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Kendal Harden

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EXPOSURE TO POLICE BRUTALITY ALLOWS FOR TRANSPARENCY AND ACCOUNTABILITY OF LAW ENFORCEMENT

KENDAL HARDEN *

I. INTRODUCTION

In 2014, 23 years since a bystander filmed the beating of Rodney King, another filming of police brutality took place, this time captured with a personal cell phone, ending in tragedy.¹ On July 17, 2014, Eric Garner was approached by two plain clothed police officers regarding the sale of untaxed cigarettes.² As the officers approached Mr. Garner, his friend Ramsey Orta videoed the encounter on his cell phone.³ While in the process of arresting Mr. Garner, Officer Pantaleo swung one arm around Mr. Garner's neck and another under his arm, placing him in a chokehold.⁴ Still in the chokehold, Officer Pantaleo began ramming Mr. Garner into a plate glass window of a nearby store, taking him to the ground.⁵ With four other officers now assisting in the arrest, Officer Pantaleo forced Mr. Garner's face into the sidewalk while Mr. Garner repeatedly stated that he "can't breathe."⁶ The video illustrates the lack of concern from the officers with regards to Mr. Garner's physical state, leaving him without oxygen and lifeless on the ground before acknowl-

*Kendal Harden is from Key West, Florida, and received a BS from The University of Florida in 2011. Kendal is currently pursuing her Juris Doctor at The John Marshall Law School, expected June 2018. First and foremost, Kendal would like to thank her family and friends for their endless love, support and encouragement throughout the years. Kendal would like to express her sincere gratitude to Professor Joanne Hodge for her continuous support and guidance since the beginning of her law school career. Kendal would also like to thank her personal editor, Drago Putica, for his patience and commitment throughout the entire writing process, as well as the Journal of Information Technology & Privacy Law.

1. Chelsea Matiash, *What Happened to Rodney King 25 Years Ago*, TIME (March 3, 2016), <http://time.com/4245175/rodney-king-la-riots-anniversary/>; Tierney Sneed, *Tale of the Tape: When Police Brutality Is Caught on Camera*, US NEWS (August 7, 2014), <http://www.usnews.com/news/articles/2014/08/07/tale-of-the-tape-when-police-brutality-is-caught-on-camera>.

2. Al Baker, David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, THE N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

edging the severity of the situation, but it was too late.⁷ The final autopsy report confirmed that the cause of death was a result of the chokehold and chest compression during the arrest.⁸

However, without the video by Mr. Orta, the public would not be made aware of the real reason for Mr. Garner's death, as the initial police report failed to mention any contact with Mr. Garner's neck.⁹ The report even went as far as erroneously stating a witness's testimony, to corroborate the officer's side of the story.¹⁰ The tragic video of Mr. Garner's death sparked national protests, as well as an emerging trend to record and expose police brutality.¹¹ Prior to the death of Mr. Garner, the Federal Government did not keep track of how many people died each year at the hands of police officers.¹² It was not until 2015 that journalists began to keep track, not the Federal Government.¹³ Beginning in 2015, *The Guardian*, an online news source, began to track the daily deaths of citizens by police officers, called "The Counted," and reported 1146 deaths in 2015.¹⁴ Thanks to the advancements in technology and valor of citizens, the public is finally able to understand the true severity of police brutality within the United States.

The following considerations aim to address the lack of accountability and transparency of police brutality in the United States today. Part III will show how advancements in technology brings police brutality to the forefront of our nation's issues by creating an informed society. Part IV will describe how individual states control the use of private cameras and cell phones of citizens to capture occurrences of police brutality. States do this by employing anti-wiretapping statutes to citizens' recordings of on-duty police officers. Part V will demonstrate how citizens' recordings of police brutality are vital for accountability. Finally, Part VI will conclude by encouraging community policing as a solution to police brutality.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Elliott C. McLaughlin, *There aren't more police shootings, just more coverage*, CNN (April 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>.

12. Tom McCarthy, *The uncounted: why the US can't keep track of people killed by police*, THE GUARDIAN (2015), <https://www.theguardian.com/us-news/2015/mar/18/police-killings-government-data-count>.

13. J Charlie Savage, *Justice Department to Streamline Tracking of Police Killings*, THE N.Y. TIMES (August 9, 2016), <http://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html>.

14. Jon Swaine et al., *The Counted: people killed by police in the United States*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Sep 20, 2016).

II. BACKGROUND

COURTS ARE QUESTIONING THE RIGHTS OF PRIVATE CITIZENS BECAUSE OF EXPOSURE TO POLICE BRUTALITY

Police brutality has existed in the United States since the creation of police forces.¹⁵ Historically, police brutality was directly related to large political movements: the prohibition era,¹⁶ the 1960's civil rights movements,¹⁷ anti-war demonstrations,¹⁸ and the war on drugs,¹⁹ with very little attention given to excessive force in daily policing.²⁰ Two decades ago, great attention was given to police brutality.²¹

In 1991, police brutality was brought to the forefront of this nation's issues, when the beating of Rodney King by four Los Angeles police officers was videotaped and disclosed to the public, sparking a rise in national awareness of police brutality.²² Since that incident, numerous recordings of police brutality are publicly displayed.²³

In 2015, websites like the Guardian and The Washington Post, took on the initiative to account for, and report the number of deaths in the United States by police officers on a daily basis.²⁴ In 2015, the Guardian reported that police killed 1146 people, 1018 of those deaths were a result of gunshots.²⁵ For 2016, the Guardian has reported 961 victims

15. MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 1-2 (2003).

16. Wickersham Commission, *Police, Crime, Prohibition, and Enforcement*, NET INDUSTRIES, <http://law.jrank.org/pages/11309/wickersham-commission.html> (last visited Nov 12, 2016).

17. Algernon Austin, *It's Time to Stop Whitewashing Civil Rights History*, THE HUFFINGTON POST (February 4, 2014), http://www.huffingtonpost.com/algernon-austin/its-time-to-stop-whitewas_b_9158710.html.

18. Bill Ganzel, *Protesting the Vietnam War in Urban and Rural America*, WESSELS (2007), http://www.livinghistoryfarm.org/farminginthe50s/life_09.html.

19. Rep. Hank Johnson, *The Failed 'War on Drugs' Is Militarizing Law Enforcement, Fueling Police Violence*, THE HUFFINGTON POST (2014), http://www.huffingtonpost.com/rep-hank-johnson/the-failed-war-on-drugs-i_b_6043558.html.

20. Elliott C. McLaughlin, *There aren't more police shootings, just more coverage*, CNN (April 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>.

21. Natasha Bach, *Police Violence Has Been Going On Forever. No Wonder People Are Fed Up With It*, THE HUFFINGTON POST (August 23, 2014), http://www.huffingtonpost.com/2014/08/23/police-brutality-michael-brown_n_5700970.html.

22. Lily Rothman, *The Police Misconduct Caught on Tape Before Rodney King*, TIME (March 3, 2016), <http://time.com/4237832/citizens-filming-rodney-king/>.

23. Tierney Sneed, *Tale of the Tape: When Police Brutality is Caught on Camera*, US NEWS (August 7, 2014), <http://www.usnews.com/news/articles/2014/08/07/tale-of-the-tape-when-police-brutality-is-caught-on-camera>.

24. Leslie Savan, *How Many People Are Killed by Police? We're Only Beginning to Find Out*, THE NATION (June 18, 2015), <https://www.thenation.com/article/how-many-people-are-killed-police-were-only-beginning-find-out/>.

25. Jon Swaine et al., *The Counted: people killed by police in the United States*,

killed by police, 901 of those deaths were the result of gunshots.²⁶

Anti-Wiretapping Statutes Aim to Protect People's Privacy in Their Communications

In an attempt to regulate use of private cameras and cell phones of citizens to capture occurrences of police brutality, individual states employed anti-wiretapping statutes to citizens' recordings of on-duty police officers.²⁷ Prosecution of citizens under states' wiretap statutes is based on the need to protect the conversational privacy of officers.²⁸

The Supreme Court first addressed the issue of wire-tapping in 1928, in *Olmstead v. United States*, where the Court held that evidence obtained by wiretaps was admissible in trials against criminal defendants.²⁹ The Court reasoned that the wiretaps in question were not in violation of the Fourth Amendment's protection against unreasonable search and seizure because wiretapping did not constitute a seizure.³⁰

In 1967, due to the advancements in technology, the Supreme Court again addressed the constitutionality of wire-tapping in *Berger v. New York* and *Katz v. United States*.³¹ In *Berger*, the Court invalidated the New York's wiretapping statute under the Fourth Amendment, because the statute authorized electronic eavesdropping without the required procedural safeguards.³² Procedural safeguards include probable cause supported by oath or affirmation, and warrants particularly describing the place to be searched, and the persons or things to be seized.³³

The Court outlined the constitutional criteria for electronic surveillance establishing that "the particularity and evidence of reliability ... is especially great in the case of eavesdropping."³⁴ In *Katz*, the Court reversed *Olmstead* and considered whether the defendant had a reasonable expectation of privacy to determine whether there had been an unreasonable search and seizure in violation of the Fourth Amendment.³⁵ The Court explained that if the defendant had a expectation of privacy and society recognizes it as reasonable, then the government was obligated to obtain a search warrant before wiretapping in accord-

THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Sep 20, 2016).

26. *Id.*

27. Taylor Robertson, *Article: 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, 123 (2014).

28. *Id.*

29. *See Olmstead v. United States*, 277 U.S. 438, 469 (1928).

30. *See Id.* at 466.

31. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

32. *Berger v. New York*, 388 U.S. 41, 55 (1967).

33. U.S. Const. Amend. IV.

34. *Berger v. New York*, 388 U.S. 41, 56 (1967).

35. *Katz v. United States*, 389 U.S. 347, 351-52 (1967).

ance with the Fourth Amendment.³⁶

In response to the Court's decisions in *Berger* and *Katz*, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 (also known as "Title III").³⁷ Title III permits the use of wiretaps by federal and state law enforcement under three circumstances.³⁸ In drafting Title III, Congress took into account the protocols set forth in *Berger*,³⁹ and established a precise procedure for interception of wire, oral, or electronic communications.⁴⁰ Additionally, Title III provides that it is lawful for a person, whether acting under color of law or not, "to intercept a wire, oral, or electronic communication, where such a person is a party to the communication or one of the parties to the communication has given prior consent to such interception."⁴¹ Thus, it is legal for an individual who interacts with a police officer to record that interaction, even if the officer does not have knowledge of the recording.

A majority of states also have wiretapping statutes similar to Title III, requiring one-party to consent to the recording.⁴² However, eleven states require all parties to consent in order to legally wiretap.⁴³ States requiring all parties to consent are having trouble determining when these statutes apply, especially with the increase in technology.

States Requiring All Party Consent are Applying Wiretap Statutes to Citizens Recording Police Misconduct

Technology advancements provide individuals access to a multitude of recording devices. Since the entry of the camcorder to the market in 1983, recording devices are steadily changing in size, quality, and capabilities, making them convenient and readily available.⁴⁴ For in-

36. *Id.* at 359-61.

37. Timothy Casey, *Electronic Surveillance and the Right To Be Secure*, 41 U.C. DAVIS L. REV. 977, at 998-99 (2008).

38. 18 U.S.C. 2516-2518 (pursuant to or in anticipation of a court order); 18 U.S.C. 2511(2)(c) (with the consent of one of the parties to the communication); 18 U.S.C. 2511(2)(i) (with respect to the communications of an intruder within an electronic communications system); Charles Doyle, *Privacy: An Overview of the Electronic Communications Privacy Act*, CONGRESSIONAL RESEARCH SERVICE (October 9, 2012), <https://www.fas.org/sgp/crs/misc/r41733.pdf>.

39. S. Rep. No. 90-1097, at 2154.

40. 18 U.S.C. 2518(1), (2).

41. 18 USC § 2511; *See also United States v White*, 401 U.S. 745 (1971).

42. Dustin F. Robinson, *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 Geo. L.J. 1399, 1403 (April 2012).

43. The eleven states include: California, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington; CAL. PENAL CODE § 632 (2011); FLA. STAT. ANN. § 934.02 (2011); 720 ILL. COMP. STAT. 5 / 14-2(a)(1)(A) (2011); MASS. GEN. LAWS ANN. ch. 272, § 99(a)(4) (2011).; MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2011); MICH. COMP. LAWS § 750.539c (2011); MONT. CODE ANN. § 45-8-213 (2011); N.H. REV. STAT. ANN. § 570-A:2 (2011); OR. REV. STAT. § 165.540 (2011); 18 PA. CONS. STAT. ANN. § 5704 (2011); WASH. REV. CODE ANN. § 9.73.030 (2011); Dustin F. Robinson, *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 Geo. L.J. 1399, 1403 (April 2012).

44. Mark Shapiro, *The History of Camcorders*, PRODUCT DESIGN AND DEVELOPMENT (August 28, 2014), <https://www.pddnet.com/blog/2014/08/history-camcorders>.

stance, in 2002, Nokia introduced the first camera phone to consumers.⁴⁵ Since then, cell phone developers are constantly inventing and integrating new technology into a handheld device.⁴⁶ Today, every citizen with a smart phone is able to record anything on video that he or she wants, with little to no limitations.⁴⁷ However, this accessibility comes at a price, at least in the states requiring all parties to consent, as these states are applying wiretap statutes to citizens recording police officers.

Massachusetts was the first all party consent state to address the application of wiretap statutes to cell phone recordings of police officers. In *Glik v. Cunniffe*, Simon Glik observed an arrest of another individual by three Boston Police Officers.⁴⁸ Concerned that the officers were using excessive force, Glik began recording video footage of the arrest on his cell phone.⁴⁹ One of the officers noticed Glik recording the video and arrested him for violating the Massachusetts wiretap statute.⁵⁰ Glik's charges were later dropped and he filed a 42 U.S.C. § 1983 claim against the officers and the City of Boston for violating his First and Fourth Amendments rights.⁵¹ The First Circuit Court of Appeals affirmed the lower courts order denying the officers' claims of qualified immunity.⁵² In its opinion, the court explained that there is a constitutionally protected right to videotape police carrying out their duties in public⁵³ and that the "proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew."⁵⁴

As a result of the First Circuit's decision in *Glik*, numerous circuits have followed the First Circuit's logic in *Glik*. Recently, the Seventh Circuit held in *ACLU v. Alvarez*, that application of the Illinois wiretap statute to public recordings of police officers is unconstitutional.⁵⁵ The court stressed that placing restrictions on recording police officers in public places "interferes with the gathering and dissemination of information about government officials performing their duties in public."⁵⁶ The Second Circuit expanded the First Circuit's ruling in *Glik* and held that "the right to film is not without limitations" and "may be subject to

45. *The incredible history of Nokia camera phones in pictures*, WINDOWS (July 25, 2013), <https://blogs.windows.com/devices/2013/07/25/the-incredible-history-of-nokia-camera-phones-in-pictures/#dmqiyh87x1xyix8.97> (The Nokia 7650 allowed users to record, save and play back video sequences on their mobile phone).

46. Taylor Martin, *Pocket computing: evolution of the smartphone*, POCKETNOW (July 28, 2014), <http://pocketnow.com/2014/07/28/the-evolution-of-the-smartphone>.

47. See Sam Rutherford, *Best Smartphone Cameras 2016*, TOM'S GUIDE (October 31, 2016), <http://www.tomsguide.com/us/best-phone-cameras,review-2272.html>.

48. *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

49. *Id.* at 79-80

50. *Id.* at 80

51. *Id.*

52. *Id.*

53. *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

54. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

55. *ACLU v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012).

56. *Id.* at 600

reasonable time, place, and manner restrictions.”⁵⁷ In *Basinski v. City of New York*, the court distinguished its case from *Glik* and *Alvarez* in that “Basinski filmed [the officer] from mere feet away and admitted to having drawn his attention from the police business at hand.”⁵⁸ The Second Circuit set forth reasonable time, place, and manner restrictions, and held that a citizen does not have a clearly established right when interfering in the business of the officer.⁵⁹ These circuits’ rulings maintain that the First Amendment protects the use of video cameras to record an on duty police officer, when the individual recording is not interfering with the officer’s duties.

The First Amendment Protects an Individual’s Right to Free Speech and Conduct

The First Amendment of the United States Constitution protects an individual’s freedom of expressions from government interference.⁶⁰ The Supreme Court “interprets the extent of the protections afforded to an individual” under the First Amendment.⁶¹ Historically, the Supreme Court affords an individual the protection of expressions that communicate a message.⁶² However, conduct, as “speech” under the First Amendment, is not limitless.⁶³ Conduct receiving First Amendment protection, must intend to convey a message that the audience is likely to understand.⁶⁴ Although the Supreme Court acknowledges expressive conduct, there are no Supreme Court decisions directly addressing the right of an individual to capture public police activity.⁶⁵

Recently, courts are questioning the extent of the protections provided by the First Amendment to individuals taking pictures or videoling public police activity.⁶⁶ The Supreme Courts’ silence has created a split among the circuits.⁶⁷ The circuit split on an individual’s right to

57. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

58. *Basinski v. City of New York*, 2016 U.S. Dist. LEXIS 77349, at *20-1.

59. *Id.*

60. U.S. Const. Amend. I. (Freedom of expressions includes the freedoms to speech, freedom to assembly, freedom to redress, and freedom to association and belief).

61. *First Amendment*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/first_amendment (last visited Nov 12, 2016).

62. *Stromberg v. California*, 283 U.S. 359, 361 (1931) (display of a red flag as speech); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (wearing of a black armband as speech); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (burning of an American flag); Bill Kenworthy, *Photography & the First Amendment, Freedom of the Press, Press Research*, FIRST AMENDMENT CENTER (January 1, 2012), <http://www.firstamendmentcenter.org/photography-the-first-amendment>.

63. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

64. *Id.*

65. Bill Kenworthy, *Photography & the First Amendment, Freedom of the Press, Press Research*, FIRST AMENDMENT CENTER (January 1, 2012), <http://www.firstamendmentcenter.org/photography-the-first-amendment>.

66. *Id.*

67. *Basinski v. City of New York*, 2016 U.S. Dist. LEXIS 77349; *Fleck v. Trs. of the Univ. of Pa.*, 995 F. Supp. 2d 390 (E.D. Pa. 2014); *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. Pa. 2010); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. Ill. 2012); *Barich v.*

capture police activity creates mass confusion throughout the country on when and where it is appropriate for an individual to record police activity.

A Section 1983 Claim Allows an Individual to Hold Police Officer Accountable for Misconduct

In 1871, Congress enacted 42 USC § 1983 (also known as “Section 1983”).⁶⁸ Section 1983 provides that any person under color of law who deprives a United States citizen of any right provided by the Constitution “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”⁶⁹ However, Section 1983 went without much use until 1961, with the landmark decision of *Monroe v. Pape*.⁷⁰ In *Monroe*, the Supreme Court determined that Section 1983 was passed “to afford a federal right in federal courts because, by reason of prejudice ... state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”⁷¹ This case established the role of the federal courts in enforcing civil rights of United States citizens by upholding the rights of individuals to seek compensation for abuses of their civil rights by state or local government authorities.

Years later, the Court further expanded the applicability of Section 1983. In *Monell v. New York City Department of Social Services*, the Supreme Court concluded that the government was considered a person who could be sued under the statute “when execution of an official government policy or custom caused the constitutional violation.”⁷² However, the Court is clear that the government should not be liable for injuries caused by an employee who is working within the scope of his or her employment relationship.⁷³ Cases after *Monell* determined the prerequisites for proving a policy of custom that can cause a deprivation of a constitutional right.⁷⁴ The government’s failure to properly train its employees in a particular order was a common argument used in these cases.⁷⁵ The Supreme Court gave weight to this theory in *City of Canton v. Harris*, recognizing that a civil rights claim was cognizable if the government’s failure to train its police force reflected a deliberate indifference to the constitutional rights of its citizens.⁷⁶ A mere allegation that a training program represents a policy for which the city is responsible

City of Cotati, 2015 U.S. Dist. LEXIS 142672; *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. Mass. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. Ga. 2000).

68. 42 U.S.C. § 1983.

69. *Id.*

70. *Monroe v. Pape*, 365 U.S. 167 (1961).

71. *Id.* at 180

72. *Monell v. N.Y. City Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978).

73. *Id.* at 691

74. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

75. See *City of Canton v. Harris*, 489 U.S. 378 (1989)

76. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

will not constitute a deliberate indifference.⁷⁷ The Court set strict criteria for what constitutes as a deliberate indifference, stressing that in order to determine a deliberate indifference, the court must focus on whether the program is adequate to the tasks the particular employees must perform, and if it is not, whether such inadequate training can justifiably be said to represent “city policy.”⁷⁸ The Court further explained that inadequate training becomes “city policy” when “the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”⁷⁹ Thus, failing to provide proper training may cause the city to be held liable for injury resulting from the inadequate training.⁸⁰ Additionally, the inadequacy in the training program must be closely related to the injury sustained by the claimant,⁸¹ as it is not enough to claim that an employee applied the government’s policy in an unconstitutional way.⁸² Circuits strictly adhere to the criteria set forth in the *City of Canton*, leaving little room for holding the police administrators accountable for the lack of training provided to their employees.

III. ANALYSIS

INSTANT ACCESS TO NEWS AND INFORMATION IS ESSENTIAL TO COMBAT POLICE BRUTALITY

Today, society has instant access to information at their fingertips. Not only does society have access, they now have the ability to publicize and share any information, specifically police misconduct. Advancements in technology enable the public to become aware of this problem by making police misconduct available on a larger scale. Accessibility to video cameras in personal cell phones and small video cameras that can be worn on the body creates an influx of police misconduct videos by making recordings of this conduct more convenient. This availability of information creates a more informed society and allows the public to hold police accountable for their misconduct instead of being hidden from the public. Nationalization of police brutality allows society to form a social movement and determine a need for change. The following comment will explore the use of technology in exposing brutality, the privacy implications, accountability and transparency, and proposes necessary changes to the judicial interpretation of a citizens right to video record police misconduct under the First Amendment, to lessen police misconduct through community policing.

77. *Id.* at 390-391.

78. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 387

Instant Access to Information Creates an Informed Society.

The 21st century is known as the information technology revolution.⁸³ It is a time that has brought overwhelming change to the way people inform themselves as a society.⁸⁴ The need for print, radio, and television has been replaced with digital media technology.⁸⁵ Digital media technology provides for a better-informed society⁸⁶ by allowing instant access to data, information, and knowledge.⁸⁷ It further allows for millions of people globally to provide useful information and firsthand knowledge for everyone to share.⁸⁸

The Global Agenda Council on Informed Societies was established in 2010 to determine the challenges and opportunities of digital media technology.⁸⁹ The Council concluded that an informed society is “one where citizens have the resources, education and skills to access and participate in the free flow of reliable and pertinent information through a diverse range of platforms and media organizations that empower them to make considered decisions about their economic, social and political lives.”⁹⁰ The Council stressed that citizens are the heart of the information technology revolution and proposed “Media Citizenship.”⁹¹ In its proposal, the Council demanded a charter and set forth principles to accomplish these goals.⁹² The Council stressed that an informed society relies on access, education, media literacy, transparency, and privacy.⁹³ To achieve this, the government must enact policies to protect media freedom and must remain mindful of the suppression of free speech.⁹⁴

83. Sanjay Kumar Pal, *21st Century Information Technology Revolution, Ubiquity Information Everywhere*, ACM (2008), <http://ubiquity.acm.org/article.cfm?id=1399619>.

84. *Towards a Blueprint for Informed Societies*, GLOBAL AGENDA COUNCIL ON INFORMED SOCIETIES (May 3, 2013), available at http://www3.weforum.org/docs/gac13/wef_gac_informedsocieties_towardsblueprintinformedsocieties_report_2013.pdf.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Media Citizenship – A New Charter For An Informed Society (World Economic Forum)*, POLIS JOURNALISM AND SOCIETY AT THE LSE (2011), <http://blogs.lse.ac.uk/polis/2011/10/07/media-citizenship-a-new-charter-for-an-informed-society-world-economic-forum/>.

90. *Towards a Blueprint for Informed Societies*, GLOBAL AGENDA COUNCIL ON INFORMED SOCIETIES (May 3, 2013), available at http://www3.weforum.org/docs/gac13/wef_gac_informedsocieties_towardsblueprintinformedsocieties_report_2013.pdf.

91. *Media Citizenship – A New Charter For An Informed Society (World Economic Forum)*, POLIS JOURNALISM AND SOCIETY AT THE LSE (2011), <http://blogs.lse.ac.uk/polis/2011/10/07/media-citizenship-a-new-charter-for-an-informed-society-world-economic-forum/>.

92. *Id.*

93. *Towards a Blueprint for Informed Societies*, GLOBAL AGENDA COUNCIL ON INFORMED SOCIETIES (May 3, 2013), available at http://www3.weforum.org/docs/gac13/wef_gac_informedsocieties_towardsblueprintinformedsocieties_report_2013.pdf.

94. *Id.*

Contrary to the Council's proposal, it is the government that actual heeds the suppression. On August 1, 2016, Maryland resident Korryn Gaines found herself in an altercation with police officers over a traffic warrant.⁹⁵ Gaines refused to let the officers into her house to serve her with the warrant, which initiated an armed standoff.⁹⁶ Recording the events during the standoff as they transpired, Gaines immediately posted them to Facebook and Instagram.⁹⁷ Hours after the standoff began, the officers contacted Facebook to deactivate Gaines' account, and Facebook complied.⁹⁸ Once switched off, Gaines was shot dead by the officers, with no digital record of her death because the account was turned off and the officers were not wearing body cameras.⁹⁹ The destruction of these videos not only infringed on Gaines' constitutional free speech guarantees, but also left the question of whether police brutality occurred, unanswered, and left the scene one sided. What would these videos have shown? Was there something to hide? Who was accountable? The ability to answer these questions during this time of distrust with law enforcement is paramount to combat police brutality.

Lack of Compliance with the Violent Crime Control and Law Enforcement Act of 1994 Misinforms Society on Excessive Force Used by Police Officers

The Violent Crime Control and Law Enforcement Act of 1994 requires the government to keep records about the use of excessive force by law enforcement officers.¹⁰⁰ However, to this day, no database of these records exists.¹⁰¹ With 18,000 police departments and law enforcement agencies located in the United States,¹⁰² the accurate numbers of police killings each year are unknown.¹⁰³ This is due to the lack of communication and participation between law enforcement entities.¹⁰⁴ The only statistics available is that law enforcement was responsible for

95. Lee Rowland & Dennis Parker, *Making Sure the Revolution Gets Televised*, AMERICAN CIVIL LIBERTIES UNION (November 12, 2016), <https://www.aclu.org/blog/free-future/making-sure-revolution-gets-televised>.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Elliott C McLaughlin, *There aren't more police shootings, just more news coverage*, CNN (April 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>.

101. *Id.*

102. James Ragland, *A new era of police accountability is all for the public good*, DALLAS NEWS (June 2, 2015), <http://www.dallasnews.com/news/news/2015/06/02/ragland-a-new-era-of-police-accountability-is-all-for-the-public-good>.

103. *Id.*

104. Elliott C McLaughlin, *There aren't more police shootings, just more news coverage*, CNN (April 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>. (A study published 14 years ago sought to nail down numbers, but its author conceded to CNN that only 564 of the nation's 18,000 law enforcement entities participated. The closest thing to a statistic is the FBI's assertion that police were responsible for about 400 "justifiable homicides" annually between 2008 and 2012).

400 “justifiable homicides” annually between 2008 and 2012.¹⁰⁵

But a 2014 report by The Wall Street Journal on police shootings from 2007 to 2012 found that more than 550 police shootings were not included in the FBI’s statistics or “were not attributed to the agency involved.”¹⁰⁶ In the absence of a national database, The Guardian and The Washington Post began obtaining and recording accurate numbers of excessive force used by police officers.¹⁰⁷ In 2015, The Guardian created an interactive database called “The Counted.”¹⁰⁸ The purpose of “The Counted” is to “count the number of people killed by police and other law enforcement agencies within the United States throughout 2015 and 2016, to monitor their demographics and to tell the stories of how they died.”¹⁰⁹ “The Counted” combines traditional journalism with citizen journalism¹¹⁰ to build the most comprehensive database for deadly use of force in the United States.¹¹¹ In 2015, The Guardian reported that police in the United States killed 1146 people.¹¹² The Washington Post reported that 93 unarmed people were shot dead by police officers in 2015.¹¹³ In 2016, 1092 killings were reported.¹¹⁴ Without real data from law enforcement departments throughout the country, society will never know the extent of the use of excessive force by police officers, hindering any positive change in societies’ trust or officer’s use of force.

The Availability of Technology Aids in Exposing Police Brutality

Images on social media platforms have massive influences on society. In 2014, the Bureau of Justice Statistics reported that instances of police brutality in the United States have not increased substantially in recent years.¹¹⁵ Thus, exposure to police brutality is the only thing changing.¹¹⁶ Since the video of Eric Garner, it has become commonplace for people to use cellphones and compact video cameras to capture po-

105. Elliott C McLaughlin, *There aren’t more police shootings, just more coverage*, CNN (April 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>.

106. Charlie Savage, *Justice Department to Streamline Tracking of Police Killings*, THE N.Y. TIMES (August 9, 2016), <http://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html>.

107. *Id.*

108. Jon Swaine et al., *The Counted: people killed by police in the United States*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Oct 24, 2016).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Police shootings 2016 database*, THE WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited Nov. 29, 2016).

114. Jon Swaine et al., *The Counted: people killed by police in the United States*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited April 2, 2017).

115. Laura Ly, *Can cell phones stop police brutality?*, CNN (November 19, 2014), <http://www.cnn.com/2014/11/18/us/police-cell-phone-videos/index.html>.

116. *Id.*

lice brutality. A search for “police brutality 2016” on YouTube results in 1,550,000 videos.¹¹⁷ Technology also gives citizens the ability to live stream incidents to Facebook from their cellphones.¹¹⁸ For example, the occurrence of one such incident was the indescribable real-time video Lavish Reynolds posted of the shooting death of her boyfriend Philando Castile on July 6, 2016.¹¹⁹

The national exposure of police brutality has motivated protests, riots, and worldwide debate.¹²⁰ In this turmoil, the need for a national database has become imperative. Even former United States Attorney General Eric Holder described the lack of data collection as “unacceptable.”¹²¹ In August 2016, the United States Justice Department announced a new program that will require police departments to report full details of deadly incidents involving their officers each quarter.¹²² The influence came from the Guardian and will mirror “The Counted.”¹²³ This program will increase transparency to the public regarding excessive force by police.¹²⁴ Officials stated that “[a]ccurate and comprehensive accounting of deaths that occur during the process of arrest is critical for law enforcement agencies to demonstrate responsiveness to the citizens and communities they serve.”¹²⁵ Officials further acknowledge that the previous program led to an under-documenting of deaths.¹²⁶ There is immense anticipation that the new “hybrid approach”¹²⁷ will lead to more comprehensive data and hopefully deter police misconduct.¹²⁸

Exposure to police conduct produces transparency in a previously secret operation of law enforcement.¹²⁹ Chief of Police Billy Grogan of Dunwoody Police Department in Georgia believes that “transparency is truly law enforcement’s best friend.”¹³⁰ In order for transparency to be

117. *Police Brutality 2016*, YOUTUBE, https://www.youtube.com/results?search_query=police+brutality+2016 (last visited November 29, 2016).

118. Live videos are real-time video posts on Facebook.

119. Woman streams graphic video of boyfriend shot by police, CNN, <http://www.cnn.com/videos/us/2016/07/07/graphic-video-minnesota-police-shooting-philando-castile-ryan-young-pkg-nd.cnn> (last visited Oct 24, 2016).

120. Jon Swaine et al., *The Counted: people killed by police in the United States*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-kills-us-database> (last visited Oct 24, 2016).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. The “hybrid approach” will proactively seek out fatal cases using open sources such as news reports, while also asking police to alert them to unnoticed cases.

128. Jon Swaine, *Police will be required to report officer-involved deaths new US system*, THE GUARDIAN (August 8, 2016), <https://www.theguardian.com/us-news/2016/aug/08/police-officer-related-deaths-department-of-justice>.

129. Billy Grogan, *Transparency: Law Enforcement’s Best Friend*, The Social Media Belt, IACP CENTER FOR SOCIAL MEDIA (August 18, 2012), <http://blog.iacpsocialmedia.org/home/tabid/142/entryid/183/default.aspx>.

130. *Id.*

accomplished, information needs to be disseminated.¹³¹ Dissemination of information can be displayed on the department's website or on social media.¹³² Social media is an effective way to communicate with citizens, as well as provide a high level of transparency.¹³³ Social media can be used to report daily activity in the community, like unusual arrests, accidents of interest, crimes in problem areas, unusual crimes, and BO-LOs for suspects.¹³⁴ Additionally, it is important to include annual reports about crime rates, use of force, and professionalism to hold department accountable.¹³⁵ Transparency creates trust. For example, the Boston Police Department has been using Twitter since 2009.¹³⁶ The use of this technology proved to be extremely beneficial during the Boston Marathon bombings on April 15, 2013.¹³⁷ Within an hour after the detonations, the Boston Police Department confirmed the explosion and injuries on Twitter.¹³⁸ Throughout the chaos, the department continuously updated the account to "request public assistance; to keep the public and the media informed about road closures, news conferences, and police activities; to reassure the public and express sympathy to the victims and their families; and ... to give accurate information about the casualty toll and the status of the investigation."¹³⁹ Constant communication with the public provides solace to the community and keeps the community greatly informed. The use of social media platforms even led to community participation in the investigation.¹⁴⁰ The use of social media allows a relationship to flourish between citizens and police, resulting in true community policing.

Outside of informing the public of the severity and prevalence of police brutality, exposure to police brutality leads to public investigations of police procedures.¹⁴¹ For instance, the investigation report from the Michael Brown shooting was made public due to the publicity of the case.¹⁴² On August 9, 2014 Michael Brown was a black unarmed teenager that was shot and killed by a white police officer in Ferguson, Mis-

131. *Id.*

132. *Id.*

133. *Id.*

134. Law enforcement uses the acronym BOLO to stand for "be on the look-out"; Billy Grogan, *Transparency: Law Enforcement's Best Friend*, The Social Media Belt, IACP CENTER FOR SOCIAL MEDIA (August 18, 2012), <http://blog.iacpsocialmedia.org/home/tabid/142/entryid/183/default.aspx>.

135. Billy Grogan, *Transparency: Law Enforcement's Best Friend*, The Social Media Belt, IACP CENTER FOR SOCIAL MEDIA (August 18, 2012), <http://blog.iacpsocialmedia.org/home/tabid/142/entryid/183/default.aspx>.

136. Edward F. Davis, Alejandro A. Alves & David Alan Sklansky, *Social Media and Police Leadership: Lessons From Boston*, New Perspectives In Policing, NATIONAL INSTITUTE OF JUSTICE (March 2014), <https://www.ncjrs.gov/pdffiles1/nij/244760.pdf>.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson Missouri*, JUSTICE NEWS (March 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>.

142. *Id.*

souri.¹⁴³ The shooting of Michael Brown sparked nationwide protests.¹⁴⁴ Without the exposure and protests, society would never have been privy to the information of that investigation. The investigation concluded that Ferguson police officers routinely violate the Fourth Amendment when stopping people without reasonable suspicions, arresting people without probable cause, and using unreasonable force against them.¹⁴⁵ Even though personal videos have led to transparency among law enforcement, recording police officers can result in an arrest of the individual behind the camera.¹⁴⁶

IV. PRIVACY CONCERNS

WHEN IT IS APPROPRIATE TO RECORD POLICE BRUTALITY

With the quick rise of citizen journalists, law enforcement hastily discovered ways to respond to this movement.¹⁴⁷ First, law enforcement officers began asking citizens to refrain from invoking in their First Amendment right to take photographs and video in a public space.¹⁴⁸ Then, if a citizen fails to comply, law enforcement officers often harass, detain, and arrest these citizens.¹⁴⁹ Citizens found themselves in violation of state wiretap laws or obstruction of justice.¹⁵⁰ A split among the circuits became evident when questions arose regarding the constitutional validity of state wiretapping laws.¹⁵¹ Courts throughout the United States have not been able to unanimously establish whether it is a citizen's First Amendment Right to record police brutality.¹⁵² This sec-

143. *What Happened in Ferguson?*, THE NEW YORK TIMES (August 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0.

144. Ferguson unrest: From shooting to nationwide protests, BBC NEWS (August 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354>.

145. *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson Missouri*, JUSTICE NEWS (March 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri>.

146. Bill Briggs, *Can the Cops Cuff You For Filming an Arrest?*, NBC NEWS (Kuly 23, 2014), <http://www.nbcnews.com/tech/gadgets/can-cops-cuff-you-filming-arrest-n162351>.

147. Taylor Robertson, *Article: 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, 122 (2014).

148. *Photographers' Rights*, ACLU, <https://www.aclu.org/issues/free-speech/photographers-rights> (last visited Oct 24, 2016)(Taking photographs and video of things that are plainly visible in public spaces is a constitutional right and that includes transportation facilities, the outside of federal buildings, and police and other government officials carrying out their duties).

149. *Photographers' Rights*, ACLU, <https://www.aclu.org/issues/free-speech/photographers-rights> (last visited Oct 24, 2016).

150. *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. Ill. 2012); *Basinski v. City of New York*, 2016 U.S. Dist. LEXIS 77349, at *7.

151. *Basinski v. City of New York*, 2016 U.S. Dist. LEXIS 77349, at *18.

152. *Basinski v. City of New York*, 2016 U.S. Dist. LEXIS 77349, at *18; *Fleck v. Trs. of the Univ. of Pa.*, 995 F. Supp. 2d 390, 407 (E.D. Pa. 2014); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-263 (3d Cir. Pa. 2010).

tion will discuss how police officers do not have an expectation of privacy while on duty and why citizens, as citizen journalists, have a right to record police officers under the First Amendment.

Publicly Capturing Police Brutality on a Cell Phone Does Not Violate an Expectation of Privacy

Some police interpret wiretapping statutes incorrectly in order to prosecute citizens who record police officers.¹⁵³ Proponents for the prosecution of citizens under states' wiretap statutes claim protections of privacy.¹⁵⁴ Specifically, proponents claim there is a need to protect the conversational privacy of officers.¹⁵⁵ However, circuits have ruled that officers do not have an expectation of privacy in public, while on duty.¹⁵⁶ The two major cases, which come from Illinois and Massachusetts, require all-party consent without the expectation of privacy.

In *ACLU v. Alvarez*, the ACLU had designed a "police accountability" program that relied on the use of audio-visual recordings of police officers.¹⁵⁷ In Illinois, it was known that police officers and state's attorneys regularly arrested and prosecuted citizens for violating the Illinois Eavesdropping Act when citizens recorded officer while performing their duties in public.¹⁵⁸ Hence, the ACLU filed suit seeking declaratory and injunctive relief barring the enforcement of the eavesdropping statute.¹⁵⁹ In opposition, the state argued that the statute is necessary to "remove incentives for interception of private conversations and minimize the harm to persons whose conversations have been illegally intercepted."¹⁶⁰ The Seventh Circuit found that the government's interest in protecting conversational privacy is not implicated when police officers are performing their duties in public and speaking at volumes audible to the unassisted ear of a bystander.¹⁶¹ The court reasoned that open audio recordings of police lack any reasonable expectation of privacy for

153. Andrew Rosado Shaw, *Our Duty in Light of the Law's Irrelevance: Police Brutality and Civilian Recordings - B. The Misuse of Wiretapping Statutes*, RACE, RACISM AND THE LAW,

http://racism.org/index.php?option=com_content&view=article&id=1608:policebrutality01&catid=137&itemid=155&showall=&limitstart=7 (last visited Oct 24, 2016).

154. Taylor Robertson, *Article: 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, 123 (2014).

155. Taylor Robertson, *Article: 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, 122 (2014); *ACLU v. Alvarez*, 679 F.3d 583, 588, 2012 U.S. App. LEXIS 9303, *8, 40 Media L. Rep. 1721, 2012 WL 1592618 (7th Cir. Ill. 2012).

156. *ACLU v. Alvarez*, 679 F.3d 583, 605-606 (7th Cir. Ill. 2012).

157. *Id.* at 588.

158. Taylor Robertson, *Article: 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, 136 (2014).

159. *ACLU v. Alvarez*, 679 F.3d 583, 588 (7th Cir. Ill. 2012).

160. *Id.* at 606

161. *Id.* at 605-6.

purposes of the Fourth Amendment.¹⁶² Furthermore, the overbreadth of the Illinois wiretapping statute severed the link between the eavesdropping statute's means and its end, as it criminalized all audio recordings, even those that are not private.¹⁶³ However, the Court cautioned that the Illinois statute is a national outlier, in that it does not provide an expectation-of-privacy requirement that limits its scope to conversations that carry a reasonable expectation of privacy.¹⁶⁴ Nevertheless, the court made clear that the legislature was able to tailor the statutory prohibition to the important goal of protecting personal privacy.¹⁶⁵

Similarly, the Massachusetts wiretap statute does not require an expectation of privacy.¹⁶⁶ However, the Massachusetts statute does limit violations to secret recordings.¹⁶⁷ In *Glik v. Cunniffe*, Simon Glik was arrested for using his cellphone to record police officers arresting another man.¹⁶⁸ Glik was charged with violation of the Massachusetts's wiretap statute.¹⁶⁹ Subsequently, his charges were dropped and Glik brought suit under 42 U.S.C. § 1983.¹⁷⁰ Glik claimed that his arrest for recording the officers constitutes a violation of his rights under the First and Fourth Amendments.¹⁷¹ The First Circuit deconstructed Massachusetts' wiretap statute to determine the validity of Glik's Fourth Amendment Claim.¹⁷² The court explains that the use of the word "interception" is critical to the restriction set by the statute.¹⁷³ Thus, Glik would be in violation of the statute if his recording were done in secret.¹⁷⁴ A recording is secret unless there is actual knowledge of the recording.¹⁷⁵ Actual knowledge is objective and does not require explicit acknowledgment of the fact of the recording.¹⁷⁶ A recording is not deemed secret within the meaning of the statute if the tape recorder is

162. *ACLU v. Alvarez*, 679 F.3d 583, 606 (7th Cir. Ill. 2012); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.")

163. *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. Ill. 2012)(holding that the Illinois statute is overbroad as it is not tailored to the important goal of protecting personal privacy).

164. *ACLU v. Alvarez*, 679 F.3d 583, 607-8 (7th Cir. Ill. 2012).

165. *Id.* at 607

166. MASS. GEN. LAWS ANN. ch. 272, § 99(a)(4) (2011).

167. *Glik v. Cunniffe*, 655 F.3d 78, 86 (1st Cir. Mass. 2011).

168. *Id.*

169. *Id.* at 80.

170. *Id.*

171. *Id.*

172. *Id.* at 79.

173. Ch. 272, § 99(B)(4) (Interception is defined to mean "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication."); *Glik v. Cunniffe*, 655 F.3d 78, 85-6 (1st Cir. Mass. 2011)

174. *Glik v. Cunniffe*, 655 F.3d 78, 86 (1st Cir. Mass. 2011).

175. *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976); *Glik v. Cunniffe*, 655 F.3d 78, 86 (1st Cir. Mass. 2011)

176. *Glik v. Cunniffe*, 655 F.3d 78, 86 (1st Cir. Mass. 2011).

held in plain sight.¹⁷⁷ Here, the Court determined that an individual holding a cellphone in front of his body satisfies “actual knowledge” of the recording, regardless of the cellphones’ alternative functions.¹⁷⁸ The court acknowledges that the wiretap statute was enacted to protect the privacy of all citizens, but that the legislative intent was to restrict secret use of electronic devices.¹⁷⁹ Yet, the Court cautioned that the Massachusetts wiretap statute is inclusive of secret recordings of police officers or other public officials interacting with members of the public.¹⁸⁰ Thus, Massachusetts limits when a police officer may be recorded in public. A recording must be done openly and not surreptitiously.

These two circuit courts’ rulings demonstrate when it is appropriate for a citizen to video a police officer and when police officers have an expectation of privacy in public. The courts have further left it up to the legislature to set the basic requirements. For instance, although the Illinois wiretap law has been found unconstitutional, the legislature may tailor the statute to include an expectation of privacy for police officers and limit recordings to open recording, similar to Massachusetts’ statute.¹⁸¹ Although the privacy expectations have been resolved, states have not been as forthcoming in accepting that recording police officers is a protected right.

A Citizen Does Not Necessarily Have A Right To Record Police Brutality

The First Amendment encompasses conduct related to the gathering and dissemination of information.¹⁸² The recording of police officers engaged in their duties in a public place, fits comfortably within this context.¹⁸³ However, there are circuit splits as a result of different interpretation of state laws.¹⁸⁴ Only four circuits (First, Seventh, Ninth, and Eleventh) have ascertained that the First Amendment provides citizens with the right to record the police performing their duties in public.¹⁸⁵

177. See *Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001);

178. *Glik v. Cunniffe*, 655 F.3d 78, 87 (1st Cir. Mass. 2011) (The defendant argued that a cell phone, unlike a tape recorder, has numerous functions, such as text messaging, internet browsing, video gaming, and photography, and actual knowledge is not apparent from an individual holding out a cell phone in front of his body).

179. *Glik v. Cunniffe*, 655 F.3d 78, 87-8 (1st Cir. Mass. 2011); *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976).

180. *Glik v. Cunniffe*, 655 F.3d 78, 86-7 (1st Cir. Mass. 2011).

181. *ACLU v. Alvarez*, 679 F.3d 583, 606 (7th Cir. Ill. 2012)

182. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. Mass. 2011).

183. *Id.*

184. *Basinski v. City of New York*, 2016 U.S. Dist. LEXIS 77349, at *18; *Fleck v. Trs. of the Univ. of Pa.*, 995 F. Supp. 2d 390, 407 (E.D. Pa. 2014); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-263 (3d Cir. Pa. 2010).

185. *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. Ill. 2012); *Barich v. City of Cotati*, 2015 U.S. Dist. LEXIS 142672; *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. Mass. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. Ga. 2000).

Courts Establishing The Right To Record:

The First Circuit established the right to record in *Glik v. Cunniffe*. Here, the court ruled that “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”¹⁸⁶ The court reasoned, “police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights.”¹⁸⁷ The First Amendment freedom allows citizens to challenge police action without risking arrest.¹⁸⁸ This is fundamental to a free nation.¹⁸⁹ Therefore, the same restriction demanded of police officers in regards to traditionally protected speech must apply to recordings in public spaces that do not impact their work.¹⁹⁰

The Seventh Circuit in *ACLU v. Alvarez* found that the eavesdropping statute did not serve an important government interest. The court stated, “the Illinois eavesdropping statute restricts an expressive medium used for the preservation and dissemination of information and ideas.”¹⁹¹ In this case, the ACLU challenged its right to openly record, not to secretly record. The court emphasized, “this case has nothing to do with private conversations or surreptitious interceptions.”¹⁹² The Illinois statute was expansive in nature and did not solely outlaw secret recordings.¹⁹³ It swept much more broadly, banning all audio recording of any oral communication “absent consent of the parties regardless of whether the communication is or was intended to be private.”¹⁹⁴ The overbreadth of the Illinois eavesdropping statute violates basic speech and press freedoms that the First Amendment protects. The Court explained: “[a]ny way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.”¹⁹⁵ Since this ruling, the Seventh Circuit has upheld that recording a police officer is a right under the First Amendment.

The Eleventh Circuit in *Smith v. City of Cumming* held that Smith had a First Amendment right to record the police.¹⁹⁶ The court stressed that a First Amendment right is “subject to reasonable time, manner and place restrictions to photograph or videotape police conduct.”¹⁹⁷ The First Amendment protects the right to “gather information about what public officials do on public property,” particularly, “a right to record matters of public interest.”¹⁹⁸ The Eleventh Circuit has set parameters

186. *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. Mass. 2011).

187. *Id.* at 79.

188. *Id.*

189. *Id.*

190. *Id.*

191. *ACLU v. Alvarez*, 679 F.3d 583, 607 (7th Cir. Ill. 2012).

192. *Id.*

193. *Id.* at 595.

194. *Id.*

195. *Id.* at 600.

196. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. Ga. 2000).

197. *Id.*

198. *Id.*

for when there is a protected right under the First Amendment to record the police in public.

Courts Opposing The Right To Record:

The courts that have chosen not to recognize an established right under the First Amendment to record the police in public all have a substantially similar analysis. This section will analyze a case from the Third Circuit, *Kelly v. Borough of Carlisle*. On May 24, 2007, Officer David Rogers pulled over a vehicle for speeding.¹⁹⁹ In the vehicle was Brian Kelly, the passenger at the time of the stop.²⁰⁰ During the stop, Kelly began to record the events.²⁰¹ When Officer Rogers realized that he was being recorded he seized the camera from Kelly.²⁰² Kelly was arrested and charged with violating Pennsylvania's wiretapping law.²⁰³ The charges were subsequently dropped and Kelly filed a section 1983 claim against Officer Rogers and the Borough of Carlisle, alleging violations of his First and Fourth Amendment rights.²⁰⁴ Summary Judgment was granted to Officer Rogers and the Borough of Carlisle.²⁰⁵ On appeal, the Third Circuit affirmed summary judgment on First Amendment claims.²⁰⁶ However, the court vacated the grant of summary judgment in favor of Officer Rogers on the Fourth Amendment claim.²⁰⁷ In analyzing the First Amendment claim, the Third Circuit discusses the Eleventh Circuit's decision in *Smith*, as well as several other cases that discuss the right to record police activity.²⁰⁸ The Third Circuit is disbelieving that these cases clearly establish the right to record police activity sufficiently enough to put Officer Rogers on notice that his arrest of Kelly was unlawful.²⁰⁹ In particular, two prior decisions within the Third Circuit imply that the First Amendment does not protect videotaping which is done without an expressive purpose.²¹⁰ The Third Circuit is even more uncertain about the right to record in this situation because none of the prior cases address recording a police officer during a traffic stop, even though there were prior cases that broadly address the right to record.²¹¹ Here, the Third Circuit is left without a clear indication of how to decide this case because no statute exists which would allow Kelly to lawfully record the traffic stop.²¹² This case provides a great example of where a federal statute clearly establishing the

199. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 260 (3d Cir. Pa. 2010).

200. *Id.* at 251.

201. *Id.*

202. *Id.*

203. *Id.* at 252.

204. *Id.*

205. *Id.*

206. *Id.* at 262-63.

207. *Id.* at 258-59

208. *Id.* at 260.

209. *Id.* at 262

210. *Id.*

211. *Id.*

212. *Id.*

right to record would prevent the courts from setting forth limitations on and interpretations of a citizen's constitutionally protected right to record police activity.

V. COMMUNITY POLICING

A UNIFORM FEDERAL STATUTE IS ESSENTIAL FOR ACCOUNTABILITY

Utilizing social media platforms as a device to hold law enforcement accountable for occurrences of police brutality contributes to the notion of community policing.²¹³ Community policing is a “philosophy of full service personalized policing,” where officers build ties and work closely with members of the communities.²¹⁴ For community policing to be successful police departments must develop community partnerships, implement organizational transformation, and engage in problem solving.²¹⁵ Working together with the individuals they serve increases trust in police officers and improves problems in the communities.²¹⁶ Acknowledging that police officers are not able to fully solve public safety problems alone, community policing encourages involvement from citizens effected by these problems, allowing for better solutions.²¹⁷ The exposure of police brutality on social media platforms is bringing about change. In enacting a uniform law, the federal government will ensure a greater opportunity for change.

De-escalation Training Prevents Use of Excessive Force by Police Officers

For over forty years, police officers' training focused on the use of force.²¹⁸ Police officers are consistently taught that complacency kills and that every situation should be approached as a threat.²¹⁹ Force based training is a key contributor to police brutality.²²⁰ However, re-

213. Polly Irungu, *The Ferguson Effect: Social media and its impact from Ferguson to now*, THE MONITOR AND LATINO REPORTER (August 9, 2016), <http://nahjnabjstudentprojects.com/2016/08/09/the-ferguson-effect-social-media-and-its-impact-from-ferguson-to-now/>.

214. Bertus R. Ferreria, *THE USE AND EFFECTIVENESS OF COMMUNITY POLICING IN A DEMOCRACY THE USE AND EFFECTIVENESS OF COMMUNITY POLICING IN A DEMOCRACY*, <https://www.ncjrs.gov/policing/use139.htm> (last visited Nov 29, 2016).

215. *Community Policing Defined*, COMMUNITY ORIENTED POLICING SERVICES (2012), <https://ric-zai-inc.com/Publications/cops-p157-pub.pdf>.

216. *Id.*

217. *Id.*

218. Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0.

219. Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (December 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>.

220. Tom Jackman, *De-escalation training to reduce police shootings facing mixed*

cently police departments throughout the country are making major changes to how officers are trained.²²¹ A major change is the use of de-escalation training instead of force based training.²²² De-escalation training focuses on the different approaches officers use to neutralize potentially violent encounters.²²³ Whereas, forced based training focuses on approaching every encounter and every individual as a potential threat.²²⁴ Changes to police officers' training is important to eliminate unnecessary deaths of both citizens and police officers by slowing an encounter down when there is no immediate threat.²²⁵ For instance, the Police Department of Camden County, New Jersey currently trains its police officers to de-escalate a potentially violent encounter before using deadly force.²²⁶ In a recent incident in Camden in which a man was threatening people with a knife, "officers walked alongside the man for blocks, waiting for the right moment to wrap him up and disarm him" instead of using deadly force.²²⁷ Police Chief Scott Thompson said that "six months before our training, we would've shot and killed that guy," because "[i]t would have been a justifiable use of deadly force, but there was another way to handle it."²²⁸ Since implementing this training excessive-force complaints against Camden County police department dropped forty-two percent.²²⁹

Due to the flood of police brutality videos, officer instructors in Oklahoma are also placing a greater emphasis on de-escalation and scenario-based training.²³⁰ Oklahoma City Police Department Chief Bill Citty said, "[f]ilmed incidents of officers acting inappropriately allow po-

reviews at launch, THE WASH. POST (October 15, 2016),

https://www.washingtonpost.com/local/public-safety/de-escalation-training-to-reduce-police-shootings-facing-mixed-reviews-at-launch/2016/10/14/d6d96c74-9159-11e6-9c85-ac42097b8cc0_story.html

221. Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0.

222. *Id.*

223. Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0. (For example, talking and behaving calmly and reasonably with unreasonable citizens).

224. Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (December 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>. (For example, shooting before a threat is fully realized because waiting until there is a threat may cost an officer his or her life.)

225. Tom Jackman, *De-escalation training to reduce police shootings facing mixed reviews at launch*, THE WASH. POST (October 15, 2016), https://www.washingtonpost.com/local/public-safety/de-escalation-training-to-reduce-police-shootings-facing-mixed-reviews-at-launch/2016/10/14/d6d96c74-9159-11e6-9c85-ac42097b8cc0_story.html

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Kaelynn Knoernschild, *You can't get a life back: Police officer training takes proactive path after violent encounters*, THE JOURNAL RECORD (July 24, 2015).

lice departments to improve.”²³¹ Exposure is affecting departments in a positive way and allowing departments the opportunity to truly address internal issues.²³² The Oklahoma City Police Department focuses its’ training on strategies that diffuse tense situations before officers use physical force.²³³ Citty states that “over a year officers might respond to more than 400,000 calls and highly publicized events might not completely represent the particular department or the overall conduct of police officers, [however,] sometimes being exposed forces departments to evaluate how they operate.”²³⁴ Oklahoma uses the exposure of police brutality in a positive way by evaluating and addressing issues that require change. De-escalation training is crucial to eliminating the use of excessive force by police officers.

Reporting Occurrences of Excessive Force is Essential for Holding Officers Accountable

Exposure to police officers’ use of excessive force is beneficial to society, as well as federal and state police departments. Police departments that report the use of excessive force benefit by reviewing and analyzing each use of force, which allows them to recognize patterns in occurrences and officer behaviors that may contribute to the use of force.²³⁵ Analyzing these occurrences is critical in improving departmental policies and procedures.²³⁶ Reporting use of force and excessive use of force aids in identifying officers that have a history of complaints, allowing for the officer to receive corrective actions.²³⁷ These reports are essential to holding officers accountable.

The Dallas Police Department began publishing twelve years of police-involved shooting data and further plans to publish reports on alternate use-of-force.²³⁸ Obtaining data is essential to understanding the full depth of the national “police-community crisis.”²³⁹ Without all the information regarding a situation, there will never be a successful change.

Currently, there is no national system for collecting data on incidents in which police officers use force during normal course of duty or on the use of excessive force.²⁴⁰ It is only when the Justice Department

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *POLICE USE OF EXCESSIVE FORCE A CONCILIATION HANDBOOK FOR THE POLICE and THE COMMUNITY*, U.S. DEPARTMENT OF JUSTICE (June 2002), <https://www.justice.gov/archive/crs/pubs/pdexcess.htm#59>.

236. *Id.*

237. *Id.*

238. James Ragland, *A new era of police accountability is all for the public good*, DALLAS NEWS BY THE DALLAS MORNING NEWS, <http://www.dallasnews.com/news/news/2015/06/02/ragland-a-new-era-of-police-accountability-is-all-for-the-public-good> (last visited Oct 24, 2016).

239. *Id.*

240. Matt Apuzzo & Sarah Cohen, *Data on Use of Force by Police Across U.S.*

analyzes state police departments and reviews records that would otherwise remain private, has evidence of police misconduct been found.²⁴¹ In Seattle, Washington, the Justice Department found that one out of every five use of force was excessive.²⁴² In Albuquerque, New Mexico, the Justice Department determined that most police shootings from 2009 to 2012 were unwarranted.²⁴³ A 2014 Justice Department report on the Cleveland Police Department, shows that the department does not hold its officers accountable for unwarrantable use of excessive force.²⁴⁴ The report reads that “no more than 51 officers out of a sworn force of 1,500 were disciplined in any fashion in connection with a use of force incident over a three-and-a half-year period.”²⁴⁵ However, the Department of Justice reports on use of excessive force only includes departments suspected of unconstitutional behavior, creating unreliable data on the use of excessive force used by police officers across the county.²⁴⁶

To expand national data on use of excessive force, beginning in 2017, the federal government plans to establish a national database that will track federal and state officers use of force.²⁴⁷ The program looks to improve data on when and how often police officers injure or kill civilians.²⁴⁸ Yet, this program remains voluntary, leaving no guarantee that federal and state departments will comply with the program.²⁴⁹ To get reliable information on the use of excessive force, the federal government must attach an incentive or implement strict requirements on participation in the program.²⁵⁰ Without such requirements, there will remain a lack of reporting and inaccurate data.

VI: CONCLUSION

Police brutality is a national issue receiving more exposure in recent years due to advancements in technology. Exposure to police bru-

Proves Almost Useless, THE N.Y. TIMES (August 11, 2015), http://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html?_r=0.

241. *Id.*

242. *Id.*

243. *Id.*

244. Sonia Moghe, *NYPD fails to discipline officers who use excessive force, report says*, CNN (October 2, 2015), <http://www.cnn.com/2015/10/02/us/new-york-police-excessive-force-report/>.

245. *Id.*

246. Matt Apuzzo & Sarah Cohen, *Data on Use of Force by Police Across U.S. Proves Almost Useless*, THE N.Y. TIMES (August 11, 2015), http://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html?_r=0.

247. Alan Neuhauser, *Feds Take Step to Track Police Use-of-Force*, U.S. NEWS (October 13, 2016), <http://www.usnews.com/news/national-news/articles/2016-10-13/feds-take-step-to-track-police-use-of-force>.

248. *Id.*

249. *Id.*

250. Matt Apuzzo & Sarah Cohen, *Data on Use of Force by Police Across U.S. Proves Almost Useless*, THE N.Y. TIMES (August 11, 2015), http://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html?_r=0.

tality creates an informed society by granting individuals access to a system that has traditionally been private. An informed society is paramount to the growth of this nation. This nation is in a current state of distrust of law enforcement officers and by informing society of the realness of police brutality, change can begin. Yet, without a mandatory national database, society will remain misinformed.

Due to the lack of information on police use of force, citizens are relying on technology to inform the public on instances of police brutality. In response to the use of technology, police officers found a way to respond to this exposure by applying state wiretapping laws to citizens' open recordings of police officers on duty. Applying these laws to citizens' recordings brought forth questions regarding the constitutional validity of state wiretapping laws, resulting in a split among the circuits. Circuits are split on whether it is a citizen's First Amendment Right to record police brutality. Currently, only four circuits have established that it is a First Amendment right. These four circuits rely heavily on an individual's right to preserve and disseminate information of public officials. The circuits that do not recognize citizens' recordings of police officers on duty as an established First Amendment right, do not, because there is no clear indication of when the First Amendment applies to a citizen's open recording of a police officer. This split allows the circuits to set forth limitations on a citizen's constitutionally protected right to record police activity.

Exposure is affecting law enforcement agencies in a positive way and allowing them the opportunity to address internal issues. Some agencies find transparency to be the first step towards change. Transparency of law enforcement agencies begins to create trust between citizens and police, resulting in true community policing. Agencies using transparency experience positive involvement from citizens in their day-to-day operations, as well as decreases in their officers' use of force. Acknowledging that police officers are not able to fully solve public safety problems alone, community policing encourages involvement from citizens effected by these problems, allowing for better solutions. In enacting a uniform law the federal government will ensure a greater opportunity for change.

As this comment has shown, advancements in technology make an enormous impact on how society views police brutality and as a result initiates national change. Technology is constantly expanding and improving, with no indication of slowing down. Inevitable changes bring great power and greater confusion. The Supreme Court must establish that the First Amendment protects an individual's right to openly record police officers while on duty.

