<https://perma.cc/72YT-ZVNZ>].

³⁷ *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

³⁸ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021); *Fields v. City of Phila.*, 862 F.3d 353, 355–56 (3d Cir. 2017); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023); *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017); *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 594–95 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995); *Irizarry v. Yehia*, 38 F.4th 1282, 1288–89 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

³⁹ *Rauvin Johl, Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 HARV. L. & POL'Y REV. 177, 191 (2018).

⁴⁰ *Marc Freeman, A Mom Got Arrested for Videotaping Cops in Public. Were Her Rights Violated?*, S. FLA. SUN-SENTINEL (Dec. 14, 2020, 10:00 AM), <https://www.sun-sentinel.com/local/palm-beach/fl-ne-police-videorecording-public-lawsuit-appeal-ss-prem-20201214-tbomhpwnyjbizjhfnmgnr7ewi-story.html> [<https://perma.cc/T5Q5-NPX9>]; *Radley Balko, Despite Court Rulings, People Are Still Getting Arrested For Recording On-Duty Cops*, WASH. POST (May 13, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/05/13/despite-court-rulings-people-are-still-getting-arrested-for-recording-on-duty-cops/> [<https://perma.cc/SC5Z-WUQN>].

⁴¹ *Expectation of Privacy*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/expectation_of_privacy [<https://perma.cc/42RT-FGQA>].

unlawfully search and seize video footage from citizens have been protected by the doctrine of qualified immunity.⁴² Furthermore, some courts that recognize the general right to record police officers have refused to extend the right to secret recording.⁴³ This means that in those jurisdictions, the court only protects the right to record if the individual is recording with their phone fully visible by law enforcement, in which case some police officers may retaliate (e.g., by grabbing the cellphone) or evade filming.⁴⁴ Finally, after the protests of 2020, spurred by video footage of Mr. Floyd's murder, states and municipalities have enacted legislation that could further threaten this civilian right.⁴⁵

In sum, even though over half of the nation's circuit courts ruled that citizens have a right to record police, citizens often struggle to exercise this right due to various moving part. This Part will break down the obstacles to exercising the right to record police. First, the First Amendment and the freedom of the press serve as the constitutional basis for the right to record. Second, although the Fourth Amendment and the expectation of privacy formed the constitutional basis for the right to privacy and establishment of wiretapping statutes, this very principle often serves as the basis for punishing citizens for exercising their right to record. Third, this Part will examine the wiretap statutes themselves, both state and federal. Finally, this Part will examine recent state and local attempts to further curtail citizens' rights through antiprotest and antirecording statutes.

A. *The Right to Record v. the Right to Privacy:
Constitutional Roots*

The right to record involves both the First and Fourth Amendments. The First Amendment freedom of the press provides a constitutional basis for individual citizens to gather and distribute news, in the form of video or audio recordings, on the conduct of police officers.⁴⁶ The Fourth Amendment is

⁴² See, e.g., *Frasier v. Evans*, 992 F.3d 1003, 1011–12 (10th Cir. 2021) (holding that since the “right to record [the officers] in the performance of their official duties in public spaces was not clearly established at the time of their alleged conduct in August 2014,” the officers were entitled to qualified immunity and did not violate the First Amendment).

⁴³ See, e.g., *Alvarez*, 679 F.3d at 606–07 (7th Cir. 2012).

⁴⁴ See Mark Brncik, *A Case for Non-Enforcement of Anti-Recording Laws Against Citizen Recorders*, 62 CASE W. RESV. L. REV. 485, 490–91, 496–98 (2011) (explaining how “[a]ll-party consent wiretapping” statutes, originally intended to protect citizens' privacy, have increasingly been used to prosecute citizens for recording the police in various circumstances).

⁴⁵ See *infra* Section I.B.3.

⁴⁶ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831–32 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021); *Fields v. City of Phila.*, 862 F.3d 353, 359–60

implicated because its associated privacy rights come into conflict with the right to record.⁴⁷ However, as will be discussed, the Fourth Amendment is intended to protect citizens from government abuse,⁴⁸ so it should provide lesser protection for police officers who are performing their official duties than for ordinary citizens.⁴⁹ Ultimately, the balance must be tipped towards favoring individuals' rights rather than the government's rights.

1. First Amendment & the Freedom of the Press

The Supreme Court has never explicitly ruled on the specific question of whether the First Amendment protects the right of citizens to record police activity.⁵⁰ However, virtually every lower court that has recently assessed this question ruled that the First Amendment does protect such recording activity.⁵¹ Further, Supreme Court jurisprudence on the freedom of press has reinforced the basis for acknowledging this right, as noted by the circuit courts.⁵²

The Supreme Court has, in no uncertain terms, emphasized the importance and breadth of the freedom of the press.⁵³ The Court has stated that the First Amendment protects

(3d Cir. 2017); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Alvarez*, 679 F.3d at 597–98, 600; *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995); *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁴⁷ Marianne F. Kies, *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) (explaining that, while “[t]he Fourth Amendment provides one of the clearest expressions of a constitutional right to privacy,” it is applicable only to state infringements and comes into tension with the public’s “interest in monitoring police activity”).

⁴⁸ See *infra* Section A.2.

⁴⁹ Brncik, *supra* note 44, at 496–97.

⁵⁰ The Supreme Court denied certiorari on the right to record police in 2021. *Frasier v. Evans*, 992 F.3d 1003, 1022–23 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (Nov. 1, 2021); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021).

⁵¹ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831–32 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021); *Fields v. City of Phila.*, 862 F.3d 353, 359–60 (3d Cir. 2017); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 597–98, 600 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995); *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁵² See, e.g., *Alvarez*, 679 F.3d at 600–01 (observing that the court in *Glik v. Cunniffe* “went on to conclude that the right to record the police was clearly established, resting its conclusion primarily on the Supreme Court’s observations about the right to gather and disseminate information about government” (citing *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011))).

⁵³ *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“A broadly defined freedom of the press assures the maintenance of our political system and an open society.”).

citizens' right to draw from a broad stock of information that the government is not permitted to limit.⁵⁴ Corollary to this protection is that there exists "an undoubted right to gather news 'from any source by means within the law.'"⁵⁵ Ultimately, filming is a method utilized to gather information regarding government officials and capture it in a media that is easily disseminated to "promot[e] the free discussion of governmental affairs."⁵⁶ In a democracy, the government is designed to be accountable to the people, and a free press can function as a government watchdog to investigate and report on government wrongdoing.⁵⁷

As observed by circuit courts across the nation, implicit in the Supreme Court's First Amendment jurisprudence is the idea that the First Amendment should protect individual citizens who record the police.⁵⁸ When a concerned citizen witnesses police misconduct, the freedom of the press should protect that citizen's right to reach for their phone, document the event, and share that news with their fellow citizens. While police misconduct has historically been a hot button news topic, its value and interest to the public has progressively grown.⁵⁹ Furthermore, journalists have increasingly reexamined their reliance on the "official police accounts as they construct breaking news stories about a violent incident or arrest."⁶⁰ Exposing the misconduct of government officials, particularly

⁵⁴ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

⁵⁵ *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)).

⁵⁶ *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

⁵⁷ C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 968 (2007) ("[T]he press receives constitutional protection to be a voice independent of the government . . . in order to perform the crucial democratic tasks of providing an independent source of vision and information, including performance of a watchdog role.").

⁵⁸ *See, e.g., Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 600–01 (7th Cir. 2012) (observing that the court in *Glik v. Cunniffe* "went on to conclude that the right to record the police was clearly established, resting its conclusion primarily on the Supreme Court's observations about the right to gather and disseminate information about government" (citing *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011))).

⁵⁹ *See* Ronald Weitzer, *Incidents of Police Misconduct and Public Opinion*, 30 J. CRIM. JUST. 397, 405–06 (2002).

⁶⁰ Paul Farhi & Elahe Izadi, *Journalists Are Reexamining Their Reliance On A Longtime Source: The Police*, WASH. POST (June 30, 2020, 11:49 AM), https://www.washingtonpost.com/lifestyle/media/journalists-are-reexamining-their-reliance-on-a-longtime-source-the-police/2020/06/30/303c929c-b63a-11ea-a510-55bf26485c93_story.html [<https://perma.cc/G8UU-5AQ2>].

police officers, is extremely consequential to the public; thus, it is a matter of public concern for First Amendment purposes.⁶¹

To this point, an increasing number of circuit courts have found the First Amendment protects the right of citizens to record police.⁶² The First Circuit's decisions from *Glik v. Cunniffe* in 2011 to *Project Veritas Action Fund v. Rollins* in 2020 are illustrative of how the progression of this doctrine may work.⁶³ It also demonstrates how the Supreme Court may not solve the issue, if they take the narrow position that *Glik* posited, rather than jumping to protect recording as a whole, as in *Project Veritas*.⁶⁴

On October 1, 2007, Simon Glik was walking in Boston Common when he saw three police officers arresting an individual.⁶⁵ Glik was concerned the officers were using excessive force when he overheard a bystander say “[y]ou are hurting him, stop,” and began recording with his cellphone.⁶⁶ Glik was ten feet away from the arrest and did not interfere, but one officer turned to him and told him that he had enough pictures.⁶⁷ Eventually, Glik told the officer he was recording. The officer determined that the recording included audio, so the officer arrested Glik for violating Massachusetts's wiretapping law.⁶⁸ Glik sued, arguing that the arrest violated his First and Fourth Amendment rights.⁶⁹ The District Court denied the officers' attempt to dismiss the case on grounds of qualified immunity.⁷⁰ The officers then appealed to the First Circuit, which ultimately held that the First Amendment protects the right to record and stating that “[i]t is firmly established that the First Amendment[] . . . encompasses a range of conduct related to the gathering and dissemination of information.”⁷¹ Second, the court held that since Glik recorded the police openly, by holding up his cell phone, the officers did not have reason to

⁶¹ *Jackler v. Byrne*, 658 F.3d 225, 236 (2d Cir. 2011) (“Exposure of official misconduct, especially within the police department, is generally of great consequence to the public.” (citing *Branton v. City of Dall.*, 272 F.3d 730, 740 (5th Cir. 2001))).

⁶² See Adam Schwartz & Mukund Rathi, *Victory! Another Court Protects the Right to Record Police*, EFF (July 12, 2022), <https://www.eff.org/deeplinks/2022/07/victory-another-court-protects-right-record-police> [<https://perma.cc/9Q8A-EBQR>].

⁶³ *Glik*, 655 F.3d at 79, 82–84; *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817–18 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021).

⁶⁴ *Id.*

⁶⁵ *Glik*, 655 F.3d at 79.

⁶⁶ *Id.* at 79–80.

⁶⁷ *Id.* at 80.

⁶⁸ *Id.*

⁶⁹ *Id.* at 78.

⁷⁰ *Id.* at 80.

⁷¹ *Id.* at 82.

believe he violated the law.⁷² Thus, Glik's Fourth Amendment rights were violated by his arrest without probable cause.⁷³ Particularly of note is the fact that the court came to this holding because the phone was held out in the open.⁷⁴

It took nearly a decade for the *Project Veritas* decision to finally extend this right to recording when it is done secretly (i.e., without putting the police on notice by holding the phone in the open).⁷⁵ In that case, the First Circuit not only extended the right to encompass secret recording but went further to invalidate the Massachusetts wiretap statute.⁷⁶ The court held that the statute "violated [the] First Amendment insofar as it banned secret, nonconsensual audio recording of any government official discharging official duties in public spaces."⁷⁷ As Judge Barron stated:

Massachusetts makes it as much a crime for a civic-minded observer to use a smartphone to record from a safe distance what is said during a police officer's mistreatment of a civilian in a city park as it is for a revenge-seeker to hide a tape recorder under the table at a private home to capture a conversation with an ex-spouse.⁷⁸

The Tenth Circuit is one of the most recent courts to hold that the right to record police is protected by the First Amendment.⁷⁹ The court further held that the officer was not entitled protection from qualified immunity for violating the right.⁸⁰ The court stated that the right to record police was clearly established in other circuits at the time that the officer retaliated against the plaintiff.⁸¹ Here, the court made a clear attempt to clear the pathway for the remaining circuit courts to follow. Nevertheless, the Second, Sixth, Eighth, and DC circuit courts have not yet considered the issue. Thus, in those circuits, the right to record police in the open or secretly has not been affirmed.

Whether the courts agree to a judicial solution or not, legislation is necessary because there are numerous issues with a judicial solution. First, it is not guaranteed that the remaining circuits will follow in affirming this right. While circuit courts will often look to other circuits' precedents when

⁷² *Id.* at 80.

⁷³ *Id.* at 79.

⁷⁴ *Id.* at 80.

⁷⁵ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 844 (1st Cir. 2020).

⁷⁶ *Id.*

⁷⁷ *Id.* at 813.

⁷⁸ *Id.* at 817.

⁷⁹ *See Irizarry v. Yehia*, 38 F.4th 1282, 1294 (10th Cir. 2022).

⁸⁰ *See id.* at 1293–98.

⁸¹ *Id.* at 1293.

the law is unclear in their jurisdiction, this is rarely the case regarding qualified immunity analysis.⁸² Thus, the plaintiff who brings the case that ultimately affirms the right will not have recourse against the officer who interfered with their recording. In contrast, if a legislative solution is enacted now, the law would protect every individual in the United States from now forward.

Second, it could simply just take too long for the remaining circuits to reach a consensus that nonconsensual recording is protected by the First Amendment. After all, it took the First Circuit an entire decade to get to that holding.⁸³ Third, the Supreme Court has turned down the opportunity to rule on this right twice in 2021 alone, among other denials of certiorari on this issue in past years, so it does not seem likely that they will issue a ruling on this question in the near future.⁸⁴ Finally, a judicial solution would only affirm the right to record, without establishing civilian oversight boards, which truly make this a comprehensive reform. Without civilian oversight and independent prosecutorial investigations, protecting the right to record will not unleash its full potential to hold police officers accountable for misconduct.

2. Fourth Amendment & Privacy Interests

The Fourth Amendment was intended to act as “a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution.”⁸⁵ So which abuses did the colonists experience that necessitated this protection? The answer is the King’s use of “general warrants” and “writs of assistance.”⁸⁶

⁸² Tyler Finn, *Qualified Immunity Formalism: “Clearly Established Law” and the Right to Record Police Activity*, 119 COLUM. L. REV. 445 (2019) (“The Supreme Court’s qualified immunity jurisprudence provides little guidance on a central component of the doctrine: the proper sources of ‘clearly established law.’ As a result, lower courts often resort to a restrictive definition of clearly established law, requiring a controlling precedent in the jurisdiction where the violation took place. This formalist approach unmoors qualified immunity from its intended purpose: ensuring that public officials are subject to liability only when they have fair warning about the legality of their conduct.”).

⁸³ *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 843–44 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021).

⁸⁴ *See Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (Nov. 1, 2021); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (Nov. 22, 2021).

⁸⁵ *See United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). This dissent later became recognized by the Court, when the above-the-line quote was reiterated by the majority in *Chimel v. California*, 395 U.S. 752, 761 (1969).

⁸⁶ *See Thomas K. Clancy, The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 992–93 (2011) (explaining that “general warrants” and “writs of assistance,” issued by the King, did not expire and allowed customhouse officers to

General warrants are warrants that provide law enforcement the broad authority to conduct searches or seizures of unspecified persons or places without the basis of probable suspicion.⁸⁷ General warrants lack the United States' modern constitutional requirement that the warrants contain a sufficiently particularized description of the person or thing to be seized or the place to be searched.⁸⁸ Writs of assistance are a type of general warrants.⁸⁹ Writs were issued as documents, serving as directives, on behalf of the King, "order[ing] a wide variety of persons to help the customs man make his search."⁹⁰ No evidence of any crime or information of contraband being stored at a particular place formed the basis of these directives.⁹¹ Customs officials just conducted searches wherever they chose.⁹²

Put simply, using these tools, whether or not the target was suspected of a crime, the King could order officers to carry out searches of anyone, anytime, and anywhere.⁹³ These warrants were abused and weaponized by the King, often against political enemies.⁹⁴ John Adams's comments make clear that this issue played a significant part in the "controversy between Great Britain and America" as a whole, and that Otis's argument in the *Writs* case was the place and time where "the child [of] Independence was born."⁹⁵ Ultimately, the founders'

forcibly enter and search wherever they may please within any house for smuggled goods without requiring specificity as to the particular home or goods being sought).

⁸⁷ Khizar A. Sheikh, *I Always Feel Like Somebody's Watching Me Warrantless Searches of Computer Hard Drives by the Government*, N.J. LAW. 5, 5 (Feb. 2013) (citing *Ellison v. Balinski*, 625 F.3d 953, 958 (6th Cir. 2010) and *Steagald v. United States*, 451 U.S. 204, 220 (1981)) (discussing the history of the Fourth Amendment: "The history of the Fourth Amendment demonstrates that it was 'enacted in part to curb the abuses of general warrants, devices which provided British officers with broad discretion to search the homes of citizens of the Colonies for evidence of vaguely specified crimes.'").

⁸⁸ *Id.* ("The chief purpose of the particularity requirement is to prevent general searches by requiring a neutral judicial officer to confine the scope of a search to those areas and items for which there exists probable cause that a crime has been committed.").

⁸⁹ Clancy, *supra* note 86, at 992–93.

⁹⁰ *Id.* at 991 (internal quotation marks omitted) (quoting M.H. SMITH, THE WRITES OF ASSISTANCE CASE 29 (1978)).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 992–94 (explaining the *Writs of Assistance Case* in colonial Massachusetts, where a group of Boston merchants retained attorney James Otis to represent their cause against the use of writs of assistance).

⁹⁴ M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 909 (2010).

⁹⁵ Letter from John Adams to Abigail Adams (July 3, 1776), reprinted in *John Adams to Abigail Adams*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-02-02-0016> [<https://perma.cc/TFY7-FF6W>]; (The day that the Declaration of Independence was agreed to, Adams wrote, in a letter to his wife, that "[w]hen [he] look[ed] back to the year 1761, and recollect[ed] the argument concerning writs of assistance in the superior court, which [he] ha[s] . . . considered as the commencement of [the] controversy between Great Britain

desire to protect the rights of citizens against government intrusion was the chief catalyst of not only the Fourth Amendment, but the war for independence and founding of the United States as a whole.

The use of modern technology by law enforcement and multinational private companies has threatened the personal freedoms of our nation's citizens.⁹⁶ However, because such technology is ubiquitous, it has simultaneously granted tools to citizens that can allow individuals to keep a close watch on our government officials as well.⁹⁷ Therefore, more than ever before, it is necessary for Congress to reimagine this early zeal for independence by enacting legislation to balance privacy rights and allow citizens to keep government officials in check.⁹⁸

B. *The Fourth Amendment's "Reasonable Expectation of Privacy"*

In *Katz v. United States*, the United States Supreme Court adopted the seminal "reasonable expectation of privacy" standard that still governs Fourth Amendment privacy issues today.⁹⁹ Acting on their suspicion that Katz was engaging in illicit transmission of gambling information over a public phonebooth line, federal agents attached a device to the phonebooth to eavesdrop on his conversations.¹⁰⁰ The Court held that when Katz entered the phonebooth and shut the door behind him, he demonstrated an expectation of privacy and that such expectation was reasonable.¹⁰¹ This reasoning led the Court to hold that the wiretapping of Katz's phone call in that public phonebooth violated the Fourth Amendment and put forth a two-prong test for determining whether a person has a reasonable expectation of privacy.¹⁰²

and America . . . [he] [was] surprised at the suddenness as well as greatness of this revolution"); John Adams, Correspondence to William Tudor, in 10 THE WORKS OF JOHN ADAMS 248 (Charles Francis Adams ed., 1851) (noting John Adams writing that "[the] audience appeared to [him] . . . as [he] did . . . ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.").

⁹⁶ See Pearlman & Lee, *supra* note 31, at 738–39.

⁹⁷ Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1315 (2018).

⁹⁸ See *infra* Part III.

⁹⁹ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

¹⁰⁰ *Id.* at 354.

¹⁰¹ *Id.* at 352.

¹⁰² *Id.* at 361 (Harlan, J., concurring) (explaining that the two-part test examines (1) whether the person exhibited an actual, subjective expectation of privacy and (2) whether that expectation is one that society recognizes as reasonable).

Katz was a landmark decision which centered the focus of Fourth Amendment privacy protections around individuals rather than locations.¹⁰³ However, although the Court was largely accurate in analyzing the Amendment’s historical intent, it failed to outline the contours of such a right.¹⁰⁴ As a result, police officers’ privacy interests in public have largely been overstated in later cases.¹⁰⁵ The Court’s failure to distinguish government officials’ (including police officers’) privacy from that of private citizens was shortsighted. Now, with *Katz*’s protection, qualified immunity,¹⁰⁶ and extraordinary surveillance capabilities, police officers have been enabled to monitor citizen conduct, while citizens’ right to monitor police conduct has not been adequately protected.¹⁰⁷

In the wake of *Katz*, if a suspect speaks in the presence of a police officer, the suspect may not have a reasonable expectation of privacy in their communications.¹⁰⁸ That is because, as proclaimed in that case, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”¹⁰⁹ Meanwhile, in this same situation, the police officer may be shielded by wiretap statutes, protecting their privacy.¹¹⁰

¹⁰³ *Id.* at 351 (“The petitioner has strenuously argued that the booth was a ‘constitutionally protected area.’ The Government has maintained with equal vigor that it was not. But . . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

¹⁰⁴ *See generally id.* (discussing the Fourth Amendment as it relates to privacy rights).

¹⁰⁵ *See* Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers’ Power*, 117 YALE L.J. 1549, 1555–57 (2008) (explaining various contexts and wiretap laws under which courts have extended police privacy to and beyond what police could reasonably expect not to be recorded, and that such analysis is improper and contrary to public interest).

¹⁰⁶ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”).

¹⁰⁷ *See* Ángel Díaz, *New York City Police Department Surveillance Technology*, BRENNAN CTR. FOR JUST. (Oct. 7, 2019), <https://www.brennancenter.org/our-work/research-reports/new-york-city-police-department-surveillance-technology> [<https://perma.cc/A4JD-RCK9>].

¹⁰⁸ *Katz*, 389 U.S. at 351.

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.*, CONN. GEN. STAT. ANN. §§ 53a-187, 53a-189, 52-570d (West, Westlaw current through Gen. Statutes of Conn., Revision of 1958, Revised to Jan. 1, 2023); FLA. STAT. ANN. § 934.03(3)(d) (West, Westlaw current with laws and joint resolutions in effect from the 2022 2d Reg. Sess. and Special A, C, and D Sess. of the 27th Leg.); 720 ILL. COMP. STAT. § 5/14-2(a)(1)–(2) (West, Westlaw current through P.A. 102-1140 of the 2022 Reg. Sess.); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West, Westlaw current through all legis. from the 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 272, §§ 99(B)(4), 99(C)(1) (West, Westlaw current through the 2022 2d Ann. Sess.); MICH. COMP. LAWS ANN. § 750.539(c) (West, Westlaw current through P.A. 2023, No. 3, of the 2023 Reg. Sess., 102nd Leg.); MONT. CODE ANN. § 45-8-213 (West,

This means that in the same conversation, the officer and citizen possess different levels of rights, and the imbalance unfortunately tips towards the wrong direction. As a result of this imbalance, should this suspect record evidence of abuse by the officer, they could be arrested for violating the wiretap statute. Additionally, if the suspect is able to successfully bring a § 1983 lawsuit—an action which would seek to hold a police officer civilly liable for their constitutional violations—they would likely be barred from introducing the recording as evidence.¹¹¹ This is because the evidence would have been illegally obtained, and thus, inadmissible.

Since *Katz* was decided in 1967, technology continues to proliferate and evolve, which, in turn, has also distorted the public's perception of what information may be considered "private" or "public."¹¹² This open question has been litigated in court, bringing forth decisions that are useful to demonstrate how such proliferation can, and has, slowly diminished privacy expectations.¹¹³ In *Kyllo v. United States*, for example, federal agents suspected Danny Kyllo was growing marijuana in his home and proceeded to use a thermal imaging device to view heat waves emanating from the home as evidence of a grow operation.¹¹⁴ Writing for the majority, Justice Scalia found that the police violated Kyllo's constitutional rights because all of the details of the home that they viewed were "intimate details" and that when "the Government uses a device that is not in general public use . . . the surveillance is a 'search' and is presumptively unreasonable without a warrant."¹¹⁵ The fact that the officers used devices that were not "in general public use" was critical to the Court's decision that Kyllo had a reasonable expectation of

Westlaw current through the 2021 Sess. of the Mont. Legis.); N.H. REV. STAT. ANN. § 570-A:2(I-a) (West, Westlaw current through Ch. 345 of the 2022 Reg. Sess.); OR. REV. STAT. ANN. §§ 165.540, 165.535 (West, Westlaw current through laws enacted in the 2022 Reg. Sess. of the 81st Gen. Assemb.); 18 PA. CONS. STAT. ANN. §§ 5702–04 (West, Westlaw current through 2022 Reg. Sess. Act 166); WASH. REV. CODE ANN. § 9.73.030 (West, Westlaw current with all legis. from the 2022 Reg. Sess. of the Wash. Leg.).

¹¹¹ Johl, *supra* note 39 at 203.

¹¹² See Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/> [<https://perma.cc/B7RK-799F>] (explaining that roughly 63 percent of Americans feel that "[i]t is not possible to go through daily life without the government collecting data about them" and 84 percent of Americans "say they have very little or no control over the data that government . . . collect[s] about them").

¹¹³ See *generally* *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the officers used devices that were not in "general public use," and this was a key issue in determining whether one had a reasonable expectation of privacy).

¹¹⁴ *Id.* at 29–30.

¹¹⁵ *Id.* at 38, 40.

privacy and that the search was unconstitutional.¹¹⁶ This implies that there may be a reduced expectation of privacy when one uses technology that *is* in general public use.¹¹⁷ That is, technology that is readily available to people in the general public.

Courts have not provided a clear picture of what constitutes “general public use.”¹¹⁸ The *Kyllo* Court highlighted the distinction between merely visually observing and using sense-enhancing technology.¹¹⁹ Over a decade later, in *United States v. Jones*, the Court cited *Kyllo* to make this same point, as Justice Scalia wrote that sense-enhancing technology “explore[s] details of the home that would previously have been unknowable.”¹²⁰ However, as many scholars have noted, using a cellphone to record video and audio is undoubtedly considered general public use and, given the ubiquity of handheld devices with advanced technology, certain sense-enhancing technologies may be in general public use as well.¹²¹

Under this reasoning, any person who is operating in public will likely have a decreased expectation of privacy and could expect that they may be filmed.¹²² Ultimately, if individual citizens have a decreased expectation of privacy, and may be recorded by cellphone in public, then police officers should be subject to the same treatment. Recording devices are ubiquitous; this ubiquity makes it increasingly unreasonable for police to expect that their official conduct will go unrecorded.¹²³ This assumption is also consistent

¹¹⁶ *Id.* at 34. This distinction has garnered criticism from those who believe it allows for regular people and police to take actions which generally intrude on one’s privacy in any understanding of the word, merely because the device is commonly used by the general public. See Quin M. Sorenson, *Losing a Plain View of Katz: The Loss of a Reasonable Expectation of Privacy Under the Readily Available Standard*, 107 DICK. L. REV. 179, 198 (2002).

¹¹⁷ *Id.* at 200–01 (“[*Kyllo*] provides no guidance to lower courts on the proper substantive standard to determine whether a technology is readily available.”).

¹¹⁸ Compare *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (“We do not . . . call into question conventional surveillance techniques and tools, such as security cameras.”) with *State v. Jones*, 903 N.W.2d 101, 118 (S.D. 2017) (finding that pole camera surveillance of a person’s residence constituted a search despite, as the dissent pointed out, the fact that “video cameras have been in general public use for years, if not decades”).

¹¹⁹ *Kyllo*, 533 U.S. at 34–35.

¹²⁰ *United States v. Jones*, 565 U.S. 400, 412 (2012); *Kyllo*, 533 U.S. at 40.

¹²¹ See, e.g., Sheryl Maccarone, *Moving Past the “General Public Use” Standard: Addressing Fourth Amendment Policy Concerns Amidst the Development of New Surveillance Technology*, 45 SW. L. REV. 199, 210 (2015).

¹²² See Mike Petridis, *In General Public Use: An Unnecessary Test in Fourth Amendment Searches Using Advanced Sensing Technology*, 36 TOURO L. REV. 577, 587–88 (2020) (explaining that searches like the one at issue in *Kyllo* could soon be considered reasonable, given that it will be possible to perform them with a device in general public use: infrared camera attachments for cellphones).

¹²³ *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/7GYB-KZRD>] (noting that 97% of Americans now own some sort of cellphone).

with the *Katz* majority's assertion that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹²⁴

These cases analyze privacy in individuals' capacities as private citizens, when the constitutional protection should theoretically be at its height. Later circuit court cases have diminished police officers' expectation of privacy when working in their official capacities.¹²⁵ Some courts have extended this decreased privacy right to police officers' professional records—particularly for records of past misconduct.¹²⁶

While it may appear that the Fourth Amendment should not bar citizens from recording on-duty police officers, at least in public, legislative bodies have created further hurdles that can suppress citizens from exercising this right.

C. *Legislative Barriers to Recording Police: Wiretap, Antirecording & Antiprotest Statutes*

Generally, wiretapping refers to "[e]lectronic or mechanical eavesdropping . . . done by law-enforcement officers under court order, to listen to private conversations."¹²⁷ However, both federal and state wiretap statutes expand the scope of wiretap application beyond the Black's Law Dictionary definition.¹²⁸

¹²⁴ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹²⁵ See *Gwynn v. City of Phila.*, 866 F. Supp. 2d 473, 482 (E.D. Pa. 2012), *aff'd*, 719 F.3d 295 (3d Cir. 2013) ("Public employees such as police officers are entitled to a reasonable expectation of privacy," for Fourth Amendment purposes, in their place of work; "[h]owever, police officers generally have a diminished expectation of privacy compared to other government employees.") (internal citations omitted).

¹²⁶ See Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 177–78 (2019); see also *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988) (explaining that the records requested contained information including "prior involvement in disciplinary proceedings or citizen complaints filed against the officers. The privacy interest in this kind of professional record is not substantial, because it is not the kind of 'highly personal' information warranting constitutional safeguard."). But see Kallie Cox & William H. Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, AP NEWS (May 12, 2021, 10:02 AM), <https://apnews.com/article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c> [<https://perma.cc/E6R9-7SH5>] (explaining that some, but not all, states have laws making police disciplinary records available to the public and outlining the laws of each of the fifty states).

¹²⁷ *Wiretapping*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹²⁸ Federal and state wiretap statutes encompass not only eavesdropping done by law enforcement, but also eavesdropping done by citizens. See, e.g., 18 U.S.C. § 2510 (defining wiretap through its definitions of "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device"); see, e.g., N.Y. PENAL LAW § 250.00 (McKinney, Westlaw current through L.2022, chapters 1 to 841) (defining wiretapping as "the intentional overhearing or recording of a telephonic or telegraphic communication by a

1. Federal Wiretap Statute

In 1968, in response to *Katz*, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.¹²⁹ This statute established the Federal Wiretap Act,¹³⁰ which restricts the use of devices to intercept oral and wire communications of both citizens and federal agents.¹³¹ This law addressed both bugging, which is the use of a secret recording device in a secret space, as well as wiretapping, which includes the interception of private telephone calls.¹³² In 1986, Congress recognized that the Federal Wiretap Act was ill-equipped to address the rise of modern technology and thus passed the Electronic Communications Protection Act (ECPA).¹³³ The ECPA, among other things, subjected electronic communications to protection, including a broad swath of computer communications.¹³⁴ While the ECPA was intended to, and does, protect citizens from privacy intrusions, state wiretap laws add another layer adding to the complexities that this note looks to solve.¹³⁵

2. State Wiretap Statutes

Most cases involving citizens recording the police are decided under state statutes because the ECPA does not contain a preemption clause.¹³⁶ However, even if it did, there is nevertheless a very low federal bar that is equivalent to or less restrictive than state statutes.¹³⁷ These statutes vary by state,

person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment.”).

¹²⁹ PRISCILLA M. REGAN, *LEGISLATING PRIVACY* 9 (1995) (“This law was passed largely in response to the Supreme Court ruling in *Katz* and because of congressional interest in organized crime.” (internal citation omitted)).

¹³⁰ 18 U.S.C. §§ 2511–12.

¹³¹ KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* 278 (15th ed. 2019).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See e.g.*, N.Y. PENAL LAW § 250.00 (McKinney, Westlaw current through L.2023, chapters 1 to 49, 61 to 120).

¹³⁶ This means that the text of the ECPA does not explicitly state that it is intended to supersede state law. Thus, in the area of wiretapping, state laws can operate without interference of the ECPA. The only law enforcement officers that are effectively governed by the ECPA are federal law enforcement (i.e., FBI agents).

¹³⁷ Under all-party (or two-party) consent statutes, if one is recording openly, they may record a conversation between others, because absent any objections, they are effectively putting the parties on notice that it is being recorded and the parties implicitly consent. However, if one is secretly recording communications they are, or are not, a part of, and does not obtain explicit consent from all-parties to the communications, then they are violating the statute. *See Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001).

with thirty-eight states and Washington, DC having laws that mirror the federal statute's "one-party-consent" framework.¹³⁸ One-party consent laws only require the consent of one party to the conversation being recorded to consent, which can be the person who is recording.¹³⁹ On the other hand, twelve states' laws follow an "all-party consent" framework.¹⁴⁰ All-party consent laws require that all parties to the conversation consent to recording, so the recorder cannot legally record unless all other parties consent to the recording.

Because wiretap statutes seek to protect individuals from unwanted privacy intrusions, statutes that require consent from all parties to a communication permissibly expand protections beyond the baseline set by the federal government.¹⁴¹ In a one-party consent jurisdiction, individuals can record their conversations with other persons regardless of whether that person would consent.¹⁴² However, in all-party consent statutes, consent is required and extends to police officers, so it also stymies the efforts of those who seek to exercise their right to record the police.¹⁴³ If one is in an "all-party consent" jurisdiction and the recording device is in plain view, that puts the officer on notice, and their consent might be implied.¹⁴⁴ However, even where the right to record the police in public is established, one could be violating the law if one secretly records audio, with or without video.¹⁴⁵ The complexity, beyond the Fourth Amendment, added by these laws is ultimately the reason that a legislative fix is required to solve this problem.

Wiretapping laws have been invoked to punish civilians for secretly recording their encounters with police.¹⁴⁶ This has occurred not only when the conversations were intercepted for unlawful or

("The [violation] here could have been avoided if, at the outset of the traffic stop, the defendant had simply . . . held the tape recorder in plain sight.")

¹³⁸ LUCY A. DALGLISH & GREGG P. LESLIE, *FIRST AMENDMENT HANDBOOK, REP. COMM. FOR FREEDOM OF THE PRESS* 1, 19 <https://www.rcfp.org/wp-content/uploads/imported/FAHB.pdf> [<https://perma.cc/2ZZS-ZLGY>]; see 18 U.S.C. § 2511.

¹³⁹ Johl, *supra* note 39, at 177 (2018).

¹⁴⁰ DALGLISH & LESLIE, *supra* note 138, at 19 (explaining that "California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington" are all-party consent states).

¹⁴¹ See *Commonwealth v. Vitello*, 327 N.E.2d 819, 833 (Mass. 1975) (explaining that the ECPA set a minimum standard of restriction in wiretap statutes that states may not lower).

¹⁴² Johl, *supra* note 39, at 177.

¹⁴³ *Id.*

¹⁴⁴ Schwartz & Rathi, *supra* note 62.

¹⁴⁵ 18 U.S.C. § 2511.

¹⁴⁶ See *Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001).

mischievous reasons,¹⁴⁷ or when police are in danger of being obstructed from conducting their official duties.¹⁴⁸ It also occurs when citizens are filming police officers that are engaged in misconduct, violence, or making lawful arrests or traffic stops.¹⁴⁹

Massachusetts provides a prime example of how all-party consent wiretap statutes have been weaponized against citizen recorders.¹⁵⁰ In *Commonwealth v. Hyde*, the defendant was convicted of violating Massachusetts's wiretap statute after secretly recording the police during a traffic stop.¹⁵¹ The majority, relying on the statute's preamble, reasoned that the statute "unequivocally banned" secret recording because the stricter statute was developed due to concern over the proliferation of recording devices.¹⁵² The dissent, however, found that the statute's legislative history begged the opposite conclusion.¹⁵³ Rather than contemplating this statute being applied to citizens recording the police, the dissent argued that the legislature chiefly aimed to define how police could engage in secret electronic surveillance of citizens suspected of organized crime and also protect the privacy of citizens.¹⁵⁴ The dissent's reasoning has slowly become the predominant view in many circuits across the country, but even if the entire nation comes to a judicial consensus, legislative action is necessary to truly protect the right and enable citizens to utilize that right to make real change.¹⁵⁵

¹⁴⁷ Teri Webster, *First Amendment 'Auditors' Filming Public Buildings, Police, Called 'Terrorists'—But Are They Really?*, BLAZE (Jan. 13, 2019), <https://www.theblaze.com/news/first-amendment-auditors-filming-public-buildings-called-terrorists-but-are-they-really> [<https://perma.cc/9AVT-6CJP>] ("I am definitely concerned," said Bob Paudert, the former police chief of West Memphis, Arkansas . . . [in explaining concerns of mischievous reasons to film the police]. "They're harassing city employees and government employees, and they've got no legitimate reason for being there other than just to film," Paudert continued. "They're trying to provoke these people to make an arrest or hit them or whatever. The problem is, the employees don't know how to handle it. They're not sure what to do.").

¹⁴⁸ Marc Freeman, *Recording A Cop in Florida? One Woman Got Arrested for It.*, S. FLA. SUN-SENTINEL (last updated May 6, 2021), <https://www.tampabay.com/news/2021/05/05/think-twice-before-you-whip-out-your-phone-and-record-a-cop-in-florida-you-could-be-arrested/> [<https://perma.cc/BKLA-9QPW>].

¹⁴⁹ Aracely Rodman, Comment, *Filming the Police: An Interference or a Public Service*, 48 ST. MARY'S L.J. 145, 147, 154–55 (2016).

¹⁵⁰ *Hyde*, 750 N.E.2d at 595–96 (2001).

¹⁵¹ *Id.* at 594–95.

¹⁵² *Id.* at 971.

¹⁵³ *Id.* at 607–8.

¹⁵⁴ *Id.*

¹⁵⁵ *Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 819 (1st Cir. 2020) (noting that the *Hyde* dissent asserted that the legislature did not intend to outlaw secret recording of a public interaction between police officers and citizens).

That said, the First Circuit, in *Project Veritas*, recognized that all-party consent statutes may be proper in some contexts but that such statutes fail to properly consider an individual's reasonable expectation of privacy, or lack thereof.¹⁵⁶ The court observed that Massachusetts's two-party consent law indiscriminately treats all individuals who engage in secret recording the same, regardless of how or why the filming occurs.¹⁵⁷ Imagine a person standing across the street from a public park, using their cellphone to record another civilian being mistreated by a police officer.¹⁵⁸ Now, imagine someone showing up to their ex-lover's private home, angrily recording a conversation while holding their phone under a table.¹⁵⁹ Both the police officer and the innocent ex-lover could be unaware that they are being recorded. But should both individuals recording in this instance be treated the same? That is, should we treat someone secretly gathering newsworthy information about government activity that is of interest of the public the same as someone who is secretly gathering information from a private citizen to use as blackmail against them? This court did not find such a result in accord with the US Constitution.¹⁶⁰ It found that the sweeping nature of the law rendered it insufficiently tailored to accomplishing either of the government's interests—namely, preventing civilians from interfering with police activity and protecting citizens' individual privacy interests.¹⁶¹

In short, amidst a plethora of case and statutory law, the states have a mix of one-party and all-party consent laws, and differing views on the permissibility of secret recording.¹⁶² Ultimately, this note proposes a federal one-party consent framework, which also permits secret recording, to preempt the lack of uniformity.¹⁶³

3. State and Local Reactions to Protests

Protests following the murder of George Floyd in the summer of 2020, many of which included violent clashes with

¹⁵⁶ See *Project Veritas Action Fund*, 982 F.3d at 838.

¹⁵⁷ *Id.* at 817.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ *Id.* at 836.

¹⁶² *Recording Calls and Conversations*, JUSTIA (last updated Oct. 2021), <https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/> [<https://perma.cc/N3ND-7XK7>].

¹⁶³ See *infra* Part III.

police and counter protestors, sparked a political firestorm.¹⁶⁴ In response, lawmakers across the nation passed highly reactionary legislation that would make it easier to punish protestors who broke laws, some of which also make it more difficult to cut police budgets and make it more difficult for injured protesters to seek damages in court.¹⁶⁵ Florida is a prime example of a state that has experienced such legislative action.¹⁶⁶ Appropriately, some of these bills incidentally, or in the case of Arizona, purposely and explicitly, outlaw recording police.¹⁶⁷

Florida is an all-party consent state, in which it is lawful for one to intercept oral or electronic communication only when all the parties to the communication have consented.¹⁶⁸ In 2021, Florida State Representative Alex Rizo (R-Hialeah) put forth a bill that would effectively prohibit recording police, even in the open.¹⁶⁹ The bill would make it unlawful to “[i]nterrupt, disrupt, hinder, impede, or interfere with” an officer within a thirty-foot radius, also criminalizing “indirect[] harass[ment].”¹⁷⁰ The officer would have full discretion to decide whether the law was violated, and the punishment would be a \$500 fine or a maximum of sixty days in jail.¹⁷¹ This bill is problematic for several reasons. First, being thirty feet away, depending on the landscape of the scene, can make it difficult for one to get a clear video of what they are witnessing, so many who are attempting to record will be within that “thirty-foot-radius.”¹⁷² Second, the language of the bill is extremely vague, leaving open questions. What defines harassment? Can an officer claim that being filmed on the job is harassment? Any legislative proposal must directly and unambiguously address these central questions.

Finally, other states are determined to unreservedly ban recording police officers. For example, in 2022, Arizona’s state

¹⁶⁴ See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [https://perma.cc/EK5N-6XWY].

¹⁶⁵ Sophie Quinton, *Republicans Respond to Black Lives Matter with Anti-Protest Bills*, PEW TRS. (Feb. 4, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/02/04/republicans-respond-to-black-lives-matter-with-anti-protest-bills> [https://perma.cc/BJ8L-FPQS].

¹⁶⁶ Billy Binion, *A New Florida Bill Could Criminalize Filming Cops on the Job*, REASON (July 27, 2021, 5:05 PM), <https://reason.com/2021/07/27/florida-bill-criminalize-filming-cops-first-amendment/> [https://perma.cc/K72R-ZTJY]; H.R. 11, 2021 Leg., Reg. Sess. (Fla. 2022).

¹⁶⁷ ARIZ. REV. STAT. ANN. § 13-3732.

¹⁶⁸ FLA. STAT. ANN. § 934.03 (West, Westlaw current with laws and joint resolutions in effect from the 2022 2d Reg. Sess. and Special A, C and D Sess. of the 27th Leg.).

¹⁶⁹ See Binion, *supra* note 166; H.R. 11.

¹⁷⁰ H.R. 11.

¹⁷¹ *Id.*

¹⁷² Binion, *supra* note 166.

legislature passed a bill that criminalizes the recording of police officers within eight feet of police activity.¹⁷³ By virtue of the American Civil Liberties Union and several news organizations, the District Court for the District of Arizona has enjoined this law.¹⁷⁴

Clearly, the judicial affirmation of the right to record police activity across half of the country has not deterred states from attempting to squelch the right. Federal legislation, to preempt any attempt to ban recording police, would provide the certainty necessary to avoid a chilling effect.¹⁷⁵ Furthermore, it would provide a nationwide, consistent framework that is sufficiently nuanced. This would explicitly define the contours of when and where citizens may film police, replacing the current framework where each circuit has a different idea of what sort of recording is protected—if the circuit even recognizes the right to begin with.

The Constitution was intended to protect the people from government intrusion, and many judicial decisions have highlighted this fact.¹⁷⁶ However, state and local laws have continuously applied these privacy principles to government officials as well, punishing citizens and journalists for documenting police activity.¹⁷⁷ This imbalance has not been

¹⁷³ H.B. 2319, 55th Leg., Second Reg. Sess. (Ariz. 2022). The bill reads in relevant part:

A. It is unlawful for a person to knowingly make a video recording of law enforcement activity if the person making the video recording is within eight feet of where the person knows or reasonably should know that law enforcement activity is occurring, either receives or has previously received a verbal warning from a law enforcement officer that the person is prohibited from making a video recording of a law enforcement activity within eight feet of the activity and continues to make a video recording of the law enforcement activity within eight feet of the activity.

...

E. For the purposes of this section, 'law enforcement activity' means any of the following:

1. Questioning a suspicious person.
2. Conducting an arrest, issuing a summons or enforcing the law.
3. Handling an emotionally disturbed or disorderly person who is exhibiting abnormal behavior.

Id.

¹⁷⁴ *Ariz. Broads. Ass'n v. Brnovich*, No. CV-22-01431-PHX-JJT, 2022 WL 4121198, at *2–3 (D. Ariz. Sept. 9, 2022).

¹⁷⁵ *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 808 (1969) (“The chilling effect focuses attention on the practical consequences of state action for the conduct of an individual.”).

¹⁷⁶ See *supra* Section I.A.

¹⁷⁷ *Arrest/Criminal Charge*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/arrest-criminal-charge/> [<https://perma.cc/4UKA-9AUP>] (tracking all of the arrests and detentions of journalists in the United States and

properly leveled by the judiciary, and, even if it eventually is, the vital interest at stake and rapid development of local laws undercutting the peoples' right require Congress to take action.

II. THE CURRENT SYSTEM'S SHORTCOMINGS CAN BE AMELIORATED THROUGH CIVILIAN RECORDING & OVERSIGHT

Citizens have a constitutional right to monitor the official duties of those who are sworn to enforce the law, and, as a matter of public interest, it is imperative to protect such a right to hold these officials accountable.¹⁷⁸ Currently, there are systems in place meant to hold police accountable and assist with internal investigations, but these fall short, as will be explained below. This Part will also highlight how civilian review boards utilizing civilian recordings will increase transparency and ultimately hold police officers accountable for their misconduct.

A. *Current Systems to Hold Police Accountable: Civil Actions & Body Cameras*

Despite the rarity of police officers being held accountable, there are currently options for citizens to complain about police misconduct and for offenders to be held liable criminally or civilly. Police departments have also implemented half-hearted efforts at reform. But these systems have failed to bring about any real change.

The United States Department of Justice Civil Rights Division accepts civilian reports of civil rights violations and sues or prosecutes violators on behalf of the victim.¹⁷⁹ Similarly, depending on the jurisdiction, one can file a civil suit, criminal complaint, or internal complaint.¹⁸⁰ Regarding civil suits, Section 1983 of the Civil Rights Act of 1871¹⁸¹ provides a statutory basis for such action. Also known as the "Ku Klux Klan Act," this law

noting that from January 1, 2017 to December 31, 2021 there were 265 arrests or detentions of journalists in the United States (144 of those occurred in 2020)).

¹⁷⁸ Project Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021); Fields v. City of Phila., 862 F.3d 353 (3d Cir. 2017); Sharpe v. Winterville Police Dep't, 59 F.4th 674 (4th Cir. 2023); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017); Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995); Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022); Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000).

¹⁷⁹ *Civil Rights Division*, U.S. DEP'T OF JUST., <https://civilrights.justice.gov> [<https://perma.cc/B6RW-Y4SU>].

¹⁸⁰ *See, e.g., File a Complaint of Police Misconduct*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <https://www1.nyc.gov/site/ccrb/complaints/file-online.page> [<https://perma.cc/4A33-F2N7>].

¹⁸¹ 42 U.S.C. § 1983.

was initially enacted in response to the entrenchment of white supremacist organizations in the South that used violence, intimidation, and other forms of terrorism to prevent African Americans from exercising their civil rights.¹⁸²

However, plaintiffs face practical and legal barriers to bringing claims and ultimately finding redress this way.¹⁸³ First, § 1983 actions are subject to a variety of procedural requirements that are difficult to navigate, especially for individuals without legal expertise.¹⁸⁴ Second, many victims of police misconduct are poor and do not have the financial resources to hire a lawyer, pay for expert witnesses, and pay other fees that must be incurred to mount a strong case against the government's attorneys.¹⁸⁵ Third, plaintiffs typically need to provide evidence that their rights were violated and it may be difficult to gather the requisite evidence, especially when there is no video footage.¹⁸⁶ Fourth, is the fact that the legal system has historically been biased in favor of law enforcement, which can make it difficult for plaintiffs to receive a fair trial and to hold police officers accountable for their actions.¹⁸⁷

Finally, the most significant barrier to bringing a § 1983 action is qualified immunity—a legal doctrine that shields government officials from liability for civil damages unless they “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁸⁸ Essentially, an officer may be entitled to qualified immunity even if their conduct ultimately violates someone's rights, unless that right was “clearly established” at the time it was violated. This is understandably a

¹⁸² Arturo Peña Miranda, “Where There Is a Right (Against Excessive Force), There Is Also a Remedy”: Redress for Police Violence Under the Equal Protection Clause, 65 UCLA L. REV. 1678, 1710–11 (2018).

¹⁸³ See Rachel A. Harmon, *Legal Remedies for Police Misconduct*, 2 REFORMING CRIM. JUST., 27, 34 (Erik Luna ed., 2017).

¹⁸⁴ Dani Kritter, *The Overlooked Barrier to Section 1983 Claims: State Catch-All Statutes of Limitations*, CAL. L. REV. BLOG (Mar. 2021), <https://californialawreview.org/the-overlooked-barrier-to-section-1983-claims-state-catch-all-statutes-of-limitations/> [<https://perma.cc/R2SC-3YV4>] (“A victim of police brutality faces a stressful and unfair sprint to the courthouse if they are required to file a complicated federal civil rights claim within one year of the date of their injuries.”).

¹⁸⁵ John McWhorter, *Police Brutality is Not Always About Race*, N.Y. TIMES (Feb. 7, 2023), <https://www.nytimes.com/2023/02/07/opinion/police-violence-race-poverty.html> [<https://perma.cc/EB3Z-VR59>].

¹⁸⁶ *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEPT. OF JUST. (last updated Oct. 13, 2020), <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> [<https://perma.cc/9FLU-Q8WK>].

¹⁸⁷ See Martin A. Schwartz, *How the Supreme Court Enables Police Excessive Force*, N.Y.L.J. (June 5, 2020, 12:30 PM), <https://www.law.com/newyorklawjournal/2020/06/05/how-the-supreme-court-enables-police-excessive-force/>.

¹⁸⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

major barrier when dealing with a right that has not been affirmed by every circuit court and has been untouched by the Supreme Court, like the right to record police officers.

Another commonly cited concern regarding police violence is that prosecutors are friendly with police and become disincentivized from charging officers who commit crimes.¹⁸⁹ It has been documented that the silence from police and toxic culture surrounding police misconduct extends to prosecutors, and even judges.¹⁹⁰ This leads to many prosecutors declining to prosecute police for crimes committed on the job.¹⁹¹

A recent and widespread technological tool used to monitor police activity is the body-worn camera (BWC).¹⁹² The idea of police walking around with cameras attached to their chests initially sparked a national debate.¹⁹³ Some of the most pertinent questions were whether these cameras have been effective for heightening police accountability and whether their implementation could incidentally expand the police state.¹⁹⁴ BWCs have been effective in finding hidden acts of misconduct, although evidence is unclear whether it has an overall effect on deterring such conduct.¹⁹⁵ However, there is scant evidence that the cameras have an effect on police use of force.¹⁹⁶ Furthermore, in many instances of police shootings, the cameras are often shut off, and the full story is ultimately told by bystander videos.¹⁹⁷

¹⁸⁹ Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 913 (2020).

¹⁹⁰ *Id.* at 905 (explaining that, in Chicago, prosecutors were expected “to align with the police at all costs—even when there were egregious errors in cases. Prosecutors were intimidated and taunted” or “could expect to have their cases taken from them” if they bucked expectations; and whistleblowers were marginalized to instill fear. “The same was true of [Chicago] police.”).

¹⁹¹ *Id.* at 913–15; Marilyn Mosby, *Prosecutors, Please Stand Up to the Police*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/george-floyd-protests-prosecutors.html> [<https://perma.cc/UD6B-8XN6>].

¹⁹² Thomas Gardiner & Patrick Molinari, *Body Cameras: A New Era in Policing*, 30 DCBA BRIEF 8, 8 (May 2018).

¹⁹³ *Id.* (“Body worn cameras, colloquially referred to as police body cameras, have sparked a national debate due to the social issues their use touches upon: police accountability, race relations, an expanding police state, or a citizen’s right to privacy.”).

¹⁹⁴ See *Research on Body-Worn Cameras and Law Enforcement*, NAT’L INST. OF JUST. (Jan. 7, 2022), <https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement> [<https://perma.cc/76FK-DX8C>]; Cynthia Lum et al., *Body-Worn Cameras’ Effects on Police Officers and Citizen Behavior: A Systematic Review*, CAMPBELL SYSTEMATIC REV. 1, 1–2, 35 (Sept. 9, 2020), <https://doi.org/10.1002/cl2.1112> [<https://perma.cc/35VS-FKU7>].

¹⁹⁵ Lum et al., *supra* note 194, at 2, 31–32; Bill Chappell, *Baltimore Police Caught Planting Drugs in Body-Cam Footage, Public Defender Says*, NPR (July 20, 2017, 9:35 AM), <https://www.npr.org/sections/thetwo-way/2017/07/20/538279258/baltimore-police-caught-planting-drugs-in-body-cam-footage-public-defender-says> [<https://perma.cc/NBR5-A62F>].

¹⁹⁶ Lum et al., *supra* note 194, at 20–21.

¹⁹⁷ *Id.* at 4.

Ultimately, BWCs have generally failed to curtail police misconduct and have been shoddily implemented, as illustrated by the circumstances surrounding the killing of Breonna Taylor.

In March 2020, Louisville police officers executed a search warrant, entering the apartment of Breonna Taylor by use of a battering ram.¹⁹⁸ It was believed her ex-boyfriend, who was not present on the scene, was receiving drug packages to the residence.¹⁹⁹ Ultimately, seven police officers, all of whom had their BWCs turned off, entered the residence and woke Ms. Taylor and her boyfriend, who fired a shot at the police thinking they were intruders.²⁰⁰ Officers returned fire, notably striking an unarmed Ms. Taylor five times.²⁰¹ One officer blindly shot ten rounds into the apartment, with a total of thirty-two bullets fired from all the police at the scene, through windows, walls, and ceilings.²⁰²

The lack of footage impeded the investigation, showing one of the various shortcomings of BWCs.²⁰³ Whether a BWC is on or off is at the discretion of officers and, without stricter regulations, police have ample opportunity to doctor or avoid uploading videos evidencing their wrongdoing, defeating the entire purpose of the cameras in the first place.²⁰⁴ BWCs and current civil complaint systems have not been a silver bullet for police accountability, and the various structural and procedural barriers continue to act as a shield.

¹⁹⁸ Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/DDG2-YQG3>].

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Tessa Duvall & Darcy Costello, *Breonna Taylor Was Briefly Alive After Police Shot Her. But No One Tried to Treat Her*, LOUISVILLE COURIER J. (last updated Mar. 13, 2021, 12:06 PM), <https://www.courier-journal.com/story/news/crime/2020/07/17/breonna-taylor-lay-untouched-20-minutes-after-being-shot-records/5389881002/> [<https://perma.cc/RW26-EWMX>].

²⁰³ See Ashleigh Mills, *The Trouble with Body Cameras*, SPECTRUM NEWS (Aug. 3, 2020, 3:44 PM), <https://spectrumnews1.com/ky/louisville/news/2020/08/03/body-cameras> [<https://perma.cc/QM2D-NPJR>].

²⁰⁴ Jay Stanley, *Abuses Show Police Departments Need to Take Cameras, Not Just Video, Into Evidence in Police Shootings*, ACLU (June 14, 2018, 12:45 PM), <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/abuses-show-police-departments-need-take-cameras> [<https://perma.cc/EL8W-83M8>]; Jack Molmud & Jesse Pagan, *Why Do Police Departments Edit Body-Worn Camera Footage?*, CBS 8 NEWS (SAN DIEGO) (May 11, 2021, 7:21 PM), <https://www.cbs8.com/article/news/local/why-do-police-departments-edit-body-camera-footage/509-79d63f03-260c-4bf5-af1d-50cb00cf1bb8> [<https://perma.cc/MLF8-PXWG>].

B. *Citizen Journalism: A Tool to Protect Citizens & Unleash Justice*

Citizen journalism—citizens reporting newsworthy events utilizing modern technology and often prior to mainstream media’s arrival to the scene—harbors great benefits for society as a whole.²⁰⁵ There is no doubt that Americans’ trust in the mainstream media has waned over the past several years.²⁰⁶ Although the source of such distrust has been the subject of debate,²⁰⁷ a majority of Americans have some, but not strong, trust in the news outlets that they themselves choose to consume.²⁰⁸ In contrast, citizen journalists, unrestrained by large corporate structures and donors, can get access to many scenes that mainstream media cannot, and connect with other citizens’ perspectives.²⁰⁹ That said, citizen journalists face massive hurdles as they compete with mega-corporations and often go uncredited and uncompensated for their work.²¹⁰

²⁰⁵ See D. Jasun Carr et al., *Cynics and Skeptics: Evaluating the Credibility of Mainstream and Citizen Journalism*, JOURNALISM & MASS COMM. Q. 452, 453–54 (2014) (defining citizen journalism broadly as “amateur news reporting” and, conversely, narrowly as “the reporting of newsworthy events, usually disasters or crises (events that the mainstream media cannot predict), typically using new media technologies, and often before the mainstream media arrive on the scene”); see also Jason Stverak, *The Pros and Pros of ‘Citizen Journalism’*, USC ONLINE JOURNALISM REV. (Mar. 12, 2010), <https://www.ojr.org/the-pros-and-pros-of-citizen-journalism/> [<https://perma.cc/D6DW-PQUZ>].

²⁰⁶ Andy Meek, *Fewer Americans than Ever Before Trust the Mainstream Media*, FORBES (Feb. 20, 2021, 5:05 PM), <https://www.forbes.com/sites/andymeek/2021/02/20/fewer-americans-than-ever-before-trust-the-mainstream-media/?sh=2179f752282a> (noting that 56 percent of Americans agree that “[j]ournalists and reporters are purposely trying to mislead people by saying things they know are false or gross exaggerations.” *Id.* “59 percent of Americans . . . agree . . . [t]hat ‘most news organizations are more concerned with supporting an ideology or political position than with informing the public.’ And 61 percent of Americans think that ‘[t]he media is not doing well at being objective and non-partisan.”). *Id.* (quoting EDELMAN, EDELMAN TRUST BAROMETER 25 (2022), <https://www.edelman.com/sites/g/files/aatuss191/files/2021-03/2021%20Edelman%20Trust%20Barometer.pdf> [<https://perma.cc/AJA-6WFFV>]).

²⁰⁷ Michael Schudson, *The Fall, Rise, and Fall of Media Trust*, COLUM. JOURNALISM REV. (Winter 2019), https://www.cjr.org/special_report/the-fall-rise-and-fall-of-media-trust.php [<https://perma.cc/3UTF-WHML>].

²⁰⁸ Jeffrey Gottfried, *Republicans Less Likely to Trust Their Main News Source if They See It as ‘Mainstream’; Democrats More Likely*, PEW RSCH. CTR. (July 1, 2021), <https://www.pewresearch.org/fact-tank/2021/07/01/republicans-less-likely-to-trust-their-main-news-source-if-they-see-it-as-mainstream-democrats-more-likely/> [<https://perma.cc/UY57-4RA4>] (noting that only 38 percent of Americans expressed that they have a “great deal” of trust” in the political news they receive from their main news source).

²⁰⁹ See Kayla Drake, *‘People Like Me’: Black Citizen Journalists Fill Trust Gap in St. Louis Media Landscape*, NPR: ST. LOUIS PUB. RADIO (July 24, 2020, 5:13 AM), <https://news.stlpublicradio.org/2020-07-25/people-like-me-black-citizen-journalists-fill-trust-gap-in-st-louis-media-landscape> [<https://perma.cc/3QUE-BZ2P>].

²¹⁰ Taya Graham & Stephen Janis, *Cops Hate Citizen Journalists, but They’re Not The Only Ones*, REAL NEWS NETWORK (July 23, 2021), <https://therealnews.com/cops-hate-citizen-journalists-but-theyre-not-the-only-ones> [<https://perma.cc/47N6-VVBR>].

Traditionally, journalists would make calls to gather information from trusted sources, such as government officials and police officers.²¹¹ However, as cellphone videos become more commonplace—countering the official narratives of police—professional journalists have increasingly turned to these videos to report the truth.²¹² Concerns over the rise of “misinformation” have led some to believe that people should only consume information from accredited news sources.²¹³ But while citizen journalism has been inaccurate in some instances, corporate news outlets often utilize these very videos and reports.²¹⁴ Most of the concern regarding recordings of the police is that the video or audio may be doctored, but ensuring a thorough review of all footage by independent prosecutors, civilian board members, and police members, as this proposal does, should ease concerns about fake or manipulated videos wrongly smearing officers.²¹⁵

Ultimately, citizen journalism can organically convey intimate accounts of real life occurrences.²¹⁶ Videos of incidents can prove what occurred on the scene better than after-the-fact news reporting or witness accounts.²¹⁷ Thus, as Chief Judge Barron said in *Project Veritas*, citizen journalism can “play a critical role in informing the public about how the police are conducting themselves, whether by documenting their heroism, dispelling claims of their misconduct, or facilitating the public’s ability to hold them to account for their wrongdoing.”²¹⁸ Further, evidence has failed “to show how secret, nonconsensual audio [and video] recording of police officers doing their jobs . . . interferes with their mission.”²¹⁹ Since citizen journalism informs the citizenry on matters of public concern while maintaining an intimate connection to the scene, there is

²¹¹ Denetra Walker, *How Citizen Journalists, Cell Phones and Technology Shape Coverage of Police Shootings*, UNIV. S.C.: COLL. INFO. & COMM’N (June 2, 2020), https://sc.edu/study/colleges_schools/cic/journalism_and_mass_communications/news/2020/citizen_journalists_cell_phones_shape_coverage.php [<https://perma.cc/XKP4-8ERZ>].

²¹² *Id.*

²¹³ See Simeon Yates, *‘Fake News’—Why People Believe It and What Can Be Done to Counter It*, CONVERSATION (Dec. 13, 2016, 4:10 AM), <https://theconversation.com/fake-news-why-people-believe-it-and-what-can-be-done-to-counter-it-70013> [<https://perma.cc/5Y3K-3G5G>].

²¹⁴ See Drake, *supra* note 209.

²¹⁵ For an extensive discussion on the characteristics of misinformation online, see generally Liang Wu et al., *Misinformation in Social Media: Definition, Manipulation, and Detection*, 21 SIGKDD EXPL. NEWSL. 80 (2019); Whitt Flora, Opinion, *Commentary: Citizen Videos of Police Don’t Always Tell the Whole Story*, PHILA. INQUIRER (July 19, 2016), https://www.inquirer.com/philly/opinion/20160719_Commentary_Citizen_videos_of_police_don_t_always_tell_the_whole_story.html [<https://perma.cc/A53E-U2RB>].

²¹⁶ Walker, *supra* note 211.

²¹⁷ *Id.*

²¹⁸ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 837 (1st Cir. 2020).

²¹⁹ *Id.*

little benefit to stifling this form of newsgathering.²²⁰ Further, these recordings are not only useful for reporting accurate news accounts, but they also can be used as evidence for court and citizen oversight and investigations into police misconduct.²²¹

C. *Transparency Through Civilian Oversight*

Achieving the goals of holding police accountable and building trust requires a degree of transparency.²²² Despite the difficulty in gaining support for civilian oversight boards, the system has shown to harbor enormous opportunity to advance these transparency goals.²²³ Transparency is a difficult metric to quantify, but it has been reported that 78 percent of civilian oversight agencies publish public reports on their findings.²²⁴ Without civilian oversight agencies, many victims and communities are left searching for answers regarding internal investigations and are met with silence from with police departments.²²⁵ Citizens should be privy to the status and process of such investigations, and they would with a civilian oversight board in place.²²⁶

Keeping citizens updated on the status of investigations into officers who have abused their communities is a net societal benefit of civilian oversight boards. Officers like Derek Chauvin have had a long track record of violent encounters.²²⁷ Often times, these incidents go unreported, or are misreported.²²⁸ Had there been action taken against Chauvin before this incident, Mr. Floyd

²²⁰ Walker, *supra* note 211.

²²¹ See *infra* Sections II.D–E.

²²² Erik Bakke, Note, *Predictive Policing: The Argument for Public Transparency*, 74 N.Y.U. ANN. SURV. AM. L. 131, 142 (2018).

²²³ JOSEPH DE ANGELIS ET AL., CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: ASSESSING THE EVIDENCE 1, 42 (Sept. 2016), https://d3n8a8pro7chmx.cloudfront.net/nacole/pages/161/attachments/original/1481727974/NACOLE_AccessingtheEvidence_Final.pdf [<https://perma.cc/Q8BA-ZNMQ>].

²²⁴ *Id.*

²²⁵ See Helen Ubinas, Opinion, *Lack of Police Transparency Breeds Anger and Mistrust*, PHILA. INQUIRER (Feb. 19, 2015), https://www.inquirer.com/philly/news/20150219_Lack_of_police_transparency_breeds_anger_and_mistrust.html [<https://perma.cc/53ZY-E7NV>] (explaining the experience of a Philadelphia mother whose son was killed by police and how the lack of answers and transparency has increased frustration, distrust, and has raised many questions).

²²⁶ See *id.*

²²⁷ Derek Hawkins, *Officer Charged In George Floyd's Death Used Fatal Force Before And Had History Of Complaints*, WASH. POST (May 29, 2020, 6:47 PM), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/> [<https://perma.cc/RF7X-ZYUA>].

²²⁸ Harmeet Kaur, *Videos Often Contradict What Police Say in Reports. Here's Why Some Officers Continue to Lie*, CNN (last updated June 6, 2020, 8:55 AM), <https://www.cnn.com/2020/06/06/us/police-reports-lying-videos-misconduct-trnd/index.html> [<https://perma.cc/V5JU-ZVNT>].

may still be alive today.²²⁹ Providing citizens the ability to feel comfortable recording routine encounters may shed light on less lethal abuses of power, encouraging action to be taken before that officer eventually does irreparable damage.²³⁰

Transparency also stands to benefit police officers and departments, who face an elevated risk of outrage from the public after their violence becomes public. After a grand jury decided not to charge any of the Louisville police officers in the killing of Breonna Taylor, protesters shot two members of the force during demonstrations.²³¹ Body camera footage was initially withheld in that case.²³² When people feel left in the dark over the cause of a family or community member's death, they are far more likely to resent and distrust those involved.²³³ Further, the unnecessary clouding of truth leads people to come to their own conclusions, to find some answer for the terrible injustice that has occurred, which rarely ends well for anyone.²³⁴ These issues are undoubtedly harmful for the citizens who are left without answers and also the police who become subject to heightened criticism and may then face threats of violence.

Many scholars have asserted that one's perception of a law as reasonable and fair incentivizes them to follow the law more than a risk of being punished does.²³⁵ This is especially true when considering societal factors that may lead individuals to be less risk-averse than others when prison time is on the table.²³⁶ This idea of legitimacy extends to a department as a whole; when people perceive the force as being reasonable and fair, they are

²²⁹ See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 467–68 (2004).

²³⁰ Jill McCorkel, *Police Officers Accused of Brutal Violence Often Have a History of Complaints By Citizens*, CONVERSATION (May 31, 2020, 4:01 PM), <https://theconversation.com/police-officers-accused-of-brutal-violence-often-have-a-history-of-complaints-by-citizens-139709> [<https://perma.cc/QH57-9NJJ>].

²³¹ *2 Officers Shot in Louisville Protests Over Breonna Taylor Charging Decision*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/breonna-taylor-decision-verdict.html> [<https://perma.cc/3Y3C-KSSZ>].

²³² See April Siese, *Lawsuit Claims There Almost Has to Be Bodycam Footage of Breonna Taylor Raid*, CBS NEWS (July 9, 2021, 2:32 AM), <https://www.cbsnews.com/news/breonna-taylor-killing-lawsuit-bodycam-footage/> [<https://perma.cc/3YLS-ADTH>].

²³³ See, e.g., Ubinas, *supra* note 225.

²³⁴ *Id.* (“Police say . . . Brandon Tate-Brown reached for a gun in his car during a struggle with officers . . . His family says they believe that he was unjustly stopped by racist cops and that the gun was planted. . . . [T]his is exactly what happens when people are left in the dark.”).

²³⁵ Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 398–99 (2001).

²³⁶ Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1650–51 (2019) (“I could not appreciate the fact that the rest of my life would be marred by an adult criminal record; in fact, I couldn’t have cared less at the time. In my hood, jail was expected, almost like a rite of passage.”).

more likely to respect the force.²³⁷ As recently as 2020, racial justice, antipolice, and abolitionist movements have been calling for this exact goal.²³⁸ The more transparent the processes of holding officers accountable, the more reasonable and fair the law is applied to such instances, the more likely people are to respect the force.²³⁹ It is difficult to imagine a more amicable relationship between communities and police than one which fosters a mutual understanding of trust.²⁴⁰ When communities work alongside the police, the increased transparency bolsters the community's confidence in their police forces and helps make communities safer.²⁴¹

D. *Evidentiary Value of Recordings & Combatting "Testilying"*

Police step into the courtroom for many reasons, from testifying for the prosecution against criminals to taking the defense for killing a citizen.²⁴² Whether the video works in favor of the police or members of the public challenging police conduct, the evidentiary value of having bystander video to replace he-said-she-said disputes cannot be overstated.²⁴³ When footage of Mr. Floyd's murder was shown during Derek Chauvin's murder trial, it struck the hearts of jurors.²⁴⁴ Not only did it have an

²³⁷ Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 765 (2016) ("Scholars have termed this notion procedural justice. The fundamental idea is to communicate to citizens at all times the reasons why an agent of the criminal justice system is doing what she is doing, and to give an opportunity for that citizen to be heard. When . . . engagement is absent, resentment builds." (footnotes omitted)).

²³⁸ See Carrie Hutchinson, *Which Part of "No Justice, No Peace" Do You Not Understand?*, SANTA BARBARA INDEP. (Sept. 30, 2020, 4:23 PM), <https://www.independent.com/2020/09/30/which-part-of-no-justice-no-peace-do-you-not-understand/> [<https://perma.cc/LD4J-GJVN>].

²³⁹ See *Importance of Police-Community Relationships and Resources for Further Reading*, U.S. DEPT OF JUST., <https://www.justice.gov/file/1437336/download> [<https://perma.cc/ZR7M-S298>].

²⁴⁰ *Id.*

²⁴¹ Olugbenga Ajilore, *How Civilian Review Boards Can Further Police Accountability and Improve Community Relations*, SCHOLARS STRATEGY NETWORK (June 25, 2018), <https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations> [<https://perma.cc/MKL2-FKJ9>].

²⁴² Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 2–3, 11 (2018).

²⁴³ Vincent Nguyen, *Watching Big Brother: A Citizen's Right to Record Police*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 637, 667 (2018).

²⁴⁴ Elisha Fieldstadt, *First Chauvin Trial Juror to Speak Out About Deliberations: 'The Evidence Was Overwhelming'*, NBC NEWS (last updated Apr. 28, 2021, 12:41 PM), <https://www.nbcnews.com/news/us-news/first-chauvin-trial-juror-speak-out-about-deliberations-evidence-was-n1265627> [<https://perma.cc/YF8J-9TTA>] (noting various quotes from juror, Brandon Mitchell, who had never seen the footage

emotional impact, but it also helped expose that the official police report of the incident was grossly inaccurate.²⁴⁵ Dishonest or inaccurate police reports and testimonies are all too common a problem, and such a vital tool as recording to combat these reports and testimony must be appreciated and protected.²⁴⁶ In all-party consent states, the video recordings of George Floyd's murder might not only be inadmissible evidence but also the fruit of a criminal act.²⁴⁷ Without the video—graphically depicting each second of the murder—the jury may have come to a different conclusion.²⁴⁸ In a trial like this, the video of the murder filled the crucial missing piece of the puzzle that was left by intermittent BWC footage, testimony, medical records, and an alternate theory of the case presented by the defense.²⁴⁹

Along with citizen board review and use of videos in investigations, independent prosecutions have a great potential for change.²⁵⁰ Some prosecutors have compiled lists of police officers who they will not allow to testify in court, because they lie too often.²⁵¹ For jurisdictions whose prosecutorial offices are not as civic-minded, an independent prosecutor under this proposal must be sure to carry out this practice. Such prosecutors must also be granted the authority to legally compel police officers who will assist in their case to testify.²⁵²

prior to the trial because “it was too gruesome. . . . It’s just tough to watch as a human being . . . somebody in agony . . . die over and over again on instant replay basically.”).

²⁴⁵ Steve Helling, *Derek Chauvin’s Murder Conviction Draws Attention to Misleading Police Report of George Floyd’s Death*, PEOPLE (Apr. 21, 2021, 04:05 PM), <https://people.com/crime/derek-chauvin-murder-conviction-highlights-misleading-police-report-george-floyd-death/> [<https://perma.cc/P4AC-BEF3>].

²⁴⁶ Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1155–61 (2013).

²⁴⁷ 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, 488 (2011).

²⁴⁸ See Edward Lempinen, *Despite Damning Video, Complex Legal Issues Make Chauvin Trial Unpredictable*, BERKELEY NEWS (Mar. 30, 2021), <https://news.berkeley.edu/2021/03/30/despite-damning-video-complex-legal-issues-make-chauvin-trial-unpredictable/> [<https://perma.cc/5BUX-T46A>].

²⁴⁹ See *id.*

²⁵⁰ See Larry Cunningham, *Taking on Testilying: The Prosecutor’s Response to In-Court Police Deception*, 18 CRIM. JUST. ETHICS 26, 26, 35–36 (1999) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/taking-testilying-prosecutors-response-court-police-deception-crime> [<https://perma.cc/843H-Q2SJ>] (“The term ‘testilying’ was coined by police officers in [NYC]. It usually refers to perjury committed by police officers. However, it has also been used to describe other forms of in-court deception.”).

²⁵¹ Zak Cheney-Rice, *NYC Prosecutors Are Keeping Lists of Police Officers Who Lie Too Much to Be Trusted in Court*, N.Y. MAG (Feb. 18, 2020), <https://nymag.com/intelligencer/2020/02/nyc-prosecutors-keep-lists-of-cops-who-lie-too-much.html> [<https://perma.cc/GM2X-XMFU>].

²⁵² See Micah Herskind & Tiffany Roberts, *The Failure of Police Reform*, N.Y. MAG. (Jan. 31, 2022), <https://nymag.com/intelligencer/2022/01/atlanta-police-reform-failure.html> [<https://perma.cc/5EWW-VXVE>].

There is scant evidence suggesting that police officers known to testify falsely lose their jobs as a result or whether it is correlated with their overall conduct on the job, but barring dishonest officers from testifying in court is a straightforward method to minimize police perjury and incentivize officers to be honest in the courtroom.²⁵³ There is direct evidence that civilian review boards fail when independent boards cannot control which officers can testify in the case.²⁵⁴ Also, testifying in court is a key function for police to seal convictions.²⁵⁵ Losing the ability to testify will make it more difficult for these police officers to secure convictions against individuals they arrested.²⁵⁶

Nevertheless, the immense power wielded by police officers should justify allowing police officers to be scrutinized, monitored, and barred from testimony if they habitually commit perjury. Thus far, it has become clear that relying on departments to get rid of their officers without public pressure will not cut it.²⁵⁷ Not to mention, the societal costs, including false convictions and deaths.²⁵⁸ Furthermore, police reports and police accounts of the scene are not always factually accurate.²⁵⁹ In these cases, along with independent prosecutors exercising discretion over who can testify, civilian recordings can act as evidence to disprove officers who are “testilying.”²⁶⁰

Police also have a growing wealth of technology to gather evidence which plays a crucial role in convictions.²⁶¹ Ring partnered with over two thousand police departments by providing law enforcement access to the home-security camera footage; despite being called a “home security system,” these cameras are effectively a civilian surveillance network.²⁶² Police have also had

²⁵³ See Cheney-Rice, *supra* note 251.

²⁵⁴ Herskind & Roberts, *supra* note 252 (explaining that Atlanta’s civilian oversight board failed because it lacked important authority, including the authority to compel officers to testify).

²⁵⁵ Cheney-Rice, *supra* note 251.

²⁵⁶ See Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 871–75 (2007).

²⁵⁷ See Katherine J. Wu, *Study Finds Misconduct Spreads Among Police Officers Like Contagion*, PBS (May 27, 2019), <https://www.pbs.org/wgbh/nova/article/police-misconduct-peer-effects/> [<https://perma.cc/KD5X-7JLR>].

²⁵⁸ Scott Shackford, *Half of All False Convictions in the U.S. Involved Police or Prosecutor Misconduct, Finds New Report*, REASON (Sept. 15, 2020, 1:50 PM), <https://reason.com/2020/09/15/half-of-all-false-convictions-in-the-u-s-involved-police-or-prosecutor-misconduct-finds-new-report/> [<https://perma.cc/9KVZ-A8A3>].

²⁵⁹ Helling, *supra* note 245.

²⁶⁰ Cunningham, *supra* note 250, at 26–27.

²⁶¹ Gee, *supra* note 26, at 54–55.

²⁶² Kirk Miller, *Amazon’s Ring Is Basically a Giant Civilian Surveillance Network*, INSIDE HOOK (May 19, 2021, 12:48 PM), https://www.insidehook.com/daily_brief/tech/amazon-ring-civilian-surveillance-network [<https://perma.cc/KET2-RRUB>].

judicial permission to set up cameras in bathrooms without warrants in certain instances.²⁶³ Despite the ambiguous lines drawn by statute restricting police surveillance capabilities,²⁶⁴ police are constantly surveilling their communities. In major cities, ordinary citizens are routinely encountering antiterrorism surveillance tools and techniques which were originally designed to combat international terrorist organizations.²⁶⁵

To keep lockstep with state surveillance of communities, it only follows that citizens reserve the right to record as well. This is not only fair but also constitutionally sound. Bringing claims against officers is much more potent when one has evidence to corroborate their claims.²⁶⁶ If police can use technology to gather evidence for claims and convictions, then so should ordinary citizens.

III. FEDERAL LEGISLATION ESTABLISHING THE RIGHT TO RECORD POLICE & FUNDING CIVILIAN OVERSIGHT BOARDS

Police reform legislation is long overdue and, as of late, the push for police reform bills has once again stalled in DC.²⁶⁷ Communities requiring immediate action would be well served by a simple federal framework allowing them to monitor the actions of their police officers and hold them accountable for such conduct.²⁶⁸ The Constitution and Supreme Court precedent have thus far failed to achieve the necessary balance for such a structure.²⁶⁹ At this point, a federal legislative solution is required to address the complex legal principles at issue.

²⁶³ State v. Henry, 783 N.E.2d 609, 617–18 (Ohio Ct. App. 2002).

²⁶⁴ See 18 U.S.C. § 2511.

²⁶⁵ In New York City, for example, everyday citizens routinely face “facial recognition software, license plate readers or mobile X-ray vans that that can see through car doors.” Ali Watkins, *How the N.Y.P.D. Is Using Post-9/11 Tools on Everyday New Yorkers*, N.Y. TIMES (last updated Oct. 13, 2021), <https://www.nytimes.com/2021/09/08/nyregion/nypd-9-11-police-surveillance.html> [<https://perma.cc/TU84-RBTH>]. Surveillance drones and antiterrorism tactics have been used to police protests and street crime. See *id.*

²⁶⁶ Cheryl Corley, *How Using Videos at Chauvin Trial and Others Impacts Criminal Justice*, NPR (May 7, 2021, 10:28 AM), <https://www.npr.org/2021/05/07/994507257/how-using-videos-at-chauvin-trial-and-others-impacts-criminal-justice> [<https://perma.cc/TK92-HS6J>].

²⁶⁷ Richard Cowan, *U.S. Congressional Negotiations on Police Reforms Fail*, REUTERS (last updated Sept. 22, 2021, 4:45 PM), <https://www.reuters.com/world/us/republicans-are-refusing-back-police-reforms-trump-supported-white-house-2021-09-22/> [<https://perma.cc/7U66-M28Y>].

²⁶⁸ Dara Lind & Joss Fong, *Why Recording the Police Is So Important*, VOX (Oct. 6, 2014, 11:50 AM), <https://www.vox.com/2014/10/6/6905253/cops-on-camera-these-powerful-video-clips-show-why-recording-the> [<https://perma.cc/RX6X-WKXV>].

²⁶⁹ See Pearlman & Lee, *supra* note 31, at 755–69.

Congress should pass laws to safeguard civilians who record police, clarify that police officers do not have a right to privacy when conducting official duties, and simultaneously regulate the privacy rights of third-party persons participating.²⁷⁰

Furthermore, the failures of internal supervision and the ineffectiveness of civil actions necessitate the establishment of independent, citizen-led police oversight boards.²⁷¹ To ensure that the legislation brings about significant change, the board should be responsible for receiving and assessing recordings and complaints, as well as conducting police misconduct investigations.²⁷² This proposal calls on Congress to promote a federal regime of civilian oversight of the police by establishing the unrestricted right to record police officers and facilitating the establishment of citizen boards to use the information gathered.

In the short term, civilian recordings have successfully shed light on incidents that could otherwise have gone misreported.²⁷³ The reality is that video monitoring is an exceptionally effective tool, as evidenced by police officers' routine use of invasive surveillance techniques to investigate criminal activity.²⁷⁴ However, citizens are often disincentivized or barred from using similar or less invasive means to monitor and report unlawful police misconduct, despite many jurisdictions recognizing that right is constitutionally founded.²⁷⁵

Currently, there exists no federal judicial or legislative standard that protects citizens' right to record and monitor their community's police officers. Thus, the current surveillance imbalance calls for proactive legislation to protect citizens who monitor police, make clear that police do not enjoy an expectation of privacy while engaged in official conduct, and

²⁷⁰ See *infra* Section III.A.

²⁷¹ See Wu, *supra* note 257.

²⁷² See *infra* Section III.B.

²⁷³ Sara Morrison & Adam Clark Estes, *How Protesters Are Turning The Tables On Police Surveillance*, VOX (June 12, 2020, 7:10 AM), www.vox.com/recodel/2020/6/12/21284113/police-protests-surveillance-instagram-washington-dc [<https://perma.cc/2KRU-ZPLN>].

²⁷⁴ *Surveillance City: NYPD Can Use More Than 15,000 Cameras to Track People Using Facial Recognition in Manhattan, Bronx, and Brooklyn*, AMNESTY INT'L (June 3, 2021), <https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed/> [<https://perma.cc/8L85-R2GF>].

²⁷⁵ *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021); *Fields v. City of Philadelphia*, 862 F.3d 353, 357 (3d Cir. 2017); *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–89 (5th Cir. 2017); *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439–40 (9th Cir. 1995); *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

govern the privacy rights of third-party citizens involved.²⁷⁶ Moreover, the failures of internal oversight and ineffectiveness of bringing civil actions calls for an independent, citizen-led police oversight board.²⁷⁷ The board should be tasked with receiving and reviewing the recordings and complaints, as well as leading police misconduct investigations to ensure the legislation harbors substantial change.²⁷⁸

A. *Establishing the Right to Record*

While the Constitution grants states the power to police their jurisdictions,²⁷⁹ police reform measures have been successfully advanced via conditional grant funding from the federal government.²⁸⁰ The majority of state wiretap laws follow the general format of the ECPA, so this proposed framework could be used either for the federal statute or virtually any of the fifty states' laws as well.²⁸¹ The ECPA protects wire, oral, and electronic communications, whether the communications are being made, in transit, or while stored on computers.²⁸² This law has been replicated by many of the current state laws, except “two-party consent” states.²⁸³ Section 2511 is the specific provision dealing with the “[i]nterception and disclosure of wire, oral, or electronic communications” that the statute prohibits—the language of which is closely followed by both all-party and one-party consent state statutes²⁸⁴—reading:

²⁷⁶ See *infra* Section III.A.

²⁷⁷ See Wu, *supra* note 257.

²⁷⁸ See *infra* Section III.B.

²⁷⁹ *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Public safety, public health, morality, peace and quiet, law and order . . . are some . . . examples of the traditional application of the police power to municipal affairs.”).

²⁸⁰ See *Safe Policing for Safe Communities*, 85 Fed. Reg. 37325 (June 19, 2020) (conditioning grant funding to police agencies on them submitting information which is specifically outlined in the text of the order through an Executive Order by President Trump); see also JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10486, CONGRESS AND POLICE REFORM: CURRENT LAW AND RECENT PROPOSALS 1 (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10486> (“Congress possesses some authority to [regulate state and municipal law enforcement], primarily through . . . legislation requiring states to take specified action in exchange for federal funds disbursed under the Spending Clause.”).

²⁸¹ REPS. COMM. FOR FREEDOM OF PRESS, CAN WE TAPE? A JOURNALIST’S GUIDE TO TAPING PHONE CALLS AND IN-PERSON CONVERSATIONS IN THE 50 STATES AND D.C. 2, (2008), <https://www.rcfp.org/wp-content/uploads/imported/CANWETAPE.pdf> [<https://perma.cc/CP5M-U7K5>].

²⁸² *Electronic Communications Privacy Act of 1986 (ECPA)*, BUREAU JUST. ASSISTANCE, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1285> [<https://perma.cc/FCT2-VP8M>].

²⁸³ See *supra* Part I.

²⁸⁴ 18 U.S.C. § 2511. Compare MASS. GEN. LAWS ANN. ch. 272, § 99 (West, Westlaw current through the 2022 2d Ann. Sess.) (“Except as otherwise specifically provided in this section any person who—willfully commits an interception, attempts to

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.²⁸⁵

The amendment would be an exception “specifically provided in this chapter,” which shall read:

Notwithstanding the preceding text of this statute:

Oral communications uttered by police officers, while on-duty or engaged in official conduct, in the public sphere are unprotected [§ 2511]. If a substantial risk of imminent harm to the officer, other persons, or national security are created by the interception, this amendment does not apply. A police officer has no expectation of privacy while on-duty or performing official duties in the public sphere. The Attorney General shall, as appropriate and consistent with applicable law, allocate Department of Justice discretionary grant funding only to those states and law enforcement agencies that adopt this amendment and establish the institutions described in²⁸⁶ the civilian oversight board section of this law.

This amendment introduces new terms to the law, so it would require amendments to § 2510, the definitions section, as well. This section—or the definitions section of any state law²⁸⁷—would be amended as follows:

(22) “*on-duty*” means engaged in a scheduled work shift with their department, or any time they not engaged in a scheduled work shift but are engaged in official conduct.

(23) “*official conduct*” means any conduct that invokes the real or apparent power of the police department, or if he or she is performing duties prescribed generally for police officers.²⁸⁸ This includes, but is

commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication.”) *with* 18 U.S.C. § 2511 (“Except as otherwise specifically provided in this chapter any person who—(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.”).

²⁸⁵ *Id.*

²⁸⁶ *Id.*; see Safe Policing for Safe Communities, 85 Fed. Reg. 37325 (June 19, 2020) (language borrowed from this executive order).

²⁸⁷ See generally MASS. GEN. LAWS ANN. ch. 272, § 99 (West, Westlaw current through the 2022 2d Ann. Sess.) (exemplifying Massachusetts’ all-party consent statute, which has a definition section built in. The definitions would be applied, in this law for example, to section “B. Definitions.”).

²⁸⁸ Language borrowed from *Miron v. Town of Stratford*, 976 F. Supp. 2d 120, 135 (D. Conn. 2013) (quoting *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994) (“An off-duty police officer may act under color of law if his or her conduct ‘invokes the real or apparent power of the police department,’ or if he or she is performing ‘duties prescribed generally for police officers.’”).

not limited to searches and seizures, traffic stops, arrests, and interrogations.

(24) “*public sphere*” means any public area, or a private area generally accessible to the public, or any private area in which an officer is engaged in *official conduct*.

This statute explicitly states that there is no reasonable expectation of privacy for on-duty police officers while conducting their official duties in situations where they are being recorded; thus, removing officers’ privacy interests from the equation.²⁸⁹ The only open questions will be whether the individual was obstructing or interfering with police activity or whether the recorder violated another individual’s privacy rights. The amendment shall also condition Department of Justice funding to state governments for police agencies on adoption of this recording provision.

Note that this amendment is intended to apply only to speech uttered by the police officer, not other persons involved in the interaction. Other persons involved may have a reasonable expectation of privacy if they are in a private space, but not if they are in a public area or a private area generally accessible to the public. For example: a police officer is arresting Joe inside his apartment with the door shut and Bob overhears from the hallway. Bob then secretly records the conversation from the hallway, outside of the apartment door. Joe has a reasonable expectation of privacy in such an instance, irrespective of the fact that the police officer may be engaged in official conduct; thus, Bob is illegally recording that conversation. However, if Joe did not utter a single word, and Bob only intercepted speech uttered by the police officer, then his recording is protected.

This type of scenario is rare and presents a difficult situation for one seeking to record. However, the proposal will leave room for judicial discretion on these issues. Whether or not a state has a one-party or all-party consent law, the amendment removes the officer’s privacy from the equation.²⁹⁰ Thus, the only question of consent would regard the individual or individuals engaged with the officer. This amendment is aimed to federally legalize, and remove barriers blocking, recording police while

²⁸⁹ The proposal put forth by this note states that “[a] police officer’s expectation of privacy, while the officer is on duty, and performing official duties in the *public sphere*, is thus presumptively unreasonable.”

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they are engaged in official conduct. To utilize the resulting recordings, the proposal also establishes civilian oversight boards as a vehicle for these recordings to be used in investigations and legal actions.

B. Civilian Oversight Boards: Utilizing Recordings to Hold Officers Accountable

This proposal calls on Congress to utilize its spending powers to provide grants to state and municipal governments on the condition that they adopt the right to record amendment and establish civilian oversight boards.²⁹¹ In order to achieve these goals of impartiality and transparency, there are several attributes vital to an efficient board, some more important than others.

First, the civilian board must be completely independent of the police department because, as experience has shown, in-house civilian oversight boards do not improve the partiality or transparency of department investigations.²⁹² In-house boards, headed by senior police officers, generally depend on the department's willingness to commit to the overall aim of the civilian board.²⁹³ Further, the civilians themselves often become extremely supportive of the police officers' perspective.²⁹⁴ Allowing strong police influence over the process defeats the purpose of having a civilian board, if the aim is to empower the community to hold police accountable.²⁹⁵

Second, to be effective, civilian oversight boards must have prosecutorial power.²⁹⁶ Failed attempts at effective civilian oversight often fail at granting the proper authority necessary for the board to take meaningful action.²⁹⁷ Although police unions have successfully defeated implementation of such boards in many cities, various courts have recognized that such

²⁹¹ U.S. CONST. art. I, § 8, cl. 1.

²⁹² Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 45 (2009).

²⁹³ *Id.* at 12–13.

²⁹⁴ *See id.* at 13.

²⁹⁵ Nicole Dungca & Jenn Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back*, WASH. POST (Apr. 27, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability/> [<https://perma.cc/U9KQ-Q8JY>].

²⁹⁶ *See* Marlene Lenthang, *Police Oversight Boards Are Proliferating, But Do They Actually Work?*, ABC NEWS (June 4, 2021, 5:00 AM), <https://abcn.ws/3VWf7f7> [<https://perma.cc/3X3L-T8V3>].

²⁹⁷ *Id.*

a structure is permissible.²⁹⁸ This proposal grants the discretion of the composition of the civilian oversight boards to the community, but must have at least one independent prosecutor, who has the authority to take the necessary legal action. To address the fact that prosecutors are often criticized for not pursuing criminal police officers, an independent prosecutor will grant the board authority to issue subpoenas and file charges against officers.²⁹⁹

Opponents often argue that civilians do not understand how law enforcement operates and why law enforcement bodies make particular decisions; thus, it is argued, they are ill-equipped to play a role in overseeing departments and internal investigations.³⁰⁰ Integrating, at the very least, a qualified prosecutor could quell concerns that civilian boards are not sophisticated enough to understand law enforcement practices.³⁰¹

Third, these boards require full cooperation of all officers and department staff, which includes but is not limited to open lines of communication, commitment on the end of the department, and unfettered access to relevant records.³⁰² Complaints submitted along with civilian footage must be filed directly with the civilian board, rather than the police department, but boards must have access to all records relevant to the investigation.³⁰³ Many officers who are violent, like Derek Chauvin,³⁰⁴ have a long history of complaints filed against them. These records, among many others, are vital to conducting

²⁹⁸ See *Lynch v. Giuliani*, 755 N.Y.S.2d 6, 13 (App. Div. 2003) (holding that the Police Commissioner's power to prosecute and discipline officers may be delegated to a civilian oversight board).

²⁹⁹ *Clearly Defined and Adequate Jurisdiction and Authority*, NAT'L. ASS'N. FOR CIVILIAN OVERSIGHT L. ENFORCEMENT, https://www.nacole.org/adequate_jurisdiction_and_authority [https://perma.cc/98W4-AJMN].

³⁰⁰ See Dungca & Abelson, *supra* note 295; see also Pamela Seyffert, *Can Professional Civilian Oversight Improve Community-Police Relations?*, POLICE CHIEF (Sept. 13, 2017), <https://www.policechiefmagazine.org/can-professional-civilian-oversight-improve-community-police-relations/> [https://perma.cc/GRA7-QG6Y] (“Although most cops do not like Internal Affairs, nevertheless, they defend its operations as necessary. They argue that civilian review is unfair because it is operated by individuals unfamiliar with police work.”) (internal quotation marks omitted).

³⁰¹ See Seyffert, *supra* note 300 (citing that some boards do not take the education of the board members into account).

³⁰² *Unfettered Access to Records and Facilities*, NAT'L. ASS'N. FOR CIVILIAN OVERSIGHT L. ENFORCEMENT, https://www.nacole.org/unfettered_access [https://perma.cc/VXH4-6YJT].

³⁰³ *Id.*

³⁰⁴ See Tami Abdollah, *Derek Chauvin Used Force Against Suspects Before George Floyd. The Jury Won't Hear About 6 of Those Incidents*, USA TODAY (last updated Apr. 5, 2021, 12:34 PM), <https://www.usatoday.com/story/news/nation/2021/04/01/derek-chauvin-trial-past-violence-force-arrestee-george-floyd/7020506002/> [https://perma.cc/YM7U-BGSS] (explaining that eighteen complaints had been filed with the Minneapolis police department about Derek Chauvin prior to George Floyd's murder).

proper investigations and decision-making regarding accountability.³⁰⁵ For example, since most police brutality cases involve officers with a history of complaints, knowing whether a complaint was levied against an officer who has zero prior incidents or ten prior incidents will likely be vital in deciding how to proceed with the investigation and the proper legal action.³⁰⁶ Access to such records is essential to ensuring informed, effective, and fact-driven oversight.³⁰⁷ An open line of communication is vital for an organization to achieve virtually any goal.³⁰⁸

Finally, since the proposal seeks to create nationwide consistency in this area, the civilian boards and police departments must be required to report all information to the Department of Justice. From there, the Department of Justice can analyze the findings to evaluate the effectiveness of the program and the consistency between the investigations from the civilian board and police departments.

In 2020, the Supreme Court of New Jersey ruled that the City of Newark did not have the authority to create a civilian complaint review board to investigate police misconduct, issue subpoenas, and suggest policy changes.³⁰⁹ However, some cities have created such boards,³¹⁰ and police reform measures have also been successfully advanced by the federal government via conditional grant funding.³¹¹ In some cities, like Louisville and Minneapolis, the boards have failed to reach their full potential, as they have been strangled by limitations.³¹² For example, after

³⁰⁵ *Thirteen Principles for Effective Oversight*, NAT'L. ASS'N. FOR CIVILIAN OVERSIGHT L. ENFORCEMENT, <https://www.nacole.org/principles> [<https://perma.cc/6HH8-KDD2>].

³⁰⁶ McCorkel, *supra* note 230.

³⁰⁷ *Thirteen Principles for Effective Oversight*, *supra* note 305.

³⁰⁸ Leigh Richards, *How Effective Communication Will Help an Organization*, CHRON (Mar. 11, 2019), <https://smallbusiness.chron.com/effective-communication-organization-1400.html> [<https://perma.cc/2B6K-G8NT>].

³⁰⁹ *See Fraternal Police, Newark Lodge No. 12 v. City of Newark*, 236 A.3d 965, 968, 985 (N.J. 2020).

³¹⁰ DARREL W. STEPHENS ET AL., CMTY. ORIENTED POLICING SERVS., U.S. DEP'T. OF JUST., CIVILIAN OVERSIGHT OF THE POLICE IN MAJOR CITIES 1, 3 (2018), <https://cops.usdoj.gov/ric/Publications/cops-w0861-pub.pdf> [<https://perma.cc/K76C-2TLU>].

³¹¹ *See Safe Policing for Safe Communities*, 85 Fed. Reg. 37325 (June 19, 2020) (conditioning grant funding to police agencies on them submitting information that is specifically outlined in the text of the order); *see also* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10486, CONGRESS AND POLICE REFORM: CURRENT LAW AND RECENT PROPOSALS 1, 4 (2020).

³¹² Both Minneapolis and Louisville—where George Floyd and Breonna Taylor were murdered by police—had civilian oversight boards that failed to prevent police killings. Minneapolis' board was unable to act on past complaints against Derek Chauvin because the board had “no power over citizen complaints, officer discipline or law enforcement policies.” Marlene Lenthang, *Police Oversight Boards Are Proliferating, But Do They Actually Work?*, ABC NEWS (June 4, 2021, 5:00 AM), <https://abcnews.go.com/US/police-oversight-boards->

Breonna Taylor was killed in Louisville, Kentucky, the local civilian oversight group did not have the requisite power to investigate her death.³¹³ However, with adequate independence, disciplinary powers, and resources, according to experts, these boards have the potential to harbor great change.³¹⁴

There are two major areas in which civilian oversight boards will improve holding police accountable for wrongdoing: impartiality and transparency.³¹⁵ Employing citizen oversight boards can help ensure that recordings go to proper use.³¹⁶ As opposed to internal investigations, impartiality should be much greater in citizen-board-led investigations.³¹⁷ Also, having a prosecutor on the board will help save the victim time and money that would otherwise be spent bringing action themselves.³¹⁸

Citizen boards can complement the current practice of posting videos online by collecting and verifying the evidence of potential misconduct, and translating their findings into data reports.³¹⁹ Collecting data of misconduct will not only allow for the evidence to be organized, reviewed, and analyzed, but has the potential to break through the traditional influence dynamic created by police departments.³²⁰ Instead of having limited options of either handing evidence to police or hoping a video goes viral, the citizen has the opportunity to first approach their local civilian board.

The perspective from which a video is viewed changes based on how and by whom they are taken.³²¹ Many times, the only available footage is from a BWC or a low-quality CCTV

proliferating-work/story?id=77919091 [https://perma.cc/S9AH-FYXH]. In Louisville, the citizen oversight group did not have investigatory abilities, but was only able to “review closed police cases and fatal incidents.” *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See *Transparency and Accountability at the Frontlines of Justice: Citizen Oversight of Police*, OPEN GOV'T P'SHIP (July 8, 2020), <https://www.opengovpartnership.org/documents/transparency-and-accountability-at-the-frontlines-of-justice-citizen-oversight-of-police/> [https://perma.cc/9DQQ-WYRB].

³¹⁶ See Eric Umansky & Mollie Simon, *The NYPD Is Withholding Evidence From Investigations Into Police Abuse*, PROPUBLICA (Aug. 17, 2020, 5:00 AM), <https://www.propublica.org/article/the-nypd-is-withholding-evidence-from-investigations-into-police-abuse> [https://perma.cc/G8UY-TF77].

³¹⁷ See *What Are the Benefits of Police Oversight?*, NAT'L. ASS'N. FOR CIVILIAN OVERSIGHT L. ENFORCEMENT, <https://www.nacole.org/benefits> [https://perma.cc/23RU-SGQK].

³¹⁸ Mark R. Brown, *A Primer on the Law of Attorney's Fees Under § 1988*, 37 URB. LAW. 663, 663 n.3 (2005) (“Successful § 1983 defendants can recover their attorney’s fees from losing plaintiffs whose claims were frivolous, unreasonable and without foundation.”).

³¹⁹ See Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 417–20 (2016).

³²⁰ Jim Dwyer, *When Official Truth Combines with Cheap Digital Technology*, N.Y. TIMES (July 30, 2008), <http://www.nytimes.com/2008/07/30/nyregion/30about.html> [https://perma.cc/TQL2-A3C2].

³²¹ Simonson, *supra* note 319, at 418.

security video.³²² Aside from reliability concerns regarding such footage,³²³ the fact that these forms of evidence are only available to the police also creates an imbalance.³²⁴ Bolstering the power of citizen recordings, and utilizing citizen oversight boards, can help break down the monopoly on information that police often have.³²⁵

CONCLUSION

The reality of America's police culture, police surveillance capabilities, and citizens' increasing ability to record makes establishing the right to record police a necessity. Given the evidentiary value and candidness of such recordings, the nation would be remiss to forego the opportunity to utilize these recordings for reform and holding abusive police accountable. Civil suits and internal investigations have proved futile, so civilian oversight boards equipped with independent prosecutors are necessary to effect change. Congress should energetically pursue a legislative solution to protect the right of citizens to record police and hold those who abuse the public's trust accountable. After the Chauvin trial, Darnella Frazier famously stated that her "video didn't save George Floyd, but it put his murderer away and off the streets."³²⁶ Although the video did not save Mr. Floyd, its impact could save others in the future. Congress must act to protect citizens' rights to hold their police accountable. Our communities, and the soul of our nation, depend on it.

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³²² *Id.* at 413–14, n.111.

³²³ *See supra* Section II.A.

³²⁴ Simonson, *supra* note 319, at 414–15.

³²⁵ Dwyer, *supra* note 320 (describing how videos of police behavior by spectators using mobile technology have "ended a monopoly on the history of public gatherings that was limited to the official narratives").

³²⁶ Giulia McDonnell Nieto del Rio, *Darnella Frazier, the Teenager Who Recorded George Floyd's Murder, Speaks Out*, N.Y. TIMES (last updated July 7, 2021), <https://www.nytimes.com/2021/05/25/us/darnella-frazier.html> [<https://perma.cc/RTZ4-SKWL>].

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