

VIRGINIA LAW REVIEW ONLINE

VOLUME 107

JULY 2021

166–192

COMMENT

CAUGHT ON TAPE: ESTABLISHING THE RIGHT OF THIRD-PARTY BYSTANDERS TO SECRETLY RECORD THE POLICE

*Aidan J. Coleman and Katharine M. Janes**

Throughout the thirty years between the televised beating of Rodney King and the videotaped murder of George Floyd, recordings of police misconduct have given a face to the perpetrators and victims of police brutality. Given the accessibility of these recordings today over social media, anyone with a smartphone can demand the nation's attention on one of racial discrimination's cruelest manifestations.

In spite of their utility to social movements, though, recordings of the police have occupied a legally nebulous space. Federal courts have consistently affirmed the First Amendment's protection of individuals' rights to publicly record the police, but they have been unclear as to whether that protection extends to secret recordings. Federal and state wiretap laws can be interpreted to make secret recordings unlawful, and courts have—until late—largely avoided deciding the question.

* Aidan J. Coleman, University of Virginia School of Law, J.D. 2021; University of Virginia, M.A. (History) 2021. Katharine M. Janes, University of Virginia School of Law, J.D. 2021; University of Virginia, M.A. (History) 2021. We would like to thank Professor Frederick Schauer, William Scheffer, and Chinmayi Sharma for their helpful feedback on early drafts of this Comment. A special thanks to the editors of the *Virginia Law Review*—and in particular Elizabeth Adler, Tyler Demetriou, and Anna Cecile Pepper—for their insightful comments and edits.

In December 2020, however, the First Circuit expressly held that individuals have a right to secretly record the police. Project Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020). In its decision, the court affirmed the value of surreptitious recordings and found that the state’s ban on producing such recordings violates individuals’ First Amendment rights. This case comment argues that courts across the country should follow the First Circuit’s model. We maintain that the production of secret recordings serves a critical First Amendment interest by providing social movements with a means to shed light on misconduct and hold power to account. Moreover, we contend that the established constitutionality of surreptitious recordings lends certainty, and therefore protection, to would-be recorders that is unavailable through other alternatives. Finally, we posit that the conventional rationales for circumscribing the right to record the police—such as preserving individuals’ right to privacy and securing public safety—cannot justify a constitutionally meaningful distinction between secret and open recordings, as the First Circuit has affirmed.

INTRODUCTION

On May 25, 2020, Darnella Frazier did an ordinary thing of extraordinary consequence—she pressed “record.”¹ Her video recording of George Floyd’s murder spread like wildfire across news and social media platforms, inspiring longstanding activists and newcomers alike to speak out against racial discrimination and police brutality.² One study estimates that the June protests brought out as many as 26 million people to the streets, exceeding the crowds of any other single social movement in American history.³ By leveraging the ubiquity of smart phones and the

¹ Joshua Nevett, *George Floyd: The Personal Cost of Filming Police Brutality*, BBC News (June 11, 2020), <https://www.bbc.com/news/world-us-canada-52942519> [<https://perma.cc/VC7P-C3RU>].

² Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. Times (Mar. 5, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> [<https://perma.cc/4G2N-DVA5>]. See also Eliot C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/D7UC-Y6AR>] (highlighting that the protests following George Floyd’s death were unique in that they saw an influx of “myriad White faces”).

³ Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Social Movement in U.S. History*, N.Y. Times (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/6XAT->

broad reach of social media networks, Darnella Frazier reaffirmed that civilian bystanders like her can play a pivotal role in the public square and shine a light on police misconduct that might otherwise go unnoticed. She showed that, to paraphrase Scott Gant, we can all be journalists now.⁴

The scope of one's right to record the police, however, has remained somewhat unclear in federal courts. Recent developments in case law have emphasized the important First Amendment interests inherent to the production of these recordings. Federal appellate courts across the country have consistently recognized the existence of a valid First Amendment right in recording the police in public spaces.⁵ However, these decisions have not defined the scope of this right, particularly so in the context of *secret* recordings. Some have argued that the secret recording of police officers violates state wiretap statutes and that those responsible should be criminally sanctioned.⁶ While this theory has yet to be widely considered by federal courts, there is reason to believe they may find it persuasive.⁷

In December 2020, however, the First Circuit concluded in *Project Veritas Action Fund v. Rollins* that a state may not explicitly proscribe surreptitious recordings of the police in public spaces without violating the First Amendment.⁸ The case concerned a Massachusetts statute⁹ that prohibits the secret recording of interactions between civilians and public officials.¹⁰ The plaintiffs were civil rights activists who wished to secretly

9MJE]. The 2017 Women's March previously held this title, which saw crowds of 3 to 5 million in marches nationwide. *Id.*; McLaughlin, *supra* note 2.

⁴ Scott Gant, *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* 6 (2007).

⁵ See *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595–600, 608 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

⁶ See *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 819–20 (1st Cir. 2020).

⁷ See, e.g., *Alvarez*, 679 F.3d at 606–07, 607 n.13 (“The distinction between open and concealed recording, however, may make a difference in the intermediate-scrutiny calculus because surreptitious recording brings stronger privacy interests into play.”).

⁸ 982 F.3d at 833.

⁹ Mass. Gen. Laws ch. 272, § 99 (2018) (“Section 99”).

¹⁰ Project Veritas, a far-right non-profit organization whose methods have sparked controversy, brought a separate challenge to Section 99 that, on appeal, was consolidated with K. Eric Martin and Rene Perez's suit against the Suffolk County District Attorney. Martin and Perez are unaffiliated with Project Veritas. Project Veritas went beyond Martin and Perez's requested remedy by seeking to enjoin the enforcement of this statute against the secret recording of any public official. Given the broader nature of this claim, this essay will not contest whether or not the rationales justifying the court's decision in this case should be

record police-civilian interactions and promote accountability for misconduct.¹¹ While both had previously openly recorded the police in the past, they had faced violent reprisals for doing so, and, consequently, argued that their personal safety required their future recordings be made secretly.¹² Such fears are often warranted; individuals across the country—such as Andre James,¹³ Peter Ballance,¹⁴ Joe Bennett,¹⁵ Sharron Tasha Ford,¹⁶ Gregory Rizer,¹⁷ and Alfredo Valentin¹⁸—have faced physical and legal reprisals following their recording of the police.

Given the critical nature of this right, we argue that the First Circuit's holding in *Project Veritas* should be adopted nationally, both in the context of express prohibitions on secret recordings and its broader application to state wiretap statutes. While the Massachusetts law is unique in that it *expressly* prohibits secret recordings,¹⁹ other wiretap statutes across the country do so implicitly.²⁰ Under federal and state law, individuals cannot legally record an interaction without the consent of at least one party, so long as the relevant party can legitimately claim a

applied to cover all such figures. However, it is worth noting that the First Circuit rejected *Project Veritas*'s broader argument on the grounds that it was unripe. See *Project Veritas*, 982 F.3d at 817.

¹¹ Brief for Plaintiff-Appellees at 1–2, *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (No. 19-1629) (submitted by K. Eric Martin and Rene Perez).

¹² *Id.* at 9–11.

¹³ Gary Man Arrested for Recording Police Officer, Now Considering Legal Action, NBC Chicago (Aug. 9, 2020), <https://www.nbcchicago.com/news/local/gary-man-arrested-for-recording-police-officer-now-considering-legal-action/2319456/> [<https://perma.cc/CB8J-7YBK>].

¹⁴ Ray Sanchez, Growing Number of Prosecutions for Videotaping the Police, ABC News (July 16, 2010), <https://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076> [<https://perma.cc/E3NH-N6HJ>].

¹⁵ Mayor: 3 Charged in Fraudulent Check Scheme; Internal Investigation Launched After Cops Scuffle with Man Videotaping Scene, WHAS-TV (Nov. 29, 2020), <https://www.whas11.com/article/news/crime/jeffersontown-officers-arrest-man-videotaping-kentucky-investigation-3-charged-check-fraud/417-a32470a8-5810-4b5e-a095-4e1105c3d331> [<https://perma.cc/BJS5-L85D>].

¹⁶ Press Release, ACLU, ACLU Sues After Mother Falsely Arrested by Boynton Beach Police Officers (June 25, 2010), <https://www.aclu.org/press-releases/aclu-sues-after-mother-falsely-arrested-boynton-beach-police-officers> [<https://perma.cc/9HU9-LB2K>].

¹⁷ Press Release, ACLU Pa., Lawsuit on Behalf of Man Arrested for Recording Police Officer Settles (Oct. 9, 2013), <https://www.aclupa.org/en/press-releases/lawsuit-behalf-man-arrested-recording-police-officer-settles> [<https://perma.cc/7DWJ-545F>].

¹⁸ Man Arrested for Recording Police Awarded \$275,000, CBS Sacramento (Nov. 29, 2017), <https://sacramento.cbslocal.com/2017/11/29/man-arrested-for-recording-police-awarded-275000/> [<https://perma.cc/8YNP-3SV5>].

¹⁹ Mass. Gen. Laws ch. 272, § 99(C)(1) (2018).

²⁰ See *infra* Part I.A.

reasonable expectation of privacy in that interaction.²¹ In the context of police-citizen encounters, then, these wiretap statutes imply that bystanders have no legal right to surreptitiously document the public activity of law enforcement without first making their intention to record known. We contend, as the First Circuit affirmed in *Project Veritas*, that such blanket prohibitions are unconstitutional when applied to surreptitious recordings of police activity.

In this piece, we argue that the First Circuit's decision is sound, that an individual's right to secretly record the police in public spaces is protected by the First Amendment, and thus any laws outlawing this activity are unconstitutional as applied. The First Amendment protects the rights of individuals in the United States to record and report matters of interest to the public.²² We argue here that such a right must extend to bystander *secret* recordings too. This is a novel claim: Scholars have argued in favor of granting First Amendment protection to public²³ and secret²⁴ recordings of the police, and against the application of wiretap statutes to recordings from a policy perspective,²⁵ but there has not yet been engagement with how the First Circuit's opinion advances these arguments. We argue that laws implicitly or explicitly prohibiting the secret recording of law enforcement are unconstitutional as-applied, and that the assertions of privacy interests made by those depicted in the

²¹ See *id.*

²² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281–83 (1964).

²³ See Margot E. Kaminski, *Privacy and the Right to Record*, 97 *B.U. L. Rev.* 167, 170–71 (2017); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 *U. Pa. L. Rev.* 335, 339 (2011); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 *Colum. L. Rev.* 991, 997–99 (2016); Jocelyn Simonson, *Copwatching*, 104 *Calif. L. Rev.* 391, 442 (2016); Elizabeth J. Frawley, *Note, No Calling Cut: The Political Right to Record Police*, 17 *U. Pa. J. Const. L.* 287, 298 (2014).

²⁴ See Timothy D. Rodden Jr., *Note, Yes, This Phone Records Audio!: The Case for Allowing Surreptitious Citizen Recordings of Public Police Encounters*, 47 *Suffolk U. L. Rev.* 905, 926–27 (2014); Taylor Robertson, *Note, Lights, Camera, Arrest: The Stage is Set for a Federal Resolution of a Citizen's Right to Record the Police in Public*, 23 *B.U. Pub. Int. L.J.* 117, 137–39 (2014).

²⁵ See Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 *N.C. L. Rev.* 1639, 1667–68 (2018); Rebecca G. Van Tassell, *Comment, Walking a Thin Blue Line: Balancing the Citizen's Right to Record Police Officers Against Officer Privacy*, 2013 *BYU L. Rev.* 183, 184 (2013); Mark Brncik, *Note, A Case for Non-Enforcement of Anti-Recording Laws Against Citizen Recorders*, 62 *Case W. Rsrv. L. Rev.* 485, 515 (2011); Lisa A. Skehill, *Note, Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 *Suffolk U. L. Rev.* 981, 1011 (2009).

recordings, earnest though they may be, cannot justify imposing sanctions on those who seek to illuminate wrongful conduct that could otherwise go without rebuke.

Secret recordings of police misconduct are particularly consequential because, by recording the behavior of police officers in the line of duty without their knowledge, the broader public can gain access to and awareness of conduct that would otherwise go without scrutiny. With the information depicted in these recordings, we as a society can examine potential instances of misconduct and create a mechanism for accountability.²⁶ The documentation and public dissemination of evidence of police misconduct by bystanders will enable the public to fully reckon with the harms propagated by those in power and work to hold them to account in ways that extant checks on police misconduct do not.²⁷

In Part I, we provide an overview of the *Project Veritas* decision and examine the current state of the law regarding a civilian's right to record the public conduct of police officers. We then, in Part II, explain how the First Amendment interests underpinning a right to openly record should extend to cover the production of secret recordings and contend with opposing views, before briefly concluding.

I. THE RIGHT TO RECORD

In *Project Veritas Action Fund v. Rollins*, the First Circuit reviewed a pre-enforcement action brought by plaintiffs K. Eric Martin and Rene Perez.²⁸ The First Circuit reviewed a pre-enforcement action brought by plaintiffs K. Eric Martin and Rene Perez. They had initiated this challenge under Section 1983 to enjoin the Commissioner of the Boston Police and the District Attorney for Suffolk County from enforcing “Section 99,” a

²⁶ The increased prevalence of citizen recordings shifts the balance of power between police officers and the communities they serve. See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 *Geo. L.J.* 1559, 1568 (2016) (arguing that changing the video's perspective transfers power and serves a valuable social purpose).

²⁷ See, e.g., Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording To Check Police Officers' Power*, 117 *Yale L.J.* 1549, 1553–55 (2008) (arguing that citizen recording supplements existing checks against law enforcement abuses, such as the exclusionary rule and Section 1983 actions); Simonson, *supra* note 23, at 407–21 (explaining how copwatching can serve as a form of deterrence to, data collection of, and constitutional engagement with police misconduct).

²⁸ 982 F.3d 813, 817, 820 (1st Cir. 2020), *aff'g* *Martin v. Gross*, 340 F. Supp. 3d 87 (D. Mass. 2018).

Massachusetts statute that prohibits the secret recording of interactions between civilians and public officials.²⁹ The plaintiffs were civil rights activists who had secretly recorded—and wished to continue secretly recording—police-civilian interactions as a mechanism for accountability.³⁰ However, given the history of active enforcement of Section 99, Martin and Perez felt they had no safe, legal avenue forward.³¹

Though brought in a pre-enforcement action, the issue, according to the First Circuit, required no further factual development to address the plaintiffs' claim on the merits.³² Further, the court asserted that the statute's recent history of enforcement could credibly create a fear of future prosecution in the absence of judicial intervention, and, therefore, was ripe for review.³³ The court then found for the plaintiffs on the merits, concluding a statute that prohibits the surreptitious recording of police officers' conduct in public spaces could not comply with the First Amendment.³⁴ While this decision was limited to the particular statute at issue, we argue its implications should inform courts across the country of the impermissible application of wiretap statutes against surreptitious citizen recordings of the police.

A. Background on Federal and State Wiretap Laws

In the United States, individuals generally cannot legally record a conversation without the consent of at least one party involved, when those parties have a reasonable expectation of privacy in the interaction. Federal law dictates that a recording is legal only so long as one of the individuals involved in the conversation or encounter agrees to be

²⁹ Mass. Gen. Laws ch. 272, § 99 (2018); *Project Veritas*, 982 F.3d at 817, 820.

³⁰ *Project Veritas*, 982 F.3d at 820. Though they could not predict for the court the particular moments at which they would need to make such recordings, the plaintiffs argued that their prior experience in openly recording police officers suggested that such moments would certainly occur. Brief for Plaintiff-Appellees at 9, *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (No. 19-1629) (submitted by K. Eric Martin and Rene Perez).

³¹ *Project Veritas*, 982 F.3d at 820.

³² *Id.* at 828–29. It was not necessary for the court's review that the plaintiffs specify the particular circumstances in which they would produce future secret recording, as their challenge was limited to the production of secret recordings in public spaces, a phrase the First Circuit had itself previously used to “describe the geographic bounds of the citizen's right to record police officers.” *Id.* at 827 (citing *Glik v. Cunniffe*, 655 F.3d 78, 84–85 (1st Cir. 2011); *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014)).

³³ *Id.* at 829–30.

³⁴ *Id.* at 830–31, 836.

recorded; in other words, one party must consent to being recorded.³⁵ State laws differ as to which parties must consent in order for a recording to be legal; while most have adopted similar one-party consent laws,³⁶ a minority of states are two-party consent jurisdictions, meaning the permission of both parties is required to record.³⁷

Of note, the legislative history of these statutes suggests that they were designed, broadly speaking, with two goals in mind: First, to provide law enforcement officials with a clearly lawful means to conduct wiretaps, often with the aim of facilitating the prosecution of organized crime, and second, to protect the privacy of citizens from the overreach of electronic surveillance.³⁸

Massachusetts state law goes further and explicitly *prohibits* the secret recording of non-consenting parties. Their wiretapping statute bans “the secret use of [modern electronic surveillance devices] by private individuals,” as the legislature worried their proliferation and use had placed the privacy of citizens in danger.³⁹ As interpreted by the Supreme Judicial Court of Massachusetts, a recording was made secretly if the recorded subject had no “actual knowledge of the recording,” though such knowledge may also be shown through “clear and unequivocal objective manifestations.”⁴⁰ In practice, though, this statute also prevents bystanders from secretly recording what they perceive to be police misconduct in public spaces. In 2007, activist Peter Lowney was found in

³⁵ 18 U.S.C. § 2511(2)(d) (2018).

³⁶ See, e.g., Kan. Stat. Ann. § 21-6101(a)(1) (2019).

³⁷ Cal. Penal Code § 632 (West 2017); Del. Code Ann. tit. 11, § 1335(a)(4) (2017); Fla. Stat. § 934.03(2)(d) (2019); Haw. Rev. Stat. Ann. § 711-1111(1)(d)–(e) (LexisNexis 2016); Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3) (West 2019); Mich. Comp. Laws § 750.539c–d (2016); Mont. Code Ann. § 45-8-213(1)(c) (2019); N.H. Rev. Stat. Ann. § 570-A:2(I) (2017); 18 Pa. Cons. Stat. Ann. § 5704(4) (West 2020); Wash. Rev. Code § 9.73.030(1) (2019). In 2014, the Illinois Supreme Court held the state’s two-party consent statute was unconstitutional as written, as it banned the recording of conversations or situations when the parties had no reasonable expectation of privacy, thus violating the First Amendment. *People v. Melongo*, 6 N.E.3d 120, 127 (Ill. 2014).

³⁸ Brncik, *supra* note 25, at 492–93.

³⁹ Mass. Gen. Laws ch. 272, § 99(A) (2018) (“The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth.”). Notably, a recording is secret, according to the Supreme Judicial Court of Massachusetts, when it is made without the actual knowledge of the depicted subject, though that finding may be established by “unequivocal objective manifestations of knowledge.” *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976).

⁴⁰ *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976). See also *Commonwealth v. Hyde*, 750 N.E.2d 963, 968 (Mass. 2001) (reaffirming this interpretation).

violation of this statute for recording an on-duty Boston University police sergeant during a protest.⁴¹ When ordered by the police to stop filming, Lowney returned the device to his pocket but did not stop recording.⁴² He was convicted under the statute and received a suspended sentence of up to two years in jail, a \$500 fine, and was made to remove the relevant video from the internet.⁴³

Over recent years, the use of these state wiretap laws to penalize recordings of police-civilian interactions has been challenged repeatedly in federal court, most often when such recordings were made openly.⁴⁴ Each federal court of appeal facing the issue has held the application of these statutes to public (i.e. non-secret) recording of police-citizen interactions is unconstitutional as a violation of the First Amendment.⁴⁵ Since the First Amendment protects expressive activity, it also must protect the activity required to produce or create such expression.⁴⁶ The Department of Justice has also affirmed that citizens must have at least some right to record the police, as “[t]he First Amendment protects the rights of private citizens to record police officers during the public discharge of their duties.”⁴⁷ And notably, the courts have affirmed that

⁴¹ Sam Bayard, *Massachusetts Wiretapping Law Strikes Again*, Digit. Media L. Project (Dec. 12, 2007), <http://www.dmlp.org/blog/2007/massachusetts-wiretapping-law-strikes-again> [<https://perma.cc/ADJ9-ZZ9Q>].

⁴² *Id.*

⁴³ Daily Free Press Admin, *BU Protester Fined, Could Face Jail Time*, Daily Free Press (Dec. 6, 2007), <https://dailyfreepress.com/2007/12/06/bu-protester-fined-could-face-jail-time/> [<https://perma.cc/MG7H-4H5X>].

⁴⁴ See *supra* note 5.

⁴⁵ *Id.*

⁴⁶ See *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); see also *Fields v. City of Philadelphia*, 862 F.3d 353, 358–59 (3d Cir. 2017) (affirming that the First Amendment protects the act of “capturing inputs that may yield expression”) (quoting Brief for the Cato Institute as Amicus Curiae at 7); Kreimer, *supra* note 23, at 408–09 (concluding that given how, in public spaces, “pervasive image capture grants authority to a range of unofficial voices . . . [and] provides a means of holding the conduct of the powerful to account,” it must be that “the First Amendment protects the right to record images we observe as part of the right to form, reflect upon, and share our memories”).

⁴⁷ Statement of Interest of the United States at 4, *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888, 2012 WL 9512053 (D. Md. filed Jan. 10, 2012); see also Justin Fenton, DOJ Urges Judge to Side with Plaintiff in Baltimore Police Taping Case, *Balt. Sun* (Jan. 11, 2012), <https://www.baltimoresun.com/news/bs-xpm-2012-01-11-bs-md-ci-aclu-doj-videotaping-20120111-story.html> [<https://perma.cc/7XVA-W4SW>] (describing the case).

this right cannot be limited to news reporters, but must also extend to recordings made by private individuals.⁴⁸

This should not come as a surprise. Longstanding Supreme Court precedent has recognized the existence of a First Amendment interest in criticizing public officials,⁴⁹ and in particular, police officers.⁵⁰ A necessary prerequisite to such expression is the gathering of information about these public officials “from any source by means within the law,”⁵¹ which has been construed broadly enough to include audio and video recordings.⁵² Such action helps to facilitate “the free discussion of governmental affairs,”⁵³ uncover governmental abuse,⁵⁴ and generally improve the government’s functioning.⁵⁵

Further, while such forms of newsgathering criticism often emerge spontaneously, they also take organized forms. For example, Professor Jocelyn Simonson has highlighted the fifty-year history of “copwatching,” a civic practice in which “organized groups of local residents . . . patrol their neighborhoods, monitor police conduct, and create videos of what they see.”⁵⁶ She argues that copwatching is a form of constitutional engagement, as it enables local neighborhoods to “challeng[e] the control that courts and police officers have in determining what is ‘reasonable’ or ‘suspicious’ with regard to the Fourth Amendment,” and to demand that law enforcement respect the dignity of those they encounter.⁵⁷

⁴⁸ *Glik*, 655 F.3d at 83–84 (“[T]he public’s right of access to information is coextensive with that of the press.”).

⁴⁹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (“The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.”); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

⁵⁰ *City of Houston v. Hill*, 482 U.S. 451, 460–62, 467 (1987) (invalidating a city ordinance which made it illegal to interrupt an officer in the performance of his duties).

⁵¹ *Glik*, 655 F.3d at 82 (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978)).

⁵² See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (emphasizing that First Amendment protections go “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”).

⁵³ *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 83 (quoting *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986)).

⁵⁶ Simonson, *supra* note 23, at 408.

⁵⁷ *Id.* at 421.

This right to record, though, is not without limit. Some scholars and advocates argue that countervailing factors—such as the privacy interests of the police officers and civilians depicted in the recordings—justify secret recordings’ restriction.⁵⁸ Courts have long held that a person does not entirely forfeit their privacy when entering public spaces.⁵⁹ In fact, as Professor Margot Kaminski has explained, statutes that regulate recording protect legitimate privacy interests, since that which an individual does not reveal to the recorder is meant to remain private and should be protected against another’s intrusions.⁶⁰ Professor Kaminski further asserts that the distribution of such recordings—such as the posting of video and audio recordings of police misconduct on social media—implicate a second, distinct privacy interest in preserving one’s dignity from harm.⁶¹

Police officers, however, cannot claim to have as robust expectations of privacy when acting as public officials as they might when off-duty.⁶² Some courts have emphasized that police officers shed any expectation of privacy when they act in public spaces, particularly if the conduct at issue is easily observable by members of the public.⁶³ Other courts have focused on the prominent and important nature of the police officer’s position in the community to determine that they cannot expect the same kind of privacy when on-duty as a private citizen might otherwise claim.⁶⁴

⁵⁸ See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 611 (7th Cir. 2012) (Posner, J., dissenting).

⁵⁹ See, e.g., *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970) (clarifying that “under certain circumstances, surveillance may be so ‘overzealous’ as to render it actionable” as an invasion of one’s right to privacy).

⁶⁰ Kaminski, *supra* note 23, at 171. It should be noted, though, that privacy is a notoriously difficult value to characterize, and it often depends upon the context in which it is claimed. See Daniel J. Solove, *Understanding Privacy* 101–70 (2008) (proposing a taxonomy of privacy interests); Julie E. Cohen, *What Privacy is For*, 126 *Harv. L. Rev.* 1904, 1907–08 (2013) (arguing that attempts to define privacy as deriving a single overarching principle are inevitably unworkable).

⁶¹ Kaminski, *supra* note 23, at 202–03. But cf. Kreimer, *supra* note 23, at 404 (arguing that the primary privacy harm of recording is in its public dissemination).

⁶² See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) (“[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance.”).

⁶³ See e.g., *State v. Flora*, 845 P.2d 1355, 1357 (Wash. Ct. App. 1992) (“The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit.”).

⁶⁴ See, e.g., *Rotkiewicz v. Sadowsky*, 730 N.E. 2d 282, 287 (Mass. 2000) (finding that a police officer is a public official for purposes of defamation claims because of “the broad

Moreover, the Supreme Court has made clear that an individual can claim no protection under the Fourth Amendment for information consensually disclosed to a police officer.⁶⁵

Other scholars claim that recording officers in public might impede the execution of important police investigations. This concern becomes most salient if the officers are acting undercover, as recording them may legitimately compromise the officer's safety.⁶⁶ In a similar vein, some fear that the threat of recording might deter members of the public from seeking assistance from or giving critically important information to the police.⁶⁷ For situations in which recorders hamper law enforcement's ability to maintain public safety, though, officers have the ability to impose reasonable time, place, and manner restrictions to prevent the conduct.⁶⁸ In a recent Section 1983 action, one plaintiff alleged an officer impermissibly interfered with his First Amendment right to record the police when the officer seized the plaintiff's drone, which was flying over a car accident.⁶⁹ The court found no violation of his First Amendment rights, because despite the plaintiff's interest in obtaining footage, the

powers vested in police officers and the great potential for abuse of those powers, as well as police officers['] high visibility within and impact on a community.”)

⁶⁵ See *Lopez v. United States*, 373 U.S. 427, 437–39 (1963).

⁶⁶ *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1219–20 (10th Cir. 2007) (highlighting the importance of protecting officer safety but nonetheless finding that the public interest in revealing officer misconduct outweighed that concern under the facts of this case).

⁶⁷ See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 611–12 (7th Cir. 2012) (Posner, J., dissenting). Surveys show that a majority of police officers often suggest they are supportive of wearing body cameras. See Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Behind the Badge*, Pew Rsch. Ctr. 75 (Jan. 11, 2017), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf [<https://perma.cc/CG6C-FTCW>]. But that support does not often extend to citizen recorders, as law enforcement feel they would unduly interfere with the execution of their duties. See, e.g., Alysia Santo, *Why Cops Aren't Ready for Their Close-Up*, Marshall Project (Apr. 24, 2015), <https://www.themarshallproject.org/2015/04/24/why-cops-aren-t-ready-for-their-close-up> [<https://perma.cc/29Y3-3ZL4>] (highlighting police support for a 2015 Texas state bill that would criminalize photographing on-duty police officers).

⁶⁸ *Alvarez*, 679 F.3d at 607; *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). See also *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (observing “even insofar as it is clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions”).

⁶⁹ *Rivera v. Foley*, No. 3:14-cv-00196, 2015 WL 1296258, at *1–2 (D. Conn. March 23, 2015).

drone’s “trespass[] onto an active crime scene” hampered the police investigation.⁷⁰

B. The First Circuit’s Project Veritas Decision

In December 2020, the First Circuit became the first federal court of appeals in the country to weigh in on the constitutionality of secret recordings. Judge Barron, writing for a unanimous panel, first found that the act of producing secret recordings is deserving of First Amendment protection, given the critical role such actions play in newsgathering.⁷¹ In fact, the court agreed with the plaintiffs that secret recordings can “sometimes be a better tool for ‘gathering information about’ police officers conducting their official duties in public, and thereby facilitating ‘the free discussion of governmental affairs’ and ‘uncovering . . . abuses,’ than open recording is” because it is less likely to disrupt police operations and less likely to engender resistance from police officers.⁷² Admittedly, the production of the recording is not a form of expressive speech in the same way that Professor Jocelyn Simonson has described regarding open recordings.⁷³ Nonetheless, the court argued that the secret recordings “can constitute newsgathering every bit as much as a credentialed reporter’s after-the-fact efforts to ascertain what had transpired.”⁷⁴

The court then affirmed the lower court’s conclusion that Section 99, like other state wiretap laws, is a “content-neutral law of general applicability.”⁷⁵ While First Circuit precedent had not cleanly articulated what level of scrutiny should apply to such a law, the court concluded that the lower court’s evaluation under intermediate scrutiny—whether the statute “is ‘narrowly tailored to serve a significant government interest’”—was correct.⁷⁶

⁷⁰ Id. at *10. The court expressly contrasted the plaintiff’s actions with the attempts by citizens to record the police using handheld devices at a distance from the ongoing investigation, like those at issue in *Glik* and *Alvarez*. Id.

⁷¹ Project Veritas Action Fund v. Rollins, 982 F.3d 813, 832 (1st Cir. 2020).

⁷² Id. at 832–33.

⁷³ Simonson, *supra* note 23, at 435–36 (describing how organized copwatching takes “the shape of a confrontational practice that seeks change through a combination of official and grassroots channels”).

⁷⁴ *Project Veritas*, 982 F.3d at 833.

⁷⁵ Id. at 834 (quoting *Jean v. Mass. St. Police*, 492 F.3d 24, 29 (1st Cir. 2007)).

⁷⁶ Id. (quoting *Rideout v. Gardner*, 838 F.3d 65, 71–72 (1st Cir. 2016)).

Having identified the relevant First Amendment interest at issue and the level of scrutiny to apply, the Court then revisited the two interests Section 99 was designed to realize: to “prevent[] interference with police activities and protect[] individual privacy.”⁷⁷ The court conceded these qualified as important government interests but nevertheless found that an outright ban on secret recordings was not a narrowly tailored means to pursue those ends. First, any secret recording, by definition, would be produced out of plain sight and without the actual knowledge of the officer depicted.⁷⁸ Accordingly, it would be hard to imagine how the recording itself could be understood to interfere with police activity.⁷⁹

The court devoted considerably more attention to the second potential government interest: protecting individual privacy. At oral argument, the District Attorney argued the relevant interest was not a freedom from being filmed, but a freedom from being filmed *without notice* to ensure “the vibrancy of [] public spaces” and assure citizens “they will not be unwittingly recorded.”⁸⁰ While acknowledging the importance of this interest, Judge Barron countered that on-duty police officers “are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights.”⁸¹ To that end, the court concluded that even where a police officer might have some privacy interest in their actions, a total ban of surreptitious audio recordings is “too unqualified to be justified in the name of protecting that degree of privacy.”⁸² Even the privacy concerns of individuals who interact with police officers cannot justify “the blunderbuss prohibitory approach embodied in Section 99,” given the public nature of the private individual’s speech.⁸³ Given the critically important role that surreptitious recordings play in the ability of private individuals to gather news about police officer conduct without

⁷⁷ Id. at 836.

⁷⁸ Id.

⁷⁹ Id. at 836–37. The court did nod to Judge Posner’s concern in *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 613 (7th Cir. 2012) (Posner, J., dissenting)—that the potential for secret recordings could deter confidential informants from cooperating with police officers. However, the court found it was largely without merit, given that officers meeting with informants are likely careful about the circumstances in which they do so and the defendants offered no concrete evidence of such deterrence, only conjecture. Id. at 837.

⁸⁰ *Project Veritas*, 982 F.3d at 837–38.

⁸¹ Id. at 838 (quoting *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011)).

⁸² Id.

⁸³ Id. at 839. For example, the court noted the potential privacy interest in the identity of rape victims. Id. (citing *Fla. Star v. B.J.F.*, 491 U.S. 524, 537 (1989)).

fear of retaliation for their actions, the statute failed intermediate scrutiny.⁸⁴

Police officers, as agents of the state, are entrusted with the protection of the public safety and are authorized to exert force, including deadly force if necessary, to achieve that mission.⁸⁵ However, to render that permission legitimate, the public must be able to seek redress when its trust is abused. As Robert Post argues, this process requires that “citizens have access to the public sphere so that they can participate in the formation of public opinion” and “that governmental decision making be somehow rendered accountable to public opinion.”⁸⁶ Within the context of policing, the production of recordings by citizens can play a critical role in that democratic process by broadening the scope of perspectives that informs the public’s understanding of the police.

Given the extent to which many activists, like Martin and Perez, credibly fear retribution, it may be that surreptitious recordings are the only kind that activists feel safe to produce. While recordings of law enforcement officers are often made openly, with the intention of making the officer aware they are being recorded,⁸⁷ this is not the case for those who fear reprisals. Recordings bringing attention to the most salient examples of police brutality have often come at a heavy cost to those who created them, including through violent retaliation, intimidation, and pretextual arrest at the hands of law enforcement.⁸⁸ Cities have also

⁸⁴ For that reason, the court found that there was no alternative kind of recording that would serve the same function as surreptitious recordings. Their outright prohibition under Section 99 could not survive intermediate scrutiny. *Id.* at 839–40.

⁸⁵ See Barry Friedman, *Unwarranted: Policing without Permission* 5 (2017) (“Policing officials are granted remarkable powers. They are allowed to use force on us. And to conduct surveillance of us. . . . Possession of these powers . . . is what defines policing, what sets it apart.”).

⁸⁶ Robert Post, *Participatory Democracy and Free Speech*, 97 *Va. L. Rev.* 477, 482 (2011).

⁸⁷ See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 79–80 (1st Cir. 2011). These kinds of tactics have consistently been used in protests over police brutality. Karen Hao, *How to Turn Filming the Police into the End of Police Brutality*, *M.I.T. Tech. Rev.* (June 10, 2020), <https://www.technologyreview.com/2020/06/10/1002913/how-to-end-police-brutality-filming-witnessing-legislation/> [<https://perma.cc/LLB7-686G>].

⁸⁸ Officers often render citations to civilian recorders for broadly defined and difficult to disprove charges, such as obstruction. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017). Some of the most prominent civilian recorders, like those who filmed the police killings of Freddie Gray, Eric Garner, Walter Scott, Philando Castile, and Alton Sterling, have faced continued harassment at the hands of the police. Dragana Kaurin, *The Price of Filming Police Violence*, *Vice* (Apr. 27, 2018), <https://www.vice.com/en/article/evqw9z/filming-police-brutality-retaliation> [<https://perma.cc/9PUX-6DAG>].

enacted ordinances imposing sanctions on those recording public police activity if an officer determines the recording unduly interferes with their ongoing investigation.⁸⁹ Under such threats, it is no wonder individuals wish to keep secret their act of recording.

And just as the ability to produce secret recordings incentivizes the “democratization of proof,”⁹⁰ so too does it ensure that officers cannot hide from public scrutiny by changing their behavior when they know others may see it. Counsel for the government of Massachusetts, in the oral argument for *Project Veritas*, raised this very point, ironically asserting that secret recordings should be prohibited so that public officials can know when they are being recorded and censor their behavior accordingly.⁹¹ We assert, however, that this is directly contrary to the public’s interest. We should not want police officers to modify how they would otherwise behave when the public is not watching. In fact, surreptitious recording is the only way we can truly know how public officials are acting when the cameras are no longer rolling. Embracing secret recording, as the First Circuit demonstrated in *Project Veritas*, would supplement the range of perspectives that the public can access. It would bring life to the idea that “[W]e are the police. What is done by the police is done by all of us.”⁹²

C. Other Circuit Precedent on Surreptitious Recordings

The First Circuit’s decision is groundbreaking, in large part, because no other federal circuit has addressed the question of surreptitious recordings so squarely. Though a variety of courts have identified a generalized right to record the police in public, none have examined the

⁸⁹ See, e.g., Tucson, Ariz., Code art. I, §§ 11-70.3, 11-70.4 (2020) (prohibiting individuals from “physically entering crime scenes or areas immediately surrounding where such enforcement activity . . . [is] taking place” and criminalizing activity that “materially inhibits, obstructs, hinders, or delays any Police Officer . . . in the exercise of the Officer’s official duties”).

⁹⁰ Fan, *supra* note 25, at 1645.

⁹¹ See Oral Argument at 14:20, *Project Veritas Action Fund v. Rollins*, No. 19-1629 (1st Cir. argued Jan. 8, 2020), *sub nom.* *Martin v. Gross*, 340 F. Supp. 3d 87 (D. Mass. 2018), available at <https://www.courtlistener.com/audio/67830/project-veritas-action-fund-v-rollins/> [<https://perma.cc/NCP4-82GU>] (“Under the statute, the principle that the legislature subscribed to . . . is the notion that people have an interest in knowing when they’re being recorded, so that they can make appropriate choices about how to conduct themselves.”).

⁹² Friedman, *supra* note 85, at 321.

contours of this right in such great detail.⁹³ Further, in circuits that have not considered the issue, courts have granted police officers qualified immunity for actions taken to prevent civilian recorders from documenting officers' actions in public, or for retaliating against these recorders, so long as they were not otherwise infringing upon the recorder's constitutional rights.⁹⁴ This reality has endangered citizens' ability to surreptitiously record the police.

Notably, the Seventh Circuit, in *ACLU of Illinois v. Alvarez*, went so far as to evince explicit skepticism that the First Amendment would protect surreptitious recordings made in public spaces.⁹⁵ This was despite holding that private citizens have a right to produce *public* recordings of police-civilian interactions.⁹⁶ The court distinguished the public nature of the recording at issue from surreptitious recordings, suggesting that the regulation of the latter might survive intermediate scrutiny because secret recordings fail to provide adequate notice to subjects that they are being recorded.⁹⁷ According to the court, the secret nature of the recording could

⁹³ See *Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (“This right [to record the police], however, ‘is not without limitations.’ Like all speech, filming the police ‘may be subject to reasonable time, place, and manner restrictions.’ In this case, however, we need not decide which specific time, place, and manner restrictions would be reasonable.”) (quoting *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011)); see also *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (declining to address the limits of the constitutional right to record); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012) (stating that the court need not address surreptitious recordings or recordings of private conversations); *Glik*, 655 F.3d at 84 (declining to address the limits of the right to film); *Fordyce v. City of Seattle*, 55 F.3d 436, 440 (9th Cir. 1995) (noting that the Washington Supreme Court had not yet interpreted whether its wiretapping statute covered private conversations); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment right to record but not defining its scope).

⁹⁴ For example, the Tenth Circuit recently found that four officers were entitled to qualified immunity in a Section 1983 action that alleged the officers had unconstitutionally infringed on the plaintiff's First Amendment right to record the police in public spaces because no such right had been clearly established at the time of the purported violation. *Frasier v. Evans*, 992 F.3d 1003, 1023 (10th Cir. 2021). However, the court then “exercise[d] [its] discretion to bypass the constitutional question of whether such right even exists.” *Id.* at 1020 n.4.

⁹⁵ See *Alvarez*, 679 F.3d at 605–07.

⁹⁶ *Id.* at 608 (enjoining the State's Attorney from applying the Illinois wiretap statute against the ACLU and its employees who openly record law enforcement).

⁹⁷ *Id.* at 605–06. Under this standard, courts ask whether the regulation is narrowly tailored to serve a substantial government interest, meaning the government must prove its interest “would be achieved less effectively absent the regulation” and that the regulation can accomplish this end without burdening “substantially more speech than is necessary.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

“bring[] stronger privacy interests into play.”⁹⁸ The Seventh Circuit’s skepticism about the legality of secret recordings was, until now, the only forecast of how regulations of surreptitious recordings under state and federal wiretap statutes might be treated.

In addition, prior to the First Circuit’s decision in *Project Veritas*, federal courts had largely avoided questions involving the constitutionality of secret recording of the police. Federal and state courts alike often found that the act of recording does not violate state wiretap statutes, as officers cannot reasonably claim an expectation of privacy in public places.⁹⁹ And while courts have been clear that bystanders have a right to record police-civilian interactions, they have avoided exploring whether an officer might claim a privacy interest in cases involving recordings produced by third parties by finding that the bystander recorder violated another statute while producing their recording (such that police intervention was necessary), or, conversely, that the bystander’s right to record had not been clearly established.¹⁰⁰ That path, however, was unavailable to the First Circuit. Section 99, as described above, is unique among wiretap statutes in that it prohibits all secretly produced audio recordings, irrespective of whether the person depicted could claim any reasonable expectation of privacy in the content of their recorded speech.¹⁰¹ As a result, the court, for the first time in the country, fully confronted the constitutionality of such a regulation.

II. IMPACT BEYOND BOSTON

The implications of the First Circuit’s decision in *Project Veritas* will reach far outside the state of Massachusetts. While Section 99 is unique in its express prohibition of secret recordings, the underlying principle

⁹⁸ *Alvarez*, 679 F.3d at 607 n.13 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001)).

⁹⁹ See *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *19 (Md. Cir. Ct. Sept. 27, 2010); *State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992); *Jones v. Gaydula*, No. CIV. A. 85-1859, 1989 WL 156343, at *3 (E.D. Pa. Dec. 22, 1989).

¹⁰⁰ See *Bleish v. Moriarty*, No.11-cv-162, 2012 WL 2752188, at *10–*12 (D.N.H. 2012) (finding a Section 1983 plaintiff’s arrest for disorderly conduct did not violate the Fourth Amendment and that the plaintiff failed to show she was arrested for exercising her First Amendment rights); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that the plaintiffs failed to show that the police had violated their First Amendment right to record); *Gravolet v. Tassin*, No.08-3646, 2009 WL 1565864, at *4 (E.D. La. June 2, 2009) (finding a Section 1983 plaintiff’s arrest while recording did not violate his Fourth Amendment rights because the officers had probable cause to arrest him for stalking and that the plaintiff failed to clearly establish his right to record).

¹⁰¹ See *supra* notes 35–39 and accompanying text.

has direct consequences to other states' wiretap laws. We argue here that, as similar First Amendment interests are at play in both public and secret contexts, constitutional protection for secret recordings should be extended across the country,¹⁰² as has successfully happened in the First Circuit. While the Seventh Circuit may be correct in highlighting that surreptitious recording of police might implicate different privacy interests than open recordings,¹⁰³ the distinction between them is not sufficiently meaningful, on its own, to override these important First Amendment interests. Further, solutions outside of constitutionally securing the right to secretly record the police provide insufficient protection and certainty to would-be recorders. To reach an opposite conclusion would frustrate police accountability efforts and threaten the public's understanding of police misconduct.

A. The Contours of This Argument

The claim we make here is a limited one: The First Circuit was correct to hold that a right to record should protect bystanders who secretly record on-duty officers engaging with citizens in public spaces.¹⁰⁴ However, such a right is not unlimited. For example, if the making of a recording might legitimately interfere with police activities, or, per the First Circuit, lead an officer to “reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties,” such recordings may be proscribed by reasonable time, place, and manner restrictions.¹⁰⁵ It is admittedly more complicated to proscribe such measures in circumstances where the recording in question was made surreptitiously—but it would be correspondingly difficult to prove such secret recordings *actually* interfered with the officer's exercise of their duties.¹⁰⁶

¹⁰² Scholars have previously discussed the compelling justifications for extending constitutional protection to surreptitious recordings. See, e.g., Rodden, *supra* note 24, at 907.

¹⁰³ *Alvarez*, 679 F.3d at 607 n.13.

¹⁰⁴ There are valid, constitutionally cognizable concerns that may limit the right to secretly record police-civilian interactions, for example, in private spaces. See Kaminski, *supra* note 23, at 238–42. However, these distinctions are not constitutionally meaningful when comparing secret and open recordings of the police in public.

¹⁰⁵ *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014). But see Simonson, *supra* note 23, at 1563 (arguing that an officer may only prevent those acts of recording which would create a “concrete, physical impediment to a police officer or to public safety”).

¹⁰⁶ See *supra* note 79 and accompanying text.

An echo of this concern rings through in Judge Posner's dissent in *Alvarez*. He argues that in some circumstances, a private citizen might want to engage a police officer in public without their interaction "being broadcast on the evening news or blogged throughout the world."¹⁰⁷ Just as the threat of civilian oversight might discourage members of the public—from the covert informant to the crime victim—from seeking out an officers' aid, so too might a policeman's ability to protect the public safety be diminished if he were to be constantly watching for any would-be recorders.¹⁰⁸ It would follow that such an effect would be all the more pronounced where an officer, and the public with which he interacts, know that any passerby could record and publish their interaction, without either of them having ever been made the wiser.

The concern is not without merit, but it is one that can be addressed with tools officers already have at their disposal. First, they might meet with private citizens in private settings, where an officer's privacy interest is stronger.¹⁰⁹ While the public has a legitimate interest in observing the public behavior of police officers, the "Constitution itself is [not] a Freedom of Information Act."¹¹⁰ Thus, individuals cannot expect the government to disclose private information regarding police officer engagements, particularly if such a disclosure might "place[] their personal security, [or] that of their families, at substantial risk."¹¹¹ Second, to the extent that there may exist a legitimate need to engage a civilian without public observation, there is, of course, nothing preventing an officer from establishing reasonable time, place, and manner restrictions to do so. In an instance in which an officer might not be sure whether or not privacy is necessary to pursue an investigatory lead or

¹⁰⁷ *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting).

¹⁰⁸ See *id.* at 611–12 (Posner, J., dissenting).

¹⁰⁹ See, e.g., *Commonwealth v. Bradley*, 232 A.3d 747, 755–56 (Pa. Sup. Ct. 2020) (holding that a no-filming condition in the lobby of a police department was a reasonable time, place, manner restriction to "ensure the safety, security and privacy of officers, informants and victims").

¹¹⁰ *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (quoting Potter Stewart, "Or of the Press," 26 *Hastings L.J.* 631, 636 (1975)).

¹¹¹ *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067–69 (6th Cir. 1998) (finding that the city's release of the police personnel files, which included, among other things, officers' home addresses, phone numbers, banking information, social security numbers, of the police officers who participated as witnesses in a criminal defense trial to defense counsel violated the officers' due process rights by rendering them vulnerable to "private acts of vengeance"). See also *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (holding that there is a constitutionally protected right to privacy in an individual's interest in avoiding the disclosure of highly sensitive, personal information).

promote the public safety, reasonable preemptive measures could well be taken to prevent the interference of a surreptitious recording.¹¹²

Furthermore, regardless of whether a recording is produced openly or surreptitiously, it remains true there is not a cognizable constitutional claim to privacy in conversations between police officers and civilians. As in the case of openly made recordings, officers do not have a legitimate privacy interest in their conduct when acting in an official capacity in public spaces.¹¹³ As a result, creating a distinction between open and surreptitious recordings lacks constitutional significance. Giving notice to those recorded does not change the public nature of the exchange or the public's interest in them.

As discussed in Part I, though, private citizens captured in secret recordings have different privacy interests at stake than police officers.¹¹⁴ Private civilians interacting with the police might legitimately argue that surreptitious recordings violate their right to be let alone, particularly if the interaction devolves into violence or, as it has for too many, death. Some commentators have observed how the production, and subsequent viral consumption, of such videos can become exploitative and even echo the lynch mobs of years past.¹¹⁵ Such privacy concerns extend to

¹¹² See, e.g., *Hill v. Colorado*, 530 U.S. 703, 725–26 (2000) (holding that an eight-foot zone around persons entering a healthcare facility was “a valid time, place, and manner regulation”). Where the production of a secret recording would contravene such reasonable time, place, manner restrictions, the police may legitimately stop the citizen recorder’s production and dissemination of that recording. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017). It should be noted, though, that Supreme Court precedent suggests that the police still may not prohibit the dissemination of such recordings by third parties. See *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (“[A] stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”); see also *Jean v. Mass. St. Police*, 492 F.3d 24, 31 (1st Cir. 2007) (finding that the publication of another’s surreptitiously produced recording, thereby violating Section 99, is entitled to First Amendment protection and therefore immunized the publisher from prosecution, even where the publisher “arguably participated . . . in a conspiracy to disclose the content of [an] illegally recorded oral communication”).

¹¹³ See *supra* notes 62–65 and accompanying text; see also Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. Ill. U. L. Rev. 485, 513 (2013) (explaining that “police officers *qua* police officers do not own a personal privacy expectation in their official acts under prevailing judicial interpretations”).

¹¹⁴ See *supra* notes 58–61 and accompanying text. Some have argued that any person who engages a police officer in a public space loses any reasonable expectation of privacy that they might otherwise be able to claim. See Alderman, *supra* note 113, at 513–14.

¹¹⁵ See Allissa V. Richardson, *Why Cellphone Videos of Black People’s Deaths Should Be Considered Sacred, Like Lynching Photographs*, *The Conversation* (May 28, 2020),

bystanders who happen to be captured by a recording, especially when they are engaged in personally or politically sensitive activity.¹¹⁶

These claims, as the First Circuit found, should fail under a standard of intermediate scrutiny, as they do in the public recording context. The viability of any privacy interest underlying such claims necessarily depends on the circumstances of the interaction in question, the means of recording, and the reasonability of the party's expectation of privacy. Scholars have presented a number of ways to determine whether an expectation of privacy is reasonable;¹¹⁷ an underlying theme of these proposals involves determining the costs inflicted on other important social values, including the ability for the public to critique matters of public interest.¹¹⁸ Where such costs cannot be found to outweigh the value of maintaining one's assertion of privacy, the privacy interest should give way.¹¹⁹ Moreover, there are less restrictive means to protecting these privacy interests. When one is surreptitiously recorded, they can redress harm through a private tort action against the recorder as an invasion of their privacy, to the extent such a relevant interest exists.¹²⁰

<https://theconversation.com/why-cellphone-videos-of-black-peoples-deaths-should-be-considered-sacred-like-lynching-photographs-139252> [<https://perma.cc/XRH4-XL75>].

¹¹⁶ Consider a recording of protestors that could expose them to criminal or civil liability. Depending on the circumstances of the conduct depicted, the protestor may have a colorable claim that the recording of their actions was an invasion of their privacy. See Thomas Germain, *How to Record Video During a Protest*, Consumer Reports (June 5, 2020), <https://www.consumerreports.org/audio-video/how-to-record-video-during-a-protest/> [<https://perma.cc/7BN6-QPM7>].

¹¹⁷ See Scott Skinner-Thompson, *Recording as Heckling*, 108 *Geo. L. J.* 125, 169–73 (2019); see also Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases*, 34 *Vill. L. Rev.* 871, 877–78 (1989) (suggesting a three-pronged analysis to adjudicate the reasonability of an individual's claim to privacy within the context of disclosing a patient's HIV status); Doris DeTosto Brogan, *Privacy's Place at the Table: A Reflection on Richard Turkington's Approach to Valuing and Balancing Privacy Interests*, 61 *Vill. L. Rev.* 437, 445, 456–64 (2016) (arguing that Professor Turkington's framework is broadly applicable and analyzing its potential application to the NSA data sweeping program and the deployment of police body cameras as examples).

¹¹⁸ See, e.g., DeTosto Brogan, *supra* note 117, at 443–45 (comparing such an analysis to that proposed by Judge Learned Hand to analyze whether or not a defendant acted negligently in the canonical *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)).

¹¹⁹ DeTosto Brogan, *supra* note 117, at 443–45.

¹²⁰ Among other causes of action, a plaintiff might successfully argue a recording was an undue invasion of their privacy if it created “unreasonable publicity,” so long as the matter publicized was “highly offensive to a reasonable person” and “not of legitimate concern to the public.” Restatement (Second) of Torts §§ 652D, 652D cmt. C (1977).

And, from a pragmatic perspective, a legal distinction between open and secret recordings is not workable in a world where recording technology is ever-evolving. Today's iPhone may well be supplanted by tomorrow's eyeglass camera. Given the subjective nature of the inquiry of the depicted subject's knowledge, determining whether a recording was made surreptitiously would require a court to identify the kind of recording technology of which a depicted subject was aware before even considering whether the officer understood a recording was being taken.¹²¹ Even if a court could salvage a standard to apply to such situations, such a test would hardly provide the level of necessary certainty to those who hope to record police-civilian interactions without fear of retribution or legal sanction.

In short, prohibiting the secret recording of police-civilian interactions under wiretap laws constitutes a broad overreach that fails to account for the valid First Amendment interests such actions serve.¹²² Applying such laws to secret recordings leads to chilling effects felt by those fearing criminal prosecution and retaliation.¹²³ To most effectively promote the First Amendment interests in bringing light to misconduct that might otherwise go unnoticed, surreptitious recordings should be granted constitutional protection.¹²⁴ In other words, a strong implication of the *Project Veritas* decision is that the application of one-party consent wiretap laws against secret recordings should be held unconstitutional.

¹²¹ Analogous inquiries have plagued courts. For example, the Supreme Court has previously instructed lower courts to determine whether a police officer's use of a given piece of technology in the course of an investigation constituted a search under the Fourth Amendment by asking whether that technology was in "general public use" at the time. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001). Critics have argued that such an inquiry is inadequate because it fails to consider how "courts [are] to deal with the rapid pace of technological development in deciding whether something is in the general public use." See Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo's Rules Governing Technological Surveillance*, 86 Minn. L. Rev. 1393, 1412–13 (2002) (furthering that "[a]dvanced technology can find its way in to the average home very quickly. When that happens . . . the courts will either have to change their stance, manipulate the meaning of the general public use doctrine, or ignore it").

¹²² See *supra* notes 75–84 and accompanying text.

¹²³ See *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

¹²⁴ For an exploration of this argument, see generally Rodden, *supra* note 24.

B. The Insufficiency of Alternatives

In the alternative, some scholars argue that granting constitutional protection to secret recorders is unnecessary. To fix this social problem, police departments and prosecutors' offices should simply commit to a policy of non-enforcement of wiretap statutes against civilian recorders.¹²⁵ Or, instead, these entities should lead educational campaigns about the potential criminal liability associated with recording the police in public spaces, so as to protect potential violators from sanction.¹²⁶ From this perspective, amending wiretap statutes would be too difficult, given the privacy interests implicated and the opposition such efforts would engender from groups like police unions.¹²⁷ Instead, a policy of non-enforcement would enjoy support from such special interests (who might otherwise balk at the idea of dramatic policy change) while accomplishing the same policy ends.¹²⁸

We agree that Congress, state legislatures, and police departments would serve the public well by implementing policies that dissuade officers from arresting or harassing those who record public police conduct. And, in the absence of other developments, such a policy choice may be warranted. However, the very conceit of this argument—that the production of these recordings implicates societal values of sufficient importance to encourage policy change¹²⁹—highlights the weakness of the position. As the First Circuit's decision makes clear, civilians' ability to surreptitiously record the police in public spaces implicates a critical First Amendment interest that, absent a significant and countervailing government interest, cannot be infringed by state or federal policy.¹³⁰ The important nature of the right thereby requires that any protection granted for it be unyielding to the whims of those who may later find it inconvenient, a quality not exhibited by a policy of non-enforcement.

¹²⁵ Brncik, *supra* note 25, at 515–19.

¹²⁶ *Id.* at 520–21.

¹²⁷ *Id.* at 514–15 (citing attempts at reform in Congress and the Mississippi legislature that were stymied, in large part, by police union opposition).

¹²⁸ *Id.* at 516–17 (pointing out police departments that have adopted such a policy and advising prosecutors' offices to follow suit).

¹²⁹ *Id.* at 502–03 (“These recordings help to inform the public and to enrich the public debate over what is or is not abusive behavior. Video evidence is particularly valuable because videos provide the viewer . . . a credible account of the interaction.”).

¹³⁰ *Project Veritas v. Rollins*, 982 F.3d 813, 831 (1st Cir. 2020) (affirming the “particular significance of First Amendment newsgathering rights with respect to government”) (internal quotation marks and citations omitted).

Such a practice is only a temporary fix for a larger, structural problem and leaves individuals' rights vulnerable to future violation. The salience of this interest necessitates constitutional protection, both inside Massachusetts and beyond.¹³¹

Further, a policy of non-enforcement is incapable of supplying the requisite level of certainty to would-be secret recorders, in either the short or long term, to guarantee they will not face criminal penalties for their activity.¹³² While a policy of non-enforcement may temporarily abate a recorder's fear of criminal prosecution, it is neither legally binding nor free from the prospect of its future renouncement.¹³³ As a result, those interested in recording surreptitiously may be discouraged from doing so under such guidelines. It is only by recognizing the right to secretly record that the balance of power can be shifted and third-party bystanders can be empowered to shed light on police misconduct—not merely when those in power allow it. As the First Circuit acknowledged, this aim is best accomplished through a widely-recognized constitutional guarantee of the First Amendment right to secretly record the police.¹³⁴ In this way, *Project Veritas* can serve as a model for how the right to record intersects with, and by and large outweighs, other political and social interests.

CONCLUSION

On March 3, 1991, Rodney King was brutally beaten during a routine traffic stop by officers of the Los Angeles Police Department. A plumber named George Holliday—who observed the altercation from a nearby, second-story balcony—pulled out his newly-purchased Sony Handycam and hit “record.”¹³⁵

¹³¹ See Rodden, *supra* note 24, at 906–07 (advocating that the secret recording of the police be permissible under all wiretap statutes, as a discrepancy between the standards applied to secret and open recordings “gives police the ability to circumvent this right, subjects those who wish to exercise it to potential prosecution, and reduces police accountability for their actions”). The First Circuit’s decision, in many ways, serves as a model for how Rodden’s argument can be given effect nationally.

¹³² For an extensive discussion on the merits and dangers of nonenforcement, see generally Zachary S. Price, *Reliance on Nonenforcement*, 58 *Wm. & Mary L. Rev.* 937 (2017).

¹³³ As explored by Professor Price, whether or not one’s reliance interests would be protected under a policy of nonenforcement depends on how a particular jurisdiction would weigh that interest against the rights of executives to enforce the law. *Id.* at 947.

¹³⁴ See *supra* notes 90–92 and accompanying text.

¹³⁵ Paul Martin Lester, *Visual Ethics: A Guide for Photographers, Journalists, and Filmmakers* 87 (2018); Erik Ortiz, *George Holliday, Who Taped Rodney King Beating, Urges Others to Share Videos*, NBC News (June 9, 2015), <https://www.nbcnews.com/nightly->

A direct line connects George Holliday to Darnella Frazier and the social movements their actions have inspired. These movements would not have been possible without bystander recording of the police.¹³⁶ In a recent statement marking the one year anniversary of George Floyd's murder, Frazier put it simply: "If it weren't for my video, the world wouldn't have known the truth."¹³⁷ While the interactions filmed by George Holliday and Darnella Frazier graphically illustrated the real, brutal, and unauthorized tactics of law enforcement, it was the *recording* of these circumstances that pushed an understanding of this reality into our public consciousness.

The First Circuit's decision in *Project Veritas* affirms this reality and, in response, correctly extends constitutional protection to surreptitious recorders. A legal regime that would draw unintelligible distinctions between secret and open recordings would restrict the tools available to the Fraziers and Hollidays of tomorrow. The secret recording of the police is a particularly crucial tool, as it enables the public reporting of police activity in a way that exposes police misconduct, better informs public discourse, and makes democratic redress and reform possible, free from fear of police retaliation or legal sanction. In this way, secret recordings of the police serve a valid First Amendment interest that open recordings cannot. While these recordings implicate the privacy interests of those depicted, particularly for third-party bystanders who act without notice that their words and conduct are being recorded for public observation, these interests are not sufficient to justify the prohibition of secret recordings.

The First Circuit's decision boldly, and correctly, gives purchase to the claim that secret recordings allow us to internalize not just what police permit us to see, but what happens at the hands of law enforcement agents when cameras are off. As other courts should soon recognize, the secret recording of police by bystanders is—and must be—a First Amendment-protected right, and wiretap statutes restricting this practice must be found

news/george-holliday-who-taped-rodney-king-beating-urges-others-share-n372551 [https://perma.cc/NM3F-Z9KZ].

¹³⁶ See McLaughlin, *supra* note 2.

¹³⁷ Hannah Knowles, Teen Speaks Out a Year After Filming George Floyd's Death, Saying Her Video 'Put His Murderer Away', Wash. Post (May 25, 2021), <https://www.washingtonpost.com/nation/2021/05/25/darnella-frazier-floyd-statement/> [https://perma.cc/4XMH-A2UZ].

unconstitutional as applied. The robustness of our public reporting and, consequently, our ability to remedy police misconduct depends on it.