

## COMMENT

### Undermining Excessive Privacy for Police: Citizen Tape Recording To Check Police Officers' Power

In *Jean v. Massachusetts State Police*, police officers conducted a warrantless search of Paul Pechonis's home.<sup>1</sup> Unbeknownst to them, the search was audiotaped and videotaped by a "nanny-cam." Pechonis later gave the recording to Mary Jean, who posted it on her Web site with commentary criticizing the local District Attorney. The officers claimed that Jean had violated state law by willfully disclosing the contents of a recording made without their prior consent.<sup>2</sup> They ordered Jean to remove the recording.<sup>3</sup> The district court granted Jean's request for preliminary injunctive relief and the First Circuit affirmed, concluding that the First Amendment likely protected Jean's disclosure of the recording.<sup>4</sup> However, the First Circuit implied that Pechonis had violated the Massachusetts recording law.<sup>5</sup>

Massachusetts and at least twelve other states criminalize recording a communication without the knowledge or consent of all parties to the communication.<sup>6</sup> While some of these states' laws could be construed to

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1. 492 F.3d 24, 25 (1st Cir. 2007).

2. *Id.* at 25-26 & n.2; see also MASS. GEN. LAWS ch. 272, § 99(C)(1), (3) (2000).

3. *Jean*, 492 F.3d at 25-26.

4. *Id.* at 33.

5. *Id.* at 31 (stating that the tape was "recorded illegally" and "illegally intercepted").

6. See CAL. PENAL CODE § 632 (West 1999); DEL. CODE ANN. tit. 11, § 1335(a) (2007); FLA. STAT. ANN. § 934.03(2)(d) (West 2001); HAW. REV. STAT. ANN. § 711-1111(1)(d)-(e) (Lexis Nexis 2007); 720 ILL. COMP. STAT. ANN. 5/14-2(a)(1) (West 2003); KAN. STAT. ANN. § 21-4001(a) (Supp. 2006); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2006); MICH. COMP. LAWS ANN. § 750.539c-d (West 2004); MONT. CODE ANN. § 45-8-213(1)(c)

exempt some recording of police,<sup>7</sup> others offer no textual basis for such an exemption.<sup>8</sup> Citizens in several states have been arrested,<sup>9</sup> and in some cases convicted,<sup>10</sup> for taping police conduct.

This Comment argues that citizen tape recording provides a necessary check against police abuses of power and furthers privacy values underlying the Constitution and other laws. But police officers' interests in privacy and safety must be balanced as well. Therefore, states should permit citizens to record police officers in the line of duty without those officers' consent, as long as their recordings are made in a physically unintrusive manner and do not capture police communications that police could reasonably expect not to be recorded.

## I. THE STATUS OF STATE RECORDING LAWS

Massachusetts and a number of other states prevent citizens from recording police officers' conversations, even within citizens' own homes. Massachusetts itself broadly prohibits the willful "secret[] record[ing]" of "any wire or oral communication" by any citizen without the consent of all parties to the communication.<sup>11</sup> Accordingly, Massachusetts's highest court has refused to exempt citizens who record police officers, even when the recording captures alleged police misconduct.<sup>12</sup>

As the First Circuit recognized, the First Amendment protects individuals like Jean who *distribute* recordings of illegal police conduct. But it probably does not protect individuals like Pechonis who *produce* the recordings. In

(2007); N.H. REV. STAT. ANN. § 570-A:2(I) (2003); 18 PA. CONS. STAT. ANN. § 5704(4) (West 2000); WASH. REV. CODE ANN. § 9.73.030(1) (West 2003).

7. See, e.g., WASH. REV. CODE ANN. § 9.73.030(1) (West 2003) (protecting only "private" oral communication); *State v. Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992) (holding that police officers' conversations during arrests are not "private").
8. See, e.g., 720 ILL. COMP. STAT. ANN. 5/14-2(1) (West 2003); MASS. GEN. LAWS ch. 272, § 99(C) (2000); MONT. CODE ANN. § 45-8-213(1)(c) (2007). *But see* 720 ILL. COMP. STAT. ANN. 5/14-3(i) (West 2003) (exempting recordings made with reasonable suspicion that another party to the conversation will commit a criminal offense).
9. See, e.g., *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986); *Flora*, 845 P.2d 1355; Matt Miller, *He's Cleared in Police Taping*, PATRIOT-NEWS (Harrisburg), June 21, 2007, at A1; *Sarasotan Charged with Taping Police*, SARASOTA HERALD-TRIB. (Fla.), Sept. 1, 2000, at 4B; Andrew Wolfe, *Man Charged After Videotaping Police*, NASHUA TELEGRAPH (N.H.), June 29, 2006, at 1.
10. See, e.g., *State v. Bichsel*, 790 P.2d 1142 (Or. Ct. App. 1990).
11. MASS. GEN. LAWS ch. 272, § 99(B)(4), (C)(1) (2000) (emphasis added).
12. *Commonwealth v. Hyde*, 750 N.E.2d 963, 964 (Mass. 2001).

*Bartnicki v. Vopper*, the Supreme Court suggested that disclosure is protected when it constitutes “the publication of truthful information of public concern.”<sup>13</sup> The Court explicitly declined, however, to protect “obtaining the relevant information unlawfully.”<sup>14</sup> Furthermore, “[t]he First Amendment [does not become] a license . . . to intrude by electronic means . . . simply because the person subjected to the intrusion is reasonably suspected of committing a crime.”<sup>15</sup> Thus, the Amendment does not excuse citizens from state liability for recording police, even where citizens allege police misconduct.

## II. THE IMPORTANCE OF CITIZEN TAPE RECORDING OF POLICE

### A. *The Need for Strong Checks Against Police Abuses*

As compared to other government officials, law enforcement officers pose the greatest risk to citizens’ physical integrity and privacy because they are authorized to implement the state’s most physically coercive and invasive powers. Moreover, law enforcement abuses have the potential to be much worse than the harms inflicted by private citizens. First, the government’s coercive and invasive powers exceed those of private citizens.<sup>16</sup> Police officers are permitted to commit actions that would be illegal if committed by private citizens,<sup>17</sup> and some officers abuse that permission.<sup>18</sup> Second, police abuses are symbolically worse because they are taken on behalf of all citizens.<sup>19</sup>

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13. 532 U.S. 514, 534 (2001).

14. *Id.* at 532 n.19. This holding is consistent with the many cases establishing that the First Amendment does not protect the media from liability for privacy-invasive torts or crimes committed in the process of newsgathering. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

15. *Dietemann*, 449 F.2d at 249.

16. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392 (1971) (“An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser . . .”).

17. *See Malcolm Thorburn, Justifications, Powers, and Authority*, 117 *YALE L.J.* 1070, 1104 (2008) (“[A] list of police functions looks like a list of serious criminal offenses.”).

18. *See, e.g.*, DAVID WEISBURD ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY 3 (2000), <http://www.ncjrs.gov/pdffiles1/nij/181312.pdf> (reporting that twenty-two percent of police officers claim their fellow officers sometimes, often, or always use excessive force).

19. *See Joseph A. Colquitt, Rethinking Entrapment*, 41 *AM. CRIM. L. REV.* 1389, 1437 (2004) (referring to “the power of police to act on [the public’s] behalf”).

The Massachusetts statute facilitated the invasion of Pechonis's personal privacy in his home by overprotecting police officers' privacy while in the line of duty. This outcome is inconsistent with most sources of privacy values in our legal culture, which emphasize individual privacy, particularly in the home.<sup>20</sup> The Fourth Amendment focuses on "[t]he right of the *people* to be secure in their *persons*, [*and*] *houses*" from infringement by government officials.<sup>21</sup> Similarly, the Massachusetts recording law purports to protect the privacy of "*citizens* of the commonwealth,"<sup>22</sup> rather than the privacy of police officers. Meanwhile, federal and state laws and cases demonstrate that law enforcement officers must tolerate a greater degree of intrusion than private citizens.<sup>23</sup>

### B. Existing Checks Are Insufficient

Many internal checks on law enforcement officers already reduce those officers' privacy in order to prevent abuses. For example, federal and state governments monitor officers through drug testing and e-mail and phone monitoring.<sup>24</sup> But most forms of monitoring do not cover officers away from the police station, where many searches and arrests occur and police officers often fail to report them.<sup>25</sup> Police corruption can undermine internal monitoring and sanctions even where they do apply.<sup>26</sup>

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20. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES \*288.
  21. U.S. CONST. amend. IV (emphasis added); see *Segura v. United States*, 468 U.S. 796, 810 (1984); *Payton v. New York*, 445 U.S. 573, 589-90 (1980).
  22. MASS. GEN. LAWS ch. 272, § 99(A) (2000) (emphasis added).
  23. See, e.g., Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2006 (2000) (protecting most private employees from employer-required lie detector tests, but excluding government employees, private security officers, and other private employees with responsibilities that resemble those of police officers); *Biehunik v. Felicetta*, 441 F.2d 228, 231 (2d Cir. 1971). Massachusetts itself has recognized that police officers are entitled to less privacy than ordinary citizens. See *Guiney v. Police Comm'r*, 582 N.E.2d 523, 528 (Mass. 1991) (listing specific Massachusetts statutes as well as First Circuit and Massachusetts Supreme Judicial Court cases).
  24. See *Amati v. City of Woodstock*, 176 F.3d 952, 955 (7th Cir. 1999); John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799, 805-14 (2000).
  25. See WEISBURD, *supra* note 18, at 3 (documenting that sixty-one percent of police officers claim fellow officers do not always report even serious criminal forms of police abuse).
  26. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive To Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998); William C. Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 868-69 (2000).

For these reasons, police departments should not simply require officers to videotape their own interactions with citizens. Officers can turn off their recorders<sup>27</sup> or record over the footage.<sup>28</sup> Furthermore, police departments could deny the existence of inculpatory recordings or attempt to shield them from discovery by claiming they contain confidential information.<sup>29</sup>

In contrast, citizen recording provides an external check not subject to intradepartment corruption. Where citizens are permitted to surreptitiously record the police, officers have incentives to be on their best behavior at all times, not just when their own recorders are on. Permitting citizen recording also allows *citizens* to control whether and when to record their interactions with the police. This respects citizens' privacy more than if police officers were required to record all citizens' interactions with them regardless of the citizens' consent.<sup>30</sup>

The exclusionary rule is one existing external check against police abuses, but it is insufficient. The rule does not deter police searches when the goal is not principally to secure an individual conviction—for example, when officers seek only to confiscate contraband, disrupt illicit networks, or assert authority on the streets.<sup>31</sup> Furthermore, the exclusionary rule pressures judges to find that a search or seizure was “reasonable” under the Fourth Amendment<sup>32</sup> and police officers to misrepresent how they obtained evidence<sup>33</sup> in order to avoid

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27. Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1052 (1996).
  28. Cf. Christina Hall, *Suspension Advised for Officer Who Erased Tape*, BLADE (Toledo), July 12, 2007, at B1 (describing how a police officer purposely recorded over a videotape of an arrest).
  29. See Kathleen M. O'Day, Comment, *Pretextual Traffic Stops: Protecting Our Streets or Racist Police Tactics?*, 23 U. DAYTON L. REV. 313, 328 (1998).
  30. See Slobogin, *supra* note 27, at 1052.
  31. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71 (2004).
  32. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2002).
  33. See Tom Barker & David Carter, “*Fluffing Up the Evidence and Covering Your Ass*”: *Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAVIOR 61, 67 (1990) (suggesting that many police officers endorse an “ends justifies the means” approach and therefore feel morally justified in misleading the court in order to secure a conviction); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 461 (1999); Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (providing evidence that police perjury occurs in twenty to fifty-three percent of the city's suppression hearings); Slobogin, *supra* note 27, at 1040.

letting guilty defendants go free. In contrast, citizen recording gives officers reason to admit their illegal practices to their supervisors immediately, in order to address the problem through training and other remedial methods before a citizen brings suit using a recording as evidence.

Civil suits pursuant to 42 U.S.C. § 1983 provide another insufficient external check.<sup>34</sup> Such suits are prohibitively expensive for the poor, who are frequent targets of police abuse.<sup>35</sup> Moreover, many who can afford to sue are insufficiently compensated for doing so: the harms of privacy violations are difficult to measure and therefore frequently result in only nominal damages; hence plaintiffs do not sue often enough to deter privacy violations.<sup>36</sup> When plaintiffs do bring § 1983 actions, they face significant evidentiary hurdles. Civil juries tend to trust police officers' testimony over suspected criminals' testimony.<sup>37</sup> Where courts permit citizen recordings to be introduced as evidence, the recordings powerfully rebut jury bias favoring police credibility.<sup>38</sup>

Thus, citizen recording fills in gaps in existing checks against law enforcement abuses. But beyond that, citizen recording provides a powerful publicity check. Recording devices can capture police officers' misconduct in order to publicize it. When the media publicizes citizens' recordings, it enables the general public to use the political process to pressure law enforcement officers to respect the limits of their authority.<sup>39</sup> Officers may generally avoid performing illegal activities, mindful of the risk of being recorded and the attendant public scorn. Finally, citizen recording ensures the "transparent

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34. See *Hudson v. Michigan*, 547 U.S. 586, 610-11 (2006) (Breyer, J., dissenting); NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* 276 (Wesley Skogan & Kathleen Frydl eds., 2004); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1388-89 (1983).
  35. Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 753-54 (1993).
  36. Jack M. Beer mann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1010 (2002). Punitive damages are rarely awarded. See Jack M. Beer mann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 78 (1989).
  37. Stewart, *supra* note 34, at 1386-87; Patton, *supra* note 35, at 754.
  38. See Patton, *supra* note 35, at 754 (emphasizing that plaintiffs rarely win in § 1983 actions without corroborating evidence); Gina Barton, *Man in Police Case Arrested in Drug Charge*, MILWAUKEE J. SENTINEL, Apr. 25, 2007, at 3B (describing how a citizen's recording led to the conviction of a police officer).
  39. See *Commonwealth v. Hyde*, 750 N.E.2d 963, 977 (Mass. 2001) (Marshall, C.J., dissenting) (referring to the media's "constitutional role of watchdog"); NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 34, at 280 (explaining that police departments are forced to respond to significant media attention).

policing” necessary to democratically legitimize police officers’ actions.<sup>40</sup> Citizen recording is the ideal form of citizen review of police actions, because it puts the power of oversight in the hands of all individuals, not just community activists.

### III. DEFINING THE STATUTORY EXEMPTION

In order to provide a crucial check against police abuses of power, states that currently prohibit citizen recording of police should amend their laws. However, these states should account for countervailing factors. First, while police officers in the line of duty may be entitled to *less* privacy than private citizens,<sup>41</sup> police officers are still citizens themselves and entitled to some privacy. Therefore, these states should explicitly permit citizens to record police communications other than those uttered with the reasonable expectation that they would not be recorded.<sup>42</sup>

In other contexts, this type of “reasonable expectation of privacy” approach has balanced law enforcement needs, police privacy, and citizen privacy. Treating the “reasonableness” of the expectation of privacy as a normative question, courts recognize that police officers must expect less privacy than private citizens, both because of the public interest in monitoring police for abuses of power, and because police communications in the line of duty are generally less intimate in nature than private citizens’ communications.<sup>43</sup> Treating the “reasonableness” as a descriptive question of whether one should predict his privacy will be violated, courts have implied that police officers cannot reasonably expect not to be recorded when they converse despite their awareness that private citizens can perceive them,<sup>44</sup> or speak in a citizen’s

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40. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

41. See *supra* notes 20-23 and accompanying text.

42. Florida and New Jersey adopt this approach for all communications, no matter who utters them, FLA. STAT. ANN. § 934.02(2) (West 2001); N.J. STAT. ANN. § 2A:156A-2 to -3 (West 1985), but Massachusetts and similar states should not unnecessarily limit protection for citizen communications.

43. See *Biehunik v. Felicetta*, 441 F.2d 228, 231 (2d Cir. 1971); *Mason v. Stock*, 869 F. Supp. 828, 833 (D. Kan. 1994); *Guiney v. Police Comm’r*, 582 N.E.2d 523, 528 (Mass. 1991).

44. See, e.g., *Migut v. Flynn*, 131 F. App’x 262, 266 (11th Cir. 2005) (conversations with citizens); *Johnson v. Hawe*, 388 F.3d 676, 685 (9th Cir. 2004) (communications over a police radio that commonly could be overheard by private citizens); *People v. Beardsley*, 503 N.E.2d 346, 351 (Ill. 1986) (conversations within hearing of citizens).

private space.<sup>45</sup> At the same time, police officers may reasonably retain an expectation of privacy with respect to their own private spaces.<sup>46</sup> Hence, under this approach, police officers could exercise some control to protect sensitive investigative or personal information against citizen recording by ensuring that they communicate about such information only in their own private spaces, or at least out of citizens' apparent earshot. But citizens would still be permitted to record officers in public spaces, the citizens' own private spaces, or other environments in which police privacy is least implicated and citizen privacy and risks of police abuse are most implicated.

Second, concerns regarding police safety may justify an additional stipulation regarding citizen recording. Technology allows recording through passive devices carried on one's person or left in her car or home; there is no reason to permit more physically intrusive means, such as resisting arrest in order to record, or putting a recording device in direct physical contact with an officer. Permitting such physically intrusive forms of recording could drive up the cost of law enforcement and the difficulty of recruiting police officers,<sup>47</sup> as well as invade officers' valuable privacy interests in bodily integrity. As a result, states should only excuse citizens who record police officers from liability under their recording laws, and should not excuse them from liability under separate laws that prohibit resisting arrest or assaulting a police officer.

While a number of state recording laws already might be construed to exempt some forms of citizen recording of police, the existing approaches fail to balance the relevant factors as effectively as the approach proposed in this Comment. Some approaches over-exempt citizen recording of *private citizens*. For example, states with one-party consent rules permit private citizens to record conversations even without the other parties' consent, which protects individual privacy less than the Massachusetts law. Similarly, states that

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45. See *Hornberger v. Am. Broadcasting Cos.*, 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002) (finding that police could not reasonably expect privacy for their conversations inside a citizen's car in his absence).

46. For example, courts have recognized that police officers have a reasonable expectation of privacy in at least some areas of their workplace. See, e.g., *United States v. Speights*, 557 F.2d 362, 363 (3d Cir. 1977).

47. See Brandon Payne, *Estimating the Risk Premium of Law Enforcement Officers* (Nov. 27, 2002) (unpublished manuscript), <http://www.ecu.edu/econ/ecer/payne.pdf>. Unlike risks to physical safety, emotional discomfort about being recorded seems unlikely to significantly discourage potential law enforcement officers. See Eddie Jimenez, *Watching Cops May Help Clarify Situations*, FRESNO BEE, Mar. 17, 2006, at B1 (reporting a local police chief's comment that he "isn't opposed to [citizens] filming his officers in action so long as [they] keep[] a reasonable distance").



protect citizen communications only if they are deemed “private”<sup>48</sup> or “confidential,”<sup>49</sup> or if they are uttered in a “private place”<sup>50</sup> or with the reasonable expectation that they would not be recorded,<sup>51</sup> fail to protect many communications that citizens would subjectively want to remain private. That approach is inappropriate for states like Massachusetts that wish to protect a broader swath of citizen communications from nonconsensual recording.

Additionally, many states fail to exempt the most valuable types of citizen recording. For example, states that require consent from at least one party to the communication may fail to exempt citizen recording of police communications in the citizen’s private spaces if the citizen is absent.<sup>52</sup> Since officers seem more likely to disrespect a citizen’s spaces and belongings when the citizen is absent, citizen recording is particularly valuable under such circumstances. Additionally, those states that specifically protect communications uttered in “private place[s]”<sup>53</sup> might protect police communications uttered within a citizen’s private home or car during an illegal search. These states, therefore, ironically protect police communications in the places where they should be least protected.

Similarly, an exemption that allows a citizen to record without all parties’ consent only if he reasonably suspects that his recording will capture evidence of another party’s imminent criminal offense against him<sup>54</sup> is too narrow. Citizens generally will not have reasonable suspicion in advance that officers will commit a criminal offense against them, as most police-citizen interactions do not result in illegal police activities. By the time a citizen reasonably suspects that the officer is likely to commit an offense against her, it will usually be too late to begin recording.

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48. *E.g.*, WASH. REV. CODE ANN. §9.73.030(1) (West 2003).

49. *E.g.*, CAL. PENAL CODE § 632(a) (West 1999).

50. *E.g.*, KAN. STAT. ANN. § 21-4001(a) (1995).

51. *E.g.*, FLA. STAT. ANN. § 934.02(2) (West 2001); N.J. STAT. § 2A:156A-2(b) (West 1985).

52. *See Hornberger v. Am. Broadcasting Cos.*, 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002) (suggesting that the New Jersey recording law would prohibit citizen recording of police within the citizen’s own car but for the law’s additional stipulation that it protects only communications uttered with the justifiable expectation that they would not be recorded).

53. *E.g.*, KAN. STAT. ANN. § 21-4001(a) (1995).

54. *See* 720 ILL. COMP. STAT. 5/14-3(1) (West 2003).

**CONCLUSION**

The facts of *Jean v. Massachusetts State Police* strongly call into question the wisdom of the Massachusetts recording law. *Jean* demonstrated that the law is strict enough to prohibit even citizen recording that captures illegal police behavior within the citizen's own home. Given the need for strong checks on police abuses of power to protect citizen privacy and the insufficiency of existing checks, states like Massachusetts should amend their recording laws to exempt citizen tape recording of police so long as it is not achieved by physically intrusive means and does not infringe upon police officers' reasonable expectation that they would not be recorded.

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