WHO WATCHES THE WATCHMEN? BIG BROTHER'S USE OF WIRETAP STATUTES TO PLACE CIVILIANS IN TIMEOUT

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INTRODUCTION

Picture the day you purchased your brand new smart phone—capable of surfing the Internet, recording videos, streaming music, and downloading games. Imagine casually walking down the street one evening, a block away from home, the weight of your grocery bags squeezing against your clenched fingers. Suddenly, you hear a commotion across the street. As you make your way closer, you soon realize that the ruckus is actually a group of police officers making an arrest, using what appears to be excessive force on a non-combative young woman. Eagerly, you scramble your hands around the inside of your coat pocket, whip out your new phone and capture the scene, poised to share it with your friends on Facebook or post it on YouTube to get some "hits." Now, envision your phone being snatched away from you, your hands cuffed tightly behind your back, the hard steel bench pressed stiff against your legs in the cold holding cell; the anxiety dripping slowly down the back of your neck. Picture your face as the laundry list of charges are read against you, including the felony offense of illegal wiretapping—a crime which could land you up to fifteen years in prison; the disbelief creeping over your face; the hope of going home tonight defeated, melting away like the pint of Ben & Jerry's at the bottom of your grocery bag. How did this happen? How can this be the law in today's society?

The rapid progression of technology over the past decade has enabled the kind of widely distributed citizen documentation that, until recently, could only be fathomed by spy novelists.[1] The widespread use of smart phones and digital devices with video recording capabilities, as well as the omnipresence of social media, has clashed head-on with the federal and state wiretapping laws, leaving a legal mess of outdated, loosely interpreted statutes, and a "piecemeal [of] court opinions that leave both cops and citizens unsure of when recording becomes a crime."[2] The continuous attempts of law enforcement officials to criminalize the use of these devices to record events of public interest chills socially beneficial activities and cloaks police with protection from public scrutiny. While the use of modern technology to record and review the activities of law enforcement officials should "marshal pride in our open system of government," it has instead "muster[ed] suspicion against citizens who conduct the recording,"[3] and

1 *See* Radley Balko, *The War on Cameras*, REASON, Jan. 2011, *available at* http://reason.com/archives/2010/12/07/the-war-on-cameras.

2 *Id.* ("'Let me just say that as a matter of policy I think it's ludicrous that people would be arrested for recording a police officer . . . I'm surprised state legislators haven't gotten more involved in this.'" (quoting Eugene Volokh, UCLA Law Professor)).

3 Tarus v. Borough of Pine Hill, 916 A.2d 1036, 1051 (N.J. 2007).

created an inexplicable double standard.

While modern jurisprudence has slowly evolved to confer First Amendment rights to civilians to record matters of public concern, state anti-wiretapping statutes criminalize that very same conduct. State judiciaries have slowly come to the realization that the anti-wiretapping statutes are impermissibly used by law enforcement to criminalize the legal conduct of civilians in gathering "every man's evidence." However, at the same time, state legislatures have maintained their adamant opposition to amending their state's statutes to allow civilian-on-police recordings and rather have given their law enforcement officials near carte blanche to record civilians in any and all situations. This rising tension between state legislatures and judiciaries has created an undeniable impasse that is in need of immediate attention.

This Note initially investigates the history and rationale of the federal anti-wiretapping statute, as well as the variations of the statutes throughout the United States. Part II of this Note then chronicles recent state cases and examines how the vague and disjunctive application of these misguided state statutes has led to arrests and prosecutions of individuals for their recording of police officers with video cameras and smart phone devices. Part III focuses on the widespread use of new technologies and the copious benefits they offer, and discusses how the outdated wiretap statutes fail to keep pace with modern society. This Note closely scrutinizes the privacy expectations of both civilians and law enforcement officials, while focusing on the specific variations in the state statutes, which are the chief cause of their misapplication. Finally, in Part IV, this Note proposes solutions to the issue, including amending current exceptions to state wiretap statutes, the drafting of a categorical exemption to the statutes to allow civilian-on-police recordings, and the recognition of a First Amendment right to record on-duty police officers.

I. HISTORY

A. *The Enactment of the Federal Wiretap Act*

Congress enacted the Federal Wiretap Act as part of the Omnibus Crime Control and Safe Streets Act of 1968[4] in an effort to articulate a balance between the legitimate needs of law enforcement and the privacy rights of individuals.[5] While the protection of individuals from the dangers

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[4] Omnibus Crime Control and Safe Streets Act (Federal Wiretap Act) of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. § 2510–22 (2006)) (promulgating electronic communication interception law).

[5] *See* Gelbard v. United States, 408 U.S. 41, 48 (1972) ("[The Federal Wiretap Act] has as its dual purpose (1) protecting the privacy of . . . communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of . . . communications may be authorized.").

of uncontrolled electronic surveillance was a growing concern,[6] the need to combat organized crime was at the forefront of the Act's enactment.[7]

The Federal Wiretap Act provides a general prohibition against the intentional interception of any form of communication—unless otherwise specifically provided for in the statute—with a punishment of up to five years in prison.[8] Throughout the Act, there are various exceptions to the broad, general prohibition against interception.[9] The most significant exceptions, whereby no violation of the Federal Wiretap Act will occur, include: the *one-party consent exception*—if one or more of the parties to the recording consents to being recorded (one-party consent rule);[10] the *reasonable expectation of privacy exception*—where one party lacks an expectation of non-interception in the conversation (reasonable privacy expectation exception or privacy exception);[11] and the *warrant exception*—if the interception is made pursuant to a court order.[12]

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6 S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153–54 (advocating for electronic surveillance regulation). "Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." *Id.* at 2154; *see also* United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 312 (1972) ("There is . . . a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens.").

7 *See* S. REP. NO. 90-1097 at 2157 ("The major purpose of [the Federal Wiretap Act] is to combat organized crime."); United States v. Phillips, 540 F.2d 319, 324 (8th Cir. 1976) (noting that the Federal Wiretap Act "sets forth a comprehensive legislative scheme . . . [to] preserv[e] . . .law enforcement tools needed to fight organized crime."); KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R40525, ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS (2010) (discussing the purposes for enacting the Omnibus Crime Control and Safe Streets Act). "The Omnibus Crime Control and Safe Streets Act of 1968 was one of the first major pieces of legislation to directly address organized crime." *Id.* at 5. "Title III of [the Federal Wiretap Act] permitted federal law enforcement agencies to wiretap conversations of suspected criminals, including suspects of organized crime." *Id.* "[The] [e]lectronic wiretapping authority granted in the Omnibus Crime Control and Safe Streets Act of 1968 immediately provided American law enforcement and policymakers with an indication of organized criminals' activity, specifically their involvement in illegally importing and distributing narcotics." *Id.*

8 Under the Federal Wiretap Act, an interception occurs by the "aural or other acquisition of contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (2006); *see also* 18 U.S.C.A. §§ 2511(1)–(4) (West 2012) (setting forth penalties for violations of the Act to include imprisonment of not more than five years).

9 The breadth of the Federal Wiretap Act's prohibition means that the legality of most surveillance techniques under the statute depends upon the applicability of a statutory exception. *See infra* note 12 and accompanying text (discussing an interception pursuant to a 18 U.S.C. § 2518 court order); *infra* note 11 (discussing the "reasonable expectation of privacy" exception); *infra* note 10 and accompanying text (examining the "consent" exceptions of 18 U.S.C. §§ 2511(2)(c)–(d)).

10 18 U.S.C. § 2511(2)(d) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, *where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception* . . . ." (emphasis added)).

11 18 U.S.C. § 2510(2) ("'[O]ral communication means any oral communication uttered by a person exhibiting an expectation that such communication is *not subject to interception* under circumstances justifying such expectation . . . ." (emphasis added)). This "expectation of non-interception" has been interpreted to mean "reasonable expectation of privacy." *See In re* John Doe Trader Number One, 894 F.2d 240, 242 (7th Cir. 1990) ("According to the legislative history of [the Federal Wiretap Act], [the] definition was intended to parallel the 'reasonable expectation of privacy' test created by the Supreme Court in *Katz v. United States*." (citation omitted)). In determining whether a person possesses a reasonable expectation of privacy in the context of the Federal Wiretap Act, courts employ the two-prong test set forth by Justice

While these three chief exceptions are seemingly straightforward, they are at the heart of the recent proliferation of the wiretap cases and the cause for much debate. For instance, under the Federal Wiretap Act's one-party consent rule, "a party . . . [may] be completely unaware that someone else is recording their oral communications as long as one party to the conversation, often the person making the recording, consents to that recording."[13] Thus, a third-party, who is not a party to the conversation, may not record the conversation without the prior consent of one of such parties.[14] Furthermore, in light of the reasonable expectation of privacy exception, an individual may record another if the person being recorded lacks a reasonable expectation of privacy in that conversation, regardless of whether they consent to the recording in the first place.[15] Lastly, and perhaps most crucial in effectuating the Federal Wiretap Act's purpose of combating organized crime,[16] is the warrant exception, which permits law enforcement to intercept wire, oral, and electronic communications pursuant to a court order, provided that the application passes several formidable requirements.[17] Most significant amongst these requirements is that the application for the order must show probable cause to believe that the interception will reveal evidence of a predicate felony offense listed therein.[18]

Harlan in *Katz*. "[F]irst . . . a person [must] have exhibited an actual (subjective) expectation of privacy and, second, the expectation [must] be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

12 18 U.S.C. § 2518 (describing the warrant procedure); 18 U.S.C. § 2511(2)(a)(ii)(A) (setting forth the warrant exception).

13 Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 989–90 (2009) (discussing the "one-party consent" rule in the Federal Wiretap Act). "Consent may be explicit or implied, but it must be actual consent rather than constructive consent." *In re* Pharmatrak, Inc., 329 F.3d 9, 19 (1st Cir. 2003). "The key to establishing implied consent in most cases is showing that the consenting party received actual notice of the monitoring and used the monitored system anyway." COMPUTER CRIME & INTELLECTUAL PROP. SECTION CRIMINAL DIV., U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 170 (3d ed. 2009). "Without actual notice, consent can only be implied when [t]he surrounding circumstances [] *convincingly* show that the party knew about and consented to the interception." Berry v. Funk, 146 F.3d 1003, 1011 (D.C. Cir. 1998) (internal quotation marks omitted). "[K]nowledge of the *capability* of monitoring alone cannot be considered implied consent." Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983).

14 *See* 18 U.S.C. § 2511(2)(d). In order to invoke the consent exception, the party giving consent must be a party to that conversation. *Id.*

15 *See* Skehill, *supra* note 13, at 990; *supra* note 11 (discussing the definition of "oral communications" under the Federal Wiretap Act).

16 *See supra* note 7. "It is said with fervor that electronic eavesdropping is a most important technique of law enforcement and that outlawing it will severely cripple crime detection." Berger v. New York, 388 U.S. 41, 60 (1967).

17 *See* COMPUTER CRIME & INTELLECTUAL PROP. SECTION CRIMINAL DIV., *supra* note 13 (referring to 18 U.S.C. §§ 2516–2518).

18 *Id.* at 168. In addition, "[t]he application for a [Federal Wiretap Act] order also (1) must show that normal investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed or to be too dangerous . . . and (2) must show that the surveillance will be conducted in a way that minimizes the interception of communications that do not provide evidence of a crime." *Id.* at 168 (citations omitted). For a list of the predicate felony offences, see 18 U.S.C.§§ 2518(1)(c), 2518(5); and 18

B. *States' Variations of the Federal Wiretap Act*

Presently, forty-nine states have enacted anti-wiretapping statutes that resemble, in some form, the Federal Wiretap Act.[19] The crux and purpose of these statutes seems to uniformly mirror their federal counterpart in that they were predominantly enacted to combat organized crime, but also focused on the protection of individual privacy rights.[20] A majority of these forty-nine state statutes have similarly provided for the "one-party consent" exception.[21] For instance, the New York eavesdropping statute serves as a prime example of states with a one-party consent rule modeled after the Federal Wiretap Act, providing that a person engages in unlawful wiretapping when he is "without the consent of *either* the sender *or* receiver"[22] and intentionally records the communication by mechanical device or other means.

However, a minority of states have enacted more stringent requirements in their anti-wiretapping statutes than provided for by the Federal Wiretap Act.[23] A common thread among this minority is the requirement that *all parties* to a conversation give consent to the recording

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U.S.C. § §2516(2), (3).

19 Vermont is the only state without any form of anti-wiretapping statute. *See Electronic Surveillance Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 1, 2009), *available at* http://www.ncsl.org/default.aspx?tabid=13492.

20 *See, e.g.*, MASS. GEN. LAWS ch. 272, § 99(A) (2008):

Preamble. The general court finds that organized crime exists within the commonwealth and that the

> increasing activities of organized crime constitute a grave danger to the public welfare and safety . . . [and] because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, *under strict judicial supervision*, when investigating these organized criminal activities. The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all *citizens* of the commonwealth. Therefore, the secret use of such devices by *private individuals* must be prohibited.

Id. (emphasis added).

21 *See* Daniel R. Dinger, 28 U. SEATTLE L. REV. 955, 967 n.59 (listing thirty-eight states with similar one-party consent exceptions).

22 N.Y. PENAL LAW § 250.00(1) (McKinney 2003).

23 *See* Dinger, *supra* note 21, at 967 n.66 (listing states with stringent anti-wiretapping laws); *see also* United States v. Charles, No. Crim. 97–10107–PBS, 1998 WL 204696 (D. Mass. Jan. 13, 1998) (noting that by enacting the Federal Wiretap Act, Congress intended to occupy the field of wiretapping and electronic surveillance, holding that 18 U.S.C. § 2516(c) specifically allows concurrent state regulation wiretaps, subject to the base requirements of the Federal Wiretap Act). Thus, while "a State statute may adopt standards more stringent than the requirements of Federal law, thus excluding from State courts evidence that would be admissible in Federal Courts, a State may not adopt standards that are less restrictive than those set forth in [the Federal Wiretap Act]." *Id.* at *9 (quoting Commonwealth v. Vitello, 327 N.E.2d 819 (Mass. 1975)).

(the All-Party Consent rule).[24] Pennsylvania is one of such minority states and offers a typical example of an all-party consent provision. Pennsylvania's statute provides that "[i]t shall not be unlawful . . . for . . . [a] person, to intercept a wire, electronic or oral communication, where *all parties* to the communication have given prior consent to such interception."[25]

Among these minority states, the Massachusetts Anti-Wiretapping Statute[26] (hereinafter Massachusetts Wiretap Act or Massachusetts Act) and the Illinois Eavesdropping Act[27] (hereinafter Illinois Wiretap Act or Illinois Act) are the strictest in the nation. In addition to the all-party consent requirement, they lack the reasonable expectation of privacy exception. Thus, both states prohibit the recording of *any* conversations, private or otherwise, without the prior consent of all parties to that conversation.[28] However, the Illinois Act is considerably more severe in that it bans *any and all recordings* without the consent of all parties, whereas Massachusetts only prohibits recordings made in a *surreptitious manner*.[29] These state variations of the Federal Wiretap Act's exceptions have markedly profound impacts on the application of the law, and are at the core of the legal issue examined in this Note.[30]

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24 *See* Dinger, *supra* note 21 (noting that the following states require more than one-party consent: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington).

25 18 PA. CONS. STAT. ANN. § 5704(4) (West 2003) (emphasis added). While Pennsylvania does not carve out a one-party consent exception, it does however, in line with the Federal Wiretap Act, incorporate an expectation of privacy exception.

26 *See* MASS. GEN. LAWS ch. 272 § 99(B)(4) (2008) (defining interception as "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of *any wire or oral communication* through the use of any intercepting device by any person other than a person given proper authority by all parties to such communication." (emphasis added)); Skehill, *supra* note 13, at 990–91. The crux of the Massachusetts statute is that the recording must be made in secret. *See Appeals Court Unanimously Affirms Right to Videotape Police*, ACLU (Aug. 29, 2011), http://aclum.org/news_release_8.29.11. A conspicuous, open act of recording will *not* qualify as a violation of the Massachusetts Wiretap statute. *Id.*

27 720 ILL. COMP. STAT. 5/14-2 (2008) (setting forth Illinois' eavesdropping statute). Illinois provides that "[a] person commits eavesdropping when he . . . [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of *any conversation* . . . unless he does so . . . with the *consent of all of the parties to such conversation*." *Id.* 5/14-2(a)(1)(A) (emphasis added). The Illinois statute defines "conversation" to mean "any oral communication between 2 or more persons *regardless of whether one or more of the parties intended their communication to be of a private nature* under circumstances justifying that expectation." *Id.* 5/14-1(d) (emphasis added).

28 *See supra* notes 26, 27 and accompanying text.

29 *See* MASS. GEN. LAWS ANN. ch. 272 §99(B)(4) (West 2012); Carlos Miller, *Reason Magazine Hits Homerun with Article on War on Photography*, PIXIQ.COM (Dec. 7, 2010), http://www.pixiq.com/article/reason-magazine-hits-homerun-with-article-on-war-on-photography. However, in Massachusetts, an individual who openly records another without his or her consent would not be in violation of the Wiretapping Act if he openly makes the recording. Thus, this surreptitious requirement provides a considerable "escape hatch" that the Illinois statute does not possess.

30 For examples, see Part II.C.

C. *Recent Cases Exposing Deficiencies in State Wiretap Acts*

A recent string of cases have not only challenged the application of the state anti-wiretapping statutes, but have also pressed the issue as to whether the First Amendment allows an individual to record police officers acting in their official capacity.[31] A common thread throughout these cases is the civilian recording of police officers acting within their official duties, for which the civilians are subsequently arrested on technical violations of the respective state wiretap act. These cases not only demonstrate the magnitude of the issue, but offer prime examples of the significance of the exceptions to the general prohibition against interception provided for in the Wiretap Acts.[32]

1. *Kelly v. Borough of Carlisle*

One such case arose from a routine traffic stop in Carlisle, Pennsylvania in 2007. Brian Kelly, an eighteen year-old man, was a passenger in a pick-up truck driven by his friend when they were stopped for a traffic violation.[33] During the stop, Kelly placed his video camera in his lap and started recording his exchange with the officer.[34] Toward the end of the stop, the officer noticed that Kelly was recording him.[35] Under the belief that this violated the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Pennsylvania Wiretap Act),[36] Officer Rogers ordered Kelly to turn over the camera and placed him under arrest for violating Pennsylvania's Wiretap Act, a felony in the third degree which carries a penalty of up to seven years in prison if convicted.[37] After his arraignment, Kelly could not make his $2,500 bail and was subsequently held in jail for twenty-seven hours until his mother posted her house as security for his release.[38]

About a month later, district attorney David Freed dropped the charges against Kelly and, in doing so, noted that the Pennsylvania Wiretap Act might need to be revised.[39] Thereafter, Kelly sued the arresting officer

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31 *See infra* notes 43, 44, 57, 59 (discussing the First Amendment right to gather information of public interest).

32 For a discussion of the exceptions to the general prohibition against interception of communications as provided for in the wiretap acts, see *supra* notes 13–30 and accompanying text.

33 *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 251 (3d Cir. 2010).

34 *Id.*

35 *Id.* at 252.

36 18 PA. CONS. STAT. ANN. § 5704 (West 2003); *see also supra* note 28 and accompanying text.

37 *Kelly*, 622 F.3d at 252.

38 Matt Miller, *Wiretap Charge Dropped in Police Video Case*, THE PATRIOT NEWS, June 21, 2007.

39 *Id.* District attorney Freed stated that "[w]hen police are audio-and video-recording traffic stops with notice to the subjects, similar actions by citizens, even if done in secret, will not result in criminal charges." *Id.* Freed continued, "I intend to communicate this decision to all police agencies . . . so that officers on the street are better-prepared to handle a similar situation should it arise again." *Id.* When asked

and the Borough of Carlisle under 42 U.S.C. § 1983,[40] alleging, inter alia, violations of his First Amendment rights.[41]

The Third Circuit affirmed the district court's grant of summary judgment in favor of the police officer, finding that the First Amendment right to videotape a police officer during a traffic stop was *not* clearly established under the § 1983 rubric at the time of Kelly's arrest.[42] The gravamen of Circuit Judge Hardiman's decision focused on the fact that insofar as there is a First Amendment right to photograph or videotape public officials in the course of their duties (and matters of public concern),[43] such right is *not absolute*.[44] Rather, it is subject to reasonable time, place, and manner restrictions.[45] According to Judge Hardiman, since

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about the wiretap statute, Freed responded: "It is not the [clearest] statute that we have on the books," adding "[i]t could need a look, based on how technology has advanced since it was written." *Id.*

40 "Long-standing principles of constitutional litigation entitle public officials to qualified immunity from personal liability arising out of actions taken in the exercise of discretionary functions." Glik v. Cunniffe, 655 F.3d 78, 81 (1st Cir. 2011); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (noting that the doctrine of qualified immunity protects government officials from liability for "civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Furthermore, the qualified immunity doctrine "balances two important interests—the need to hold public officials accountable when they *exercise power irresponsibly* and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (emphasis added). The test under 42 U.S.C. § 1983 is (1) whether the facts alleged by the plaintiff show the violation of a constitutional right; and (2) whether the law was clearly established at the time of the violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202; *see also* Barton v. Clancy, 632 F.3d 9, 22 (1st Cir. 2011) (noting that whether a right was *clearly established* is determined by looking to "(1) 'the clarity of the law at the time of the alleged civil rights violation,' and (2) whether, given the fact of the particular case, a reasonable defendant would have understood that his conduct violated the plaintiff['s] constitutional rights." (citation omitted) (quoting Maldonado v. Fontanes, 568 F.3d 263, 269)).

41 *See Kelly*, 622 F.3d at 260.

42 *Id.* at 262. "[W]e conclude there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment." *Id.*

43 "The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000). The *Kelly* court also recognized that courts in the Third Circuit have upheld a right to record police officers. *Kelly*, 622 F.3d at 260; *see also* Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding that there is a free speech right to film police officers in the performance of their public duties, and such right existed regardless of whether there is any particular reason for the videotaping). *But see* Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005) (finding that only photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection).

44 *Kelly*, 622 F.3d at 262.

45 *Id.* at 262; *see Smith*, 212 F.3d at 1333 (finding a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct); Iacobucci v. Boulter, No. CIV.A. 94-10531, 1997 WL 258494 (D. Mass. Mar. 26, 1997) (finding that an independent reporter has a protected right under the First Amendment and state law to videotape public meetings); *see also* United States v. Hastings, 695 F.2d 1278, 1281 (11th Cir. 1983) (finding that the press generally has no right to information superior to that of the general public) (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 609 (1978)); Lambert v. Polk Cnty., 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("[I]t is not just news organizations . . . who have First Amendment rights to make and display videotapes of events . . . .").

a traffic stop is an "inherently dangerous situation[]," such restrictions rightly applied in the case at hand.[46] Thus, because the Third Circuit held that the right was not clearly established, the officer was granted qualified immunity and Kelly's complaint was summarily dismissed.[47]

2. *Glik v. Cunniffe*

On an October evening in 2009, Simon Glik was walking through the Boston Common when he caught sight of three officers arresting a young man.[48] Glik heard another bystander exclaim, "[y]ou are hurting him, stop."[49] In response, Glik began recording video footage of the arrest with his cell phone from a distance of approximately ten feet away.[50] After placing the suspect in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures."[51] Thereafter, Glik confirmed to the officer that he was recording audio as well, and was immediately placed under arrest.[52] Glik was transported to the police station where he was charged with violating the Massachusetts Wiretap Act,[53] a felony offense, as well as disturbing the peace and aiding the escape of a prisoner.[54] In February 2009, in response to Glik's motion to dismiss, the Boston Municipal Court disposed of the charges.[55] Similar to Brian Kelly, Simon Glik thereafter filed a complaint against the arresting officers as well as the City of Boston, claiming, inter alia, violations of his First and Fourth Amendment rights.[56]

With respect to Glik's First Amendment claim, the First Circuit held that there is a firmly established right to film government officials engaged in their duties in a *public place*, including police officers performing their responsibilities.[57] Circuit Judge Lipez reasoned that gathering information about government officials in a form that can be readily disseminated to

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[46] *Kelly*, 622 F.3d at 262; *see* Arizona v. Johnson, 555 U.S. 323, 330 (2009) ("[T]raffic stops are 'especially fraught with dangers to police officers. The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized . . . if the officers routinely exercise unquestioned command of the situation.'" (citations omitted)); Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile").

[47] *Kelly*, 622 F.3d at 266; *see also supra* note 41 for a discussion of the doctrine of qualified immunity.

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

[49] *Id.* at 79.

[50] *Id.* For a clip of the video recorded by Glik, see http://aclum.org/glik (skip to :44 mark for footage).

[51] *Id.* at 80.

[52] *Id.*

[53] MASS. GEN. LAWS ANN. ch. 272 § 99(C)(1) (West 2012).

[54] *Glik*, 655 F.3d at 80.

[55] *Id.* The court "found no probable cause supporting the wiretap charge, because the law requires a secret recording, and the officers admitted that Glik used his cell phone openly and in plain view to obtain the video and audio recording." *Id.*

[56] *Id.*

[57] *Id.*; *see* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir., 2000) (noting that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest" in the Eleventh Circuit).

others "serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"[58] While Judge Lipez addressed the meaningful time, place, and manner restrictions imposed on First Amendment rights, as stressed by the *Kelly* court, Glik's filming was found to fall well within the bounds of constitutional protections, as it was filmed in a public park.[59] Lastly, the court noted the significance of the peaceful manner in which Glik made the recording of the police officers.[60] Accordingly, the court found that under the circumstances, the First Amendment right to record the police officers was clearly established under § 1983 and affirmed the district court's denial of the defendants' qualified immunity claim.[61]

With respect to Glik's Fourth Amendment claim, the First Circuit held that the defendant officers lacked probable cause for arresting Glik and subsequently denied their assertion of qualified immunity.[62] In assessing the claim, the court reviewed the Massachusetts Wiretap Act, which requires an interception of a communication to be done in a surreptitious manner.[63] In denying the officers' assertion of qualified immunity, the court noted that Glik openly and publicly recorded the police officers with his cell phone, and thus the "conduct [fell] plainly outside the type of clandestine recording

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58 *Glik*, 655 F.3d at 82 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). Judge Lipez further added, "'[t]he public has an interest in [the] responsible exercise' of the discretion granted [to the] police" because police may misuse the substantial discretion conferred upon them to deprive individuals of their liberties. *Id.* (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1035–36 (1991)). "Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses . . . but may also have a salutary effect on the functioning of government more generally." *Id.* at 82–83; *see also* Press-Enter. Co. v. Super Ct. of Cal., 478 U.S. 1, 8 (1986) ("[M]any governmental processes operate best under public scrutiny.").

59 *Glik*, 655 F.3d at 84. "Glik filmed the defendant police officers in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum." *Id.* "In such traditional public spaces, the rights of the state to limit the exercise of the First Amendment activity are 'sharply circumscribed.'" *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). It was on this ground that the First Circuit distinguished the Third Circuit opinion in *Kelly*, where the court found that the First Amendment right to record police officers was *not* clearly established. *See* Kelley v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010). Judge Lipez reasoned that the *Kelly* recording took place during a traffic stop, which is "worlds apart from an arrest on the Boston Common," as a traffic stop is inherently dangerous. *Glik*, 655 F.3d at 85.

60 *Glik*, 655 F.3d at 84. "Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." *Id.*

61 *Id.* at 85. "[T]hough not unqualified, 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." *Id.*

62 *Id.*

63 *See supra* notes 26, 29 and accompanying text (discussing the Massachusetts Wiretap Statute). A recording is not secret unless the subject has actual knowledge of the fact of recording. Commonwealth v. Jackson, 349 N.E.2d 337, 340 (Mass. 1976). Actual knowledge can be proven by "objective manifestations of knowledge" to "avoid the problems involved in speculating as to the [subject's] subjective state of mind." *Id.* Thus, "the secrecy inquiry turns on notice, i.e., whether based on objective indicators, such as the presence of a recording device in plain view, one can infer that the subject was aware that [he] might be recorded." *Glik*, 655 F.3d at 87; *see also* Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (explaining that a recording is not secret within the meaning of the wiretap statute if defendant holds the recording device in plain sight).

targeted by the wiretap statute."[64]

3. *Maryland v. Graber*

Much like Kelly and Glik, Anthony Graber was "armed" with a video camera when he encountered Maryland state police officers.[65] In March 2010, Graber was riding his motorcycle on the highway and was stopped by an unmarked police car as he pulled off the exit ramp.[66] A plain-clothed Maryland state trooper emerged from the sedan, with his gun drawn, and repeatedly yelled at Graber to get off his bike, before citing him for speeding and reckless driving.[67] During the course of the stop, Graber's helmet camera, which he routinely used to record his rides, had been recording the entire exchange.[68]

A week after the traffic stop occurred, Graber posted the footage on YouTube. About a month later, Graber awoke to six police officers raiding his parent's home, where he lived with his wife and two young children, pursuant to a search warrant.[69] Following the execution of the warrant, Graber spent twenty-six hours in jail[70] before the Hartford County grand jury returned an indictment charging Graber with violating the Maryland Wiretap Act, a felony punishable by up to five years in prison, a $10,000 fine, or both.[71] Thereafter, Graber's motion to dismiss was granted by the Circuit Court for Harford County, upon a finding that the conversation between Graber and the trooper was not a private conversation covered by the Wiretap Act, as it took place on a public highway and in the course of the trooper's public duties. Thus, the recording necessarily fell within the

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64 *Glik*, 655 F.3d at 87. The officers, on the other hand, contended that the use of the cell-phone was insufficient to put them on notice of the recording, because a cell-phone, unlike a tape recorder, has numerous discrete functions, such as text messaging, internet browsing, video gaming, and photography. *Id.* However, the court found the other functions of the phone to be irrelevant to the question of whether the recording was made in secret, as required under the Massachusetts Wiretap Act. *Id.*

65 Maryland v. Graber, No. 12-k-10-647 (Md. Cir. Ct., Harford Cnty., Sept. 27, 2010).

66 *Id.* at *2.

67 *Id.*

68 *See Graber*, No. 12-k-10-647 at *3 ("[Graber] did not tell the Troopers he was recording the encounter nor did he seek their permission to do so."); Annys Shin, *Traffic Stop Video on YouTube Sparks Debate on Police Use of Md. Wiretap Laws*, WASH. POST, June 16, 2010.

69 *Id.* "During [the] 90-minute search of Graber's parents' home, police confiscated four computers, the [helmet] camera, external hard drives and thumb drives." *Id.*

70 *See* Adam Cohen, *Should Videotaping the Police Really Be a Crime?*, TIME, Aug. 4, 2010.

71 *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (West 2011). Maryland is among the minority of states requiring all-party consent under its wiretap statutes. *See* Dinger, *supra* note 24. However, similar to the Federal Wiretap Act, Maryland does have the privacy exception, as Maryland's statute defines "oral communication" as "any conversation or words spoken to or by any person in a *private* conversation." MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (emphasis added). This difference in terminology is different from the language used in the Federal Wiretap Act. *See* 18 U.S.C. § 2510(2) (2006). However, the Maryland Court of Special Appeals has interpreted the term "private conversation" to "require that the plaintiff prove that each conversation intercepted was one in which he had a reasonable expectation of privacy," similar to the Federal Wiretap Act. Fearnow v. Chesapeake & Potomac Telephone Co., 676 A.2d 65, 70 (Md. 1996).

privacy exception to the Maryland Wiretap Act.[72]

4. *Illinois v. Allison*

The recent arrest and prosecution of Michael Allison under the Illinois Wiretap Act has stirred much debate in the legal community and is a leading example of the current application of state wiretap acts by law enforcement officials.[73] Allison was arrested for violating the Illinois Wiretap Act[74] after he openly recorded police officers on his own property[75] and used a digital device to record his hearing at the Crawford County Courthouse.[76] After answering in the affirmative to Judge Harrell's inquiry as to whether Allison had a tape recorder in his pocket during his hearing, Judge Harrell informed him he that he had "violated [her] right to privacy."[77] Allison was then charged with five counts of wiretapping, each punishable by four to fifteen years in prison.[78] Allison was placed in jail and Judge Harrell set his bail at $35,000.[79] About two months later, Allison filed a motion to dismiss for lack of probable cause.[80] However, unlike *Kelly*, *Glik*, or *Graber*, Allison attacked the Illinois Act directly. In his motion to dismiss, Allison challenged the statute as unconstitutional, asserting, inter alia, that it violated his First Amendment rights.[81]

In granting Allison's motion to dismiss, Judge Frankland of the

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72 *Graber*, No. 12-k-10-647 at *11. Judge Plitt noted that since the recording took place on a public highway in full view of the public, it could not be "conclude[d] that the Troopers had any reasonable expectation of privacy in their conversation with [Graber]." *Id.* at *10. Furthermore, Judge Plitt continued by stating that the officer did not have a reasonable objective expectation because there is "no possibility that society is prepared to recognize as reasonable *any* purported expectation of privacy in statements made by a police officer performing his official duties." *Id.* at *15. Thus, the recording did not fall within the definition of an "oral communication" under the Maryland wiretap statute. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i).

73 Michael Allison is a 41-year-old backyard mechanic from southeastern Illinois. *See Balko*, *supra* note 1. Allison spent time restoring inoperable cars on his mother's property in Robinson, Illinois. *Id.* Robinson has an abandoned property (or "eyesore") ordinance prohibiting the parking of inoperable or unregistered vehicles on private property. *Id.* Since Allison never registered the vehicles he worked on, they were impounded by the City in 2001, 2003, and 2005. *Id.*

74 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2012).

75 In 2008, Allison went to the Robinson police station, with a tape recorder in hand, and asked to be informed of the law he was violating and be issued a citation, or otherwise be left alone. *See* Balko, *supra* note 1. Not long thereafter, while Allison was working on a car on his mother's property, officers arrived and cited him for violating the eyesore ordinance. *Id.* "Allison openly recorded the conversation with a digital recorder." *Id.*

76 *Id.*

77 *Id.*

78 *Id.*; *see also* Order on Motion to Declare 720 ILCS 5/14 Unconstitutional, People v. Allison, No. 2009-CF-50 (Il. Cir. Ct., Crawford Cnty., Sept. 15, 2011), *available at* http://iln.isba.org/sites/default/files/blog/2011/09/Cell%20phones%20and%20eavesdropping/Allison%20order.pdf.

79 *See* Balko, *supra* note 1.

80 *See* Order on Motion, *supra* note 78, at 1.

81 *Id.* at 4. Allison contended that the Illinois eavesdropping statute violated his First Amendment right to gather information about matters of public concern, as it is of paramount public interest for the free flow of information concerning public officials. *Id.* at 5.

Crawford County Second Judicial Circuit Court held the Illinois Act to violate the First Amendment, as it sweeps too broadly.[82] Judge Frankland noted that the clear language of the statute refers to *any conversation*, and thus the statute punishes as a felony a wide array of wholly innocent conduct that is unrelated to the statute's purpose.[83] Thus, because the Illinois Act imposed a "blanket rule" forbidding all recordings without limitations—there were no time, place, or manner restrictions to consider under the statute—the court found it in violation of the First Amendment and granted Allison's motion to dismiss.[84]

5. *ACLU v. Alvarez*

In August 2010, the American Civil Liberties Union (ACLU) filed a complaint against Anita Alvarez in her official capacity as Cook County state's attorney, seeking declaratory and injunctive relief with respect to the Illinois Wiretap Act.[85] After having their motion to amend the complaint dismissed by the district court, the ACLU filed an appeal in the Seventh Circuit Court of Appeals, contending that their claims fell comfortably within the First Amendment's established protection of speech regarding government officials and matters of public concern.[86] The ACLU also

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82 *Id.* at 11. The court examined the Illinois act and discussed its flaws, including the fact that it prohibits any audio recording of any public official's conversations without his consent. *Id.*

83 The *Allison* court found that the "Illinois Eavesdropping Statute has at its core the desire 'to protect individuals from unwarranted invasions of privacy' . . . and [to] safeguard[] [citizens] from unnecessary governmental surveillance." *Id.* at 4 (quoting 87 ILL. B.J. 363 (1999) and Plock v. Bd. of Educ., 920 N.E.2d 1087, 1092 (Ill. App. Ct. 2009)). "The problem with the [Eavesdropping] [S]tatute is [that] it sweeps in wholly innocent conduct that has nothing to do with intrusion into citizens' privacy." *Id.* at 6. "The statute includes conduct that is unrelated to the statute's purpose and not rationally related to the evil legislation sought to prohibit." *Id.* "A defendant recoding his case in a courtroom has nothing to do with intrusion into a citizen's privacy, but with distraction." *Id.* "For example, a juror using an audio recorder to record directions to the courthouse for jury duty given by a police officer would be in violation of the statute without consent of the officer." *Id.* "Recording a police officer's instructions on where to pay a speeding ticket or where a towed vehicle could be picked up would violate the statute without the consent of the officer." *Id.*

84 *Id.* at 12. "A statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties." *Id.* "Such action impedes the free flow of information concerning public officials and violates the First Amendment right to gather such information." *Id.*

85 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2012); *see also* Brief of Plaintiff-Appellant, ACLU v. Alvarez, 679 F.3d 583 (2012) (No. 10-C-5235). The ACLU sought a declaratory judgment finding the Illinois Wiretap Act unconstitutional as applied, as well as an injunction to prevent Alvarez from prosecuting individuals for violating the act. *Id.*

86 *See* Brief of Plaintiff-Appellant, *supra* note 85, at 20; *see also* Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (finding a right to film police because "[t]he activities of the police, like those of other public officials, are subject to public scrutiny," including the "unsafe manner in which they were performing their duties"); Demarest v. Athol/Orange Cmty. TV, Inc., 188 F. Supp. 2d 82, 94 (D. Mass. 2002) (finding a right to make audio and video recordings of "matters of public interest"). Alvarez, on the other hand, contends, inter alia, that police will constantly be recorded at any time and at every moment they are at work, which would chill the efforts of police officers and discourage police from engaging in community service, as well as diminish their concentration. Brief of Plaintiff-Appellant, *supra* note 85, at *18–19

pointed out the disparate application of the Illinois Act to criminalize only civilian recordings, noting that "[t]here is no basis in logic or experience to conclude that police-on-civilian audio recording will not undermine privacy, but civilian-on-police audio recording will."[87]

In September 2011, oral arguments were heard before a panel of three judges in the Seventh Circuit Court of Appeals sitting in Illinois.[88] In a widely publicized exchange between Judge Richard A. Posner and ACLU attorney Richard O'Brien, Posner expressed his concern with the impact of allowing recordings of police work and investigations, noting "[o]nce all this stuff can be recorded, there's going to be a lot more of this snooping around by reporters and bloggers . . . [and] yes it's a bad thing . . . there is such a thing as privacy."[89] However, the other two presiding judges seemed more receptive to the ACLU's argument, as they directed most of their questions and criticism towards the government's attorney, and described the Illinois Act as "extremely broad."[90]

On May 8, 2012, the Seventh Circuit returned its decision finding the Illinois Act in violation of the First Amendment, and granted a preliminary injunction blocking the enforcement of the statute when applied to civilian-on-police recordings.[91] The majority found that by legislating so broadly—"by making it a crime to audio record *any* conversation, even those that are *not* in fact private"—the State severed the link between the eavesdropping statute's means and its end."[92] Although the opinion is relatively recent, since the Illinois Act is one of the strictest in the nation, there is a substantial possibility that the decision could create a ripple effect, sending shock waves throughout other states and motivating legislatures to amend their wiretap acts to be more in line with the Federal Wiretap Act.[93]

(setting out Alvarez's law enforcement interest argument).

87 Brief of Plaintiff-Appellant, *supra* note 85, at 32; *see also* Edenfield v. Fane, 507 U.S. 761, 777 (1993) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (citation omitted)).

88 *See* Natasha Korecki, *Judge Casts Doubt on ACLU Challenge to Law Forbidding Audio Recording of* Cops, CHICAGO SUN TIMES, Sept. 13, 2011.

89 *See* Timothy B. Lee, *Judge Worries Recording Police Will Lead to Excessive "Snooping Around*,*"* ARS TECHNICA, Sept. 16, 2011; Korecki, *supra* note 88. ACLU Legal Director Harvey Grossman feels the Illinois Wiretap Act is an "aberration," and finds it "virtually unheard of for law enforcement officers in other states in our country to be able to use [wiretap] laws as a weapon against citizens who seek to do nothing more than record their activities and oral expressions." Korecki, *supra* note 88.

90 Lee, *supra* note 89. "The statute criminalizes any audiotaping without regard to expectations of privacy, even if those events that are being [recorded] occur in the open, in public, for anyone to see and hear and otherwise observe." *Id.* "The government lawyer gamely argued that limiting recording actually *protected* speakers' First Amendment rights by allowing them to control who heard their speech." *Id.*

91 ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

92 *Id.* at 606.

93 *See* Korecki, *supra* note 88.

II. ANALYSIS

A. *Rapidly Evolving Consumer Technologies and the Benefits of Civilian Recordings*

If a picture is worth a thousand words, then a video is worth a million. The proliferation of electronic devices with video-recording capabilities has caused countless images of current events to come by way of bystanders, armed with a ready cell phone or digital camera, rather than the traditional film crew.[94] Digital technology has the power to make everyone a news reporter, as today's news stories are just as likely to be broken by a blogger on social networking websites such as YouTube, Facebook, or Twitter, as a reporter at major newspaper.[95] Not only has the technology in recent years advanced at an exponential rate, but so has the number of individuals using these devices.[96]

The ability of these ubiquitous technologies to rapidly, cheaply, and easily gather and record information in both public and private forums, followed by the instantaneous sharing of this information with others, has become an integral part of our modern society. This pattern has innumerable corresponding benefits, especially when used to record law enforcement officials.[97] For instance, these recordings will unquestionably deter police misconduct and help identify particular officers in need of

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94 Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) ("Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.").

95 *Id.* Every minute, twenty-four hours of video are uploaded to YouTube. *See* Website Monitoring Blog, *YouTube Facts & Figures*, SITE IMPULSE (May 17, 2010), http://www.website-monitoring.com/blog/2010/05/17/youtube-facts-and-figures-history-statistics/. YouTube receives more than two billion views per day, nearly double the prime-time audience of all three major United States broadcast networks, *combined*. *Id.* In addition to YouTube, Facebook, with more than 800 million users currently, sees over 500,000 comments, 290,000 status updates (providing news links and videos), and 140,000 photos uploaded *each minute*. *See* Mike Flacy, *Nearly 300,000 Status Updates are Posted to Facebook Every Minute*, DIGITAL TRENDS (Oct. 7, 2011), http://www.digitaltrends.com/social-media/nearly-300000-status-updates-are-posted-to-facebook-every-minute/. The increasingly popular Twitter sees an astounding 120,000 "Tweets" each minute as well, conveying news and information between individuals at rapid rates. *Id.*

96 "In 2009, 78 percent of U.S. households owned digital cameras, according to Michigan-based photo industry trade association PMA, formerly known as the Photo Marketing Association." Rachel Costello, *Courts Split Over First Amendment Protection for Recording Police Performance of Public Duties*, THE NEWS MEDIA & THE LAW, Spring 2011, at 26, *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2011/courts-split-over-first-ame. "Similarly, video cameras are available in digital versions for a fraction of the price for which they were offered in the past." *Id.* "More than one billion mobile phones are equipped with cameras, according to Tom Hausken, an analyst at Strategies Unlimited, a market research firm based in Mountain View, Calif.." *Id.* Furthermore, "[i]nternet research company comScore estimated that 90 percent of mobile subscribers in the United States have a telephone that can access the mobile Web." *Id.*

97 Brief of Plaintiff-Appellant, *supra* note 85, at 43. "Civilian [recordings] of police can help resolve police-civilian factual disputes regarding, for example, threats, verbal abuse, racial harassment, whether an officer *Mirandized* a civilian before interrogating him, whether police encouraged one civilian to threaten another, and whether force was excessive." *Id.*

additional training or discipline.[98] In addition, the civilian recordings produce a multitude of benefits for law enforcement officials, such as insulating the majority of officers who are lawfully exercising their duties from false accusations.[99] They also provide an accurate depiction of events to help resolve police-civilian disputes, thereby enhancing law enforcement's public image.[100] Furthermore, the civilian recordings can provide substantial evidentiary benefits to law enforcement officials. They create an independent record of what took place during a particular incident, free from accusations of bias, lying or faulty memory—critical information that is many times unavailable from testimony, notes, photos, or even silent video.[101] Thus, by relieving the weight of witness testimony at trial and focusing instead on accurate, objective video-recordings, jurors are better able to render verdicts based on the facts, rather than the credibility of witnesses.[102] Not only will the recordings enhance investigatory tools, but they can thwart frivolous civil rights lawsuits by providing an attorney with a clear account of their client's encounter.[103] Moreover, in addition to aiding

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98 *Id.* Knowing that citizens are allowed to record while officers are acting in their official capacity will provide a "colossal disincentive" for officers to "cross any constitutional or ethical boundaries." Skehill, *supra* note 13, at 1008. Indeed, there are countless examples of recorded videos serving as critical evidence in the investigation of police misconduct. *See, e.g.*, Amanda Covarrubias & Stuart Silverstein, *A Third Incident, a New Video: A Cellphone Camera Captures UCLA Police Using a Taser on a Student Who Allegedly Refused to Leave the Library Tuesday Night*, L.A. TIMES, Nov. 16, 2006, at B1 (reporting that a cell phone camera video led to a review of a taser incident); Milton J. Valencia, *Video of Roxbury Arrest Reviewed*, BOSTON GLOBE, Oct. 28, 2010 (reporting that video of officers severely beating unarmed 16-year-old led to a police investigation).

99 Not only do these civilian recordings aid in the investigations of police misconduct, but they also help to exonerate law enforcement officials from allegations of misconduct. *See* Kim Lanier, *Walmart Tasing Caught on Video; Couple Arrested After Altercation with Foley Officer*, PRESS-REGISTER, July 12, 2011 (reporting that a video of police officer who used a taser to subdue a couple who assaulted him while on-duty outside of a Walmart was used to find that the officer acted reasonably and within police protocols).

100 Juries are often more inclined to believe police officers over a citizen, who may have a criminal record, when that citizen makes an allegation of police misconduct or overreaching. *See* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 764–65 (1993) (describing civil rights suits as a credibility contest between plaintiff and police officer). The recording of police-citizen encounters will also be beneficial to police training and education by providing real-life scenarios to officers.

101 Brief of Plaintiff-Appellant, *supra* note 85, at 18; *see also* Commonwealth v. Rivera, 833 N.E.2d 1113 (Mass. 2005) (explaining that surveillance camera recordings for a murder in a convenience store were used to help identify the defendant, introduced into evidence, and played at trial); Shayna Jacobs, *Lawyer Hopes Video Will Exonerate Chinatown Teen Accused of Murder*, DNAINFO.COM (Dec. 7, 2010), http://www.dnainfo.com/new-york/20101207/lower-east-side-east-village/lawyer-hopes-video-will-exonerate-chinatown-teen-on-trial-for-hester-street-murder (reporting that a video to be presented to a jury reveals the teenager accused of murder standing on the opposite side of the street when it occurred); *Teacher Accused of Hitting Student Exonerated*, WSVN-TV (Mar. 13, 2008), http://www.wsvn.com/news/articles/local/MI79758/ (reporting that a Florida jury dropped charges against a teacher after cell phone video footage exonerated him of accusations of attacking a student).

102 *See* Skehill, *supra* note 13, at 1008 (discussing the benefits of allowing surreptitious recordings of law enforcement officers in Massachusetts).

103 *See Rodney King Reluctant Symbol of Police Brutality*, CNN.COM, http://archives.cnn.com/2001/LAW/03/0/beating.anniversity.king (last visited Oct. 10, 2011) ("Until I saw the video, until we saw it on video, I didn't believe it to that degree." (quoting Rodney King's attorney's disbelief of his client's beating by police)).

police in their investigations and creating clarity in criminal proceedings, these recordings are vital tools in educating the public about civic and national affairs.[104]

B. *Outdated and Not Serving Their Purpose*

As previously discussed in Parts I(A) and (B), the enactment of the Federal Wiretap Act along with its state counterparts (collectively the Wiretap Acts) was motivated by two primary concerns—the preservation of law enforcement tools to combat organized crime and the protection of individual privacy rights from uncontrolled electronic surveillance[105]—and sought to delineate a uniform basis of circumstances under which the interception of wire and oral communications would be authorized.[106]

As for the first evil sought to be remedied by the Wiretap Acts, it is patently clear that the application of the Wiretap Acts to arrest civilians for recording on-duty law enforcement officials in no way contributes or promotes to combating organized crime. The anti-wiretapping statutes were enacted with a view to law enforcements' use of devices to intercept conversations of suspected criminals, mainly in the importation and distribution of narcotics.[107] Congress' focus was on interceptions conducted by law enforcement officials, and it certainly did not intend to subject civilians to criminal penalties for the *lawful* use of modern technologies (e.g., smart phones, digital cameras). Such activities can be viewed as falling considerably outside out the scope of the Wiretap Acts. In fact, in subsequent amendments to the Federal Wiretap Act, Congress reflected a desire to avoid the unnecessary crippling of infant industries in the fields of advanced communications technology.[108] By prohibiting and criminalizing the use of these devices in their ordinary course of function, the statutes as currently applied create a chilling effect on the sale and use of these advanced technologies, stifling the progression of the burgeoning industry, in direct contravention of congressional intentions.[109]

With respect to the Wiretap Acts' more prevalent focus—civilian privacy concerns[110]—the obstinate application of the Acts not only

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104 *See* Brief of Plaintiff-Appellant, *supra* note 85, at 20. "These videos provide more than information and insight; they allow viewers to experience the devastation of events on a visceral level." *Id.*

105 *See supra* note 7 and accompanying text. State legislatures were motivated by identical purposes when adopting their versions of the anti-wiretapping statutes. *See supra* note 20 (discussing the preamble to the Massachusetts Wiretap Act).

106 *See* Gelbard v. United States, 408 U.S. 41, 48 (1972).

107 *See* FINKLEA, *supra* note 7.

108 *See* S. REP. NO. 99-541, at 5 (1986); H.R. REP. NO. 99-647, at 18–19 (1984); *see also* GINA STEVENS & CHARLES DOYLE, CONG. RESEARCH SERV., PRIVACY: AN OVERVIEW OF FEDERAL STATUTES GOVERNING WIRETAPPING AND ELECTRONIC EAVESDROPPING (2009).

109 *See supra* notes 95–96 and accompanying text (discussing the rapid rate of advancement in the consumer electronics industry).

110 *See* United States v. U.S. Dist. Ct. for the E.D. Mich., 407 U.S. 297, 312 (1972).

undercuts their purpose, but also transforms them into draconian measures used to suppress civilian autonomy. The Wiretap Acts were enacted as a necessary safeguard to protect and preserve the individual liberties of civilians from unwarranted intrusions by law enforcement officials, *not the reverse*. By arresting and prosecuting civilians for video-recording public officials in the course of their duties, the government is effectively curtailing civilian rights,[111] as opposed to preserving them.

While there is no doubt that *off-duty* police officers should enjoy privacy protections equal to those afforded to civilians, law enforcement officials forfeit these protections once they are equipped with badges and uniforms, and assume their roles as government agents.[112] Otherwise, permitting police officers to use the Wiretap Acts as both a *shield*—cloaking their misconduct and wrongdoing captured by civilian video-recordings—and a *sword*—arresting and prosecuting civilians for the lawful use of their recording devices—grants law enforcement officials the type of overreaching authority that Congress and the state legislatures sought to prevent.[113]

Moreover, in addition to the obstinate application of the Wiretap Acts, the statutes are clearly outdated. This concern is not a recent one, but was expressed twenty years ago when Congress sought to amend the Federal Wiretap Act to encompass electronic communications.[114] The Wiretap Acts were originally enacted in light of the advent and widespread use of the telephone, as it made it technologically possible for the first time to intercept the audio communications of citizens without physically entering homes or other private places.[115] The devices which Congress sought to regulate and shield privacy rights from were generally only available for use by law enforcement officials.[116] Attempting to use these same Wiretap Acts, which targeted a specific technology and form of intrusion by a specific group, in today's society erroneously assumes the statutes' flexibility to keep pace with progressing technologies. Today, the opportunity to be an "interceptor" has spread beyond the sphere of law enforcement to civilians, as everyone now, as one commentator phrased it, has a "'felony machine' in their pocket."[117]

Further evidence that the advancement of technology has outpaced the state Wiretap Acts is illustrated by the fact that the statutes, which were keen on preserving privacy, only prohibit audio interceptions, not the video portions of the interceptions, which are an inherently greater intrusion of an

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111 *See generally Gelbard*, 408 U.S. 41.

112 *See* Skehill, *supra* note 13, at 1006; *infra* notes 124–133 and accompanying text (discussing privacy expectations of on-duty police).

113 Skehill, *supra* note 13, at 1006.

114 *See* S. REP. NO. 99-541, at 2 (1986) ("[The existing law is] *hopelessly* out of date." Additionally, "[i]t has not kept pace with the development of communications and computer technology. Nor has it kept pace with changes in the structure of the telecommunications industry." (emphasis added)).

115 *See supra* note 7.

116 *See* Balko, *supra* note 1.

117 Brian Westley, *States Applying Wiretap Statutes to Personal Videos*, NEWS MEDIA & L., Aug. 1, 2010.

individual's privacy.[118] A video recording captures everything but an individual's inner thoughts—physical characteristics, gestures, and demeanor—far beyond the intrusion posed by an audio recording.[119] Thus, in light of the Wiretap Acts' fundamental purpose—protecting civilian privacy rights—it is clear that the statutes are not only misapplied, but also no longer effective. The respective legislatures could not only have failed to predict the means by which law enforcement would use the anti-wiretapping statutes, but also could not have anticipated the rapid progression of technology which has rendered the statutes futile. To conclude otherwise bestows upon Congress a level of clairvoyance they undoubtedly did not possess.[120]

C. *Privacy Expectations: Civilians vs. Law Enforcement Officials*

Proliferating societal use of digital video recording technologies has virtually diminished any tangible expectation of privacy in public locations, as being subject to a video recording is an accepted fact of modern society.[121] Thus, for both civilians and police alike, there are increasingly diminished levels of privacy when acting in public forums, and individuals must adjust their expectations accordingly.[122] Thus, the phrase "reasonable expectation of privacy" must be adjusted to reflect the advancement of modern technology. Furthermore, in comparison to ordinary civilians who still rightly exert notions of privacy expectations, law enforcement officials who invoke protections of privacy to justify the punishment of those who monitor public conduct mistake their own apprehensions and anxieties for constitutional justification.[123]

It is well settled that under the Fourth Amendment, there is no expectation of privacy to *any* conversation that a person "knowingly exposes

118 *See* Stephen S. Intille & Amy M. Intille, *New Challenges for Privacy Law: Wearable Computers that Create Electronic Digital Diaries*, MIT HOUSE TECHNICAL REP., Sept. 15, 2003, at 13 (noting that the Federal Wiretap Act "controls the interception of electronic, wire, and oral communications, but it does not regulate video [recordings]"); Balko, *supra* note 1 ("Wiretapping statutes [only] apply to audio recordings, [regardless of whether they are] with or without video.").

119 "[While] the interception of oral communications provides a[n] . . . analogy to video [recordings] even though video surveillance can be vastly more intrusive . . . ." United States v. Mesa-Rincon, 911 F.2d 1433, 1437 (10th Cir. 1990) (noting the severe intrusion on an individual's privacy from a video recording of his masturbation); *see also* Intille, *supra* note 118, at 15 ("The video camera has been compared to the six-gun of the Wild West, as a 'great equalizer,' based upon a video camera's ability as a 'truth-telling device that can cut through lies.'").

120 *See generally* Olmstead v. United States, 277 U.S. 438, 475 (1928) (Brandeis, J., dissenting) (noting that when the Constitution was written, the drafters could not have predicted the means by with which law enforcement could intercept private conversations).

121 *See* Intille, *supra* note 118 (noting that video-recording devices are "firmly rooted in our society").

122 *See generally* notes 95–96 and accompanying text.

123 *See* Seith F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and The Right to Record*, 159 U. PA. L. REV. 355, 396 (2011) ("Suppression of free expression on the part of those who capture information may protect the freedom to converse of those whose words and images are captured.").

to the public," whether that person be a civilian or a law enforcement official.[124] As Justice Harlan once pointed out, a privacy expectation must be subjectively and objectively reasonable in order to garner Fourth Amendment protection, and such standard is equally applicable to the Wiretap Acts.[125] While the courts are firm in affording robust privacy protections to ordinary civilians, they have recognized that a public official's diminished privacy expectations are one of the costs associated with participation in public affairs.[126] Furthermore, the Supreme Court recently emphasized that when public employees make statements pursuant to their official duties, they are "not speaking as citizens" and can claim "no compelling right as citizens to *shield that speech from being recorded*."[127] Thus, once a police officer or other public official cloaks himself with authority, he necessarily falls within the "public eye" and is thereby stripped of his privacy expectations in his conversations. What is crucial to this distinction is that when acting within the scope of their duties, police officers confronting demonstrators, motorists, or even the subjects of an arrest do not engage in dialogue by which they "define their private identities," but rather do so in their official capacity, and thus cannot be afforded privacy protections co-extensive with those of ordinary civilians.[128] Consequently, the actions of law enforcement officials are by definition a matter of public concern, and any diminished privacy interests of police must "give way" when balanced against the First Amendment interests in recording and publishing matters of public importance, especially when seeking to uncover police misconduct—as balancing becomes futile when one side of the scale is empty.[129]

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124 Katz v. United States, 389 U.S. 347, 351 (1967). Whether a person has knowingly exposed a conversation to the public depends on such factors as the proximity of other people, whether the location is accessible to other people, and whether the conversation is at a volume that could be heard by the unassisted human ear. *See, e.g.*, *In re* John Doe Trader Number One, 894 F.2d 240, 242–43 (7th Cir. 1990).

125 *Katz*, 389 U.S. at 351.

126 *See* Bartnicki v. Vopper, 532 U.S. 514, 516 (2001).

127 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (emphasis added); Kreimer, *supra* note 123, at 396 (emphasis added).

128 *See* Kreimer, *supra* note 123, at 396 (noting that police officers "[speak] not as autonomous citizens working out their own thoughts and destiny, but as public servants carrying out their duties").

129 *Bartnicki*, 532 U.S. at 541; *see also* FINKLEA, *supra* note 7 (discussing that a statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties and that such action impedes the free flow of information concerning public officials and violates the First Amendment right to gather such information); Kreimer, *supra* note 123, at 358 ("When privacy functions to underpin democratic society, the interests in free expression may balance one another."). The First Amendment right of free speech protects not only the actual expression of one's views, thoughts, opinions, and information concerning improper or unlawful conduct by public officials but also non-expressive conduct that intrinsically facilitates one's ability to exercise the right of free speech, including lawful efforts to gather evidence and information about public officials concerning allegedly improper or unlawful conduct. *See supra* notes 43, 44, 57, 58. While it is recognized that *Bartnicki* dealt with a prohibition against a disclosure of recorded communications, and its holding does not apply to punishing parties for obtaining the relevant information unlawfully, it nonetheless illustrates that in enforcing a statute that restricts the gathering and dissemination of information and evaluating privacy interests, courts must be sensitive to First Amendment considerations.

Where civilians can be said to have expectations of privacy in their conversations, law enforcement officials should instead be deemed to have an expectation of "*public accountability*" in the scope of their duties.[130] Police officers have a duty to protect and serve their communities and are bestowed a considerable amount of authority to carry out those duties, including the ability to employ physical force and use weapons, take away individual liberties, and search and seize property upon probable cause.[131] Imparting such powers on these officials is a sacrifice that American citizens are obligated to make in order to enjoy the freedoms and safety of our modern society, and thus curtailing the privacy rights of those individuals with that authority is a necessary safeguard to prevent overreaching and the abuse of that power.[132]

It follows then that any privacy expectations police officers assert in their conversations in the course of their duties, while they may be subjectively reasonable, are objectively per se unreasonable, regardless of the location of the recorded statement.[133] Thus, an ordinary civilian and an on-duty police officer, in the same setting making similar statements, exerting similar subjectively reasonable privacy expectations, should result in the civilian's conversation being protected, while the police officer's statement unprotected, and thereby susceptible to being recorded by civilians (regardless of how great a subjective expectation of privacy the officer may have).[134] The acknowledgment of this "per se" exemption from protection is

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130 *See* Nathan Koppel, *First Circuit Upholds Right to Videotape Arresting Officers*, WALL STREET J., Aug. 3, 2011 ("Cell phone cameras are a vital means of ensuring that police officers are held accountable for their actions."); Ed Morrissey, *Do Police Have a Legitimate Expectation of Privacy in Public Performance of Duty?*, HOT AIR, Jun. 3, 2010.

131 *See* ELMER D. GRAMER, AM. POLICE ADMIN., A HANDBOOK ON POLICE ORGANIZATION AND METHODS OF ADMINISTRATION IN AMERICAN CITIES 5–7 (1921).

132 *See* Kreimer, *supra* note 123, at 358 ("Nor can public actors claim a right to preserve their personal dignity against public inspection when they carry out their duties . . . A police officer investigating a crime can assert no comparable right of intimacy with her suspects; still less can a public official engaged in her duties on a public street. Certainly, law officials have no constitutionally cognizable or legitimate expectation that their actions remain unrecorded . . . ."); Skehill, *supra* note 13, at 993 ("Critics pose that affording police officers equal privacy rights to those of private citizens directly contradicts the constitutional framers' intent to limit police power."); *see also* Commonwealth v. Hyde, 750 N.E.2d 963, 976 (2001) (noting that the public's role "cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording . . . an interaction between a citizen and a police officer."); ARTHUR WOODS, POLICEMAN AND PUBLIC 178 (1919) ("The public should know what is going on. It has a right to know in detail what its guardians are doing in order that it may intelligently conclude as to whether they should be discharged, or slapped on the back with approval and have their pay raised.").

133 *See* Maryland v. Graber, No. 12-k-10-647, at *15 (Md. Cir. Ct., Harford Cnty., Sept. 27, 2010) (discussing the fact that there is no possibility that society is prepared to recognize as reasonable *any* purported expectation of privacy in statements made by a police officer in the performance of his official duties). Therefore, not only should a police officer be afforded no greater privacy protections under the Wiretap Act to his conversations made within the scope of his duties in a public space—but the protections of his privacy should accordingly be substantially limited—even in settings in which the civilian could assert an expectation of privacy, the police officer should be precluded from doing so.

134 For example, if a police officer has a conversation in a suspect's home, while it is in a "non-public" setting, he should not be able claim a compelling expectation of privacy; whereas an ordinary civilian in that same setting should be able to claim a valid reasonable expectation of privacy and have his

on par with the Supreme Court's recognition that law enforcement officials do not speak as private citizens when acting within the scope of their duties, and leads to the logical conclusion that civilian-on-police recordings are not in contravention of the Wiretap Acts.[135]

Nonetheless, the practical administration of the Wiretap Acts to arrest and prosecute individuals defies logic and rather speaks volumes about the mentality of the government and law enforcement officials.[136] For instance, it is readily accepted that civilians have no reasonable expectation of privacy when they knowingly converse with, or are in the presence of uniformed police.[137] Civilian expectations do not turn on the specific locale or context of the conversations (e.g., the typical factors used to determine privacy expectations), but rather solely on the fact that the conversations were made with or in the presence of law enforcement officials. Thus, the natural consequence being that, under the current state of the Wiretap Acts, a law enforcement official may be deemed to have an expectation of privacy in his conversations with a civilian, while the civilian does not have such an expectation in that very same conversation—an irrational paradigm concluding that police-on-civilian recording will not undermine privacy, but civilian-on-police recording will.[138]

Another compelling illustration of the incongruous application of the Wiretap Acts is the recent one-sided exemptions to the Acts in favor of allowing police-on-civilian recordings. For example, it is now common practice in many jurisdictions for police officers to record their encounters with the public via cameras mounted in their police cruisers.[139] On one hand, it is true that there are ample benefits of allowing the police to record traffic stops, including the enhancement of officer safety by deterring assaults on officers, improvement of officer training and integrity, resolution of complaints, and preservation of the chain of evidence.[140] However, even

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conversation protected from being recorded.

[135] *See* notes 6–7 and accompanying text (discussing the fact that the Wiretap Acts were enacted to protect private citizens).

[136] See Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABC NEWS, Jul. 19, 2010 ("Police and governmental recording of citizens is becoming more pervasive and to say that government can record you but you can't record, it speaks volumes about the mentality of people in government. It's supposed to be the other way around: They work for us; we don't work for them.").

[137] *See* United States v. Dunbar, 553 F.3d 48, 57 (1st Cir. 2009) (holding that an individual has no expectation of privacy in his conversation in the back of a police car); United States v. Burns, 624 F.2d 95, 100 (10th Cir. 1980) (holding that defendant had no reasonable expectation of privacy in conversation that could be heard by police officer situated in hallway outside motel room door, without the aid of any listening device); Lewis v. State, 139 P.3d 1078, 1088–89 (Wash. 2006) (holding that traffic stop detainees have no expectation of privacy in their conversations during the stop); People v. A.W., 982 P.2d 842, 847 (Colo. 1999) (noting that one who is speaking in the actual presence of a police officer or detective has neither a subjectively nor an objectively reasonable expectation of privacy).

[138] *But see supra* note 144.

[139] *See* Gene King, *Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations*, LEAF NEWSLETTER, Oct. 2006; *see also* Grant Fredericks, *Caught on Camera: The Clear Capture of Officer Murders is a Grim Reality of this Powerful Technology*, EVIDENCE TECH. MAG. , Jan. 2011, at 18 (discussing the increasing statistics of officer deaths that have been caught on dashboard cameras).

[140] *See* Fredericks, *supra* note 139.

in states with the strictest Wiretap Acts, including Illinois, the legislatures have categorically exempted the use of dashboard cameras from falling within the gambit of the wiretap prohibitions, regardless of any reasonable expectations of privacy the civilian may have.[141] Not only are these recordings deemed lawful, but police officers are not required to obtain prior consent to record or inform the civilians of the recording, nor do they need any independent probable cause or reasonable suspicion to conduct the recording. Perhaps most troubling is an emerging trend among states towards expanding the context of police-on-civilian recordings through the use of "body cameras" which are fitted to the officer's uniforms to record all police interactions with the public, even those outside the context of traffic stops.[142] If, similar to the dashboard cameras, an exemption is made to the Wiretap Acts to allow police use of body cameras, the inescapable effect would be the turning of the Acts on their heads—police officers would be able to record civilians at *all times* (even in situations when officer safety is not a concern) regardless of privacy expectations, where civilians would not be able to record the police officers in the same circumstance.[143] The Wiretap Acts were set forth to curtail police powers, and delineated limited circumstances when law enforcement officials were able to record civilians—the obtaining of a warrant from an impartial magistrate. If on one hand the legislature is willing to make categorical exemptions for the police to use new technologies in non-exigent circumstances, then there is scant reason to disregard the compelling First Amendment interests of civilians in the recording of law enforcement officials.[144]

D. *The Countervailing Police Perspective*

While viewing the Wiretap Acts from the standpoint of civilians is useful in portraying their misapplication, the countervailing police perspective on the matter is also useful in shedding light as to why the issue persists. The most obvious and shared sentiment amongst the law

141 *See* 720 ILL. COMP. STAT. ANN. 5/14-3(h) (West 2012) (exempting from the Illinois Wiretap Act recordings made during enforcement stops). "Enforcement stop" means an action by a law enforcement officer in relation to enforcement and investigation duties, including but not limited to, traffic stops, pedestrian stops, abandoned vehicle contacts, motorist assists, commercial motor vehicle stops, roadside safety checks, requests for identification, or responses to requests for emergency assistance." *Id.*

142 *See* Erica Goode, *Video, a New Tool For the Police, Poses New Legal Issues, Too*, N.Y. TIMES, Oct. 11, 2011, at A14 (discussing the modern trend of using cameras fitted to the uniform of police officers in locations such as Oakland, Seattle, and Minnesota).

143 While many states have still yet to recognize an exemption in their Wiretap Acts for body cameras, it appears it is just a matter of time before such exemption is made. *See* Sara J. Green, *Can Body Cams Help Fix Seattle Police Image*, SEATTLE TIMES, Sept. 7, 2011.

144 *See* Goode, *supra* note 142 ("If nothing else, . . . the adoption of the body cameras by police departments may help discourage attempts to prosecute citizens for making their own video records of police interactions, in most cases under wiretapping or eavesdropping laws that prohibit recording without consent from both parties.").

enforcement community is that subjecting police officers to potential constant civilian recording will intimidate and distract officers from doing their job, and deteriorate the efficiency of the police that society needs and desires.[145] As Judge Posner expressed in *Alvarez*, "the ubiquity of recording devices will increase security concerns by distracting the police" and

> [allowing civilian on police recordings] is likely to impair the ability of police both to extract information relevant to police duties and to communicate effectively with persons whom they speak with in the line of duty. An officer may freeze if he sees a journalist recording a conversation between the officer and a crime suspect, crime victim, or dissatisfied member of the public. He may be concerned when any stranger moves into earshot, or when he sees a recording device (even a cell phone, for modern cell phones are digital audio recorders) in the stranger's hand. To distract police during tense encounters with citizens endangers public safety and undermines effective law enforcement.[146]

While there is sound reasoning to this argument in the abstract, as fear of being subject to scrutiny may lead to trepidation in exerting authority, in practice the argument holds scant merit.[147] As previously outlined, police officers today are already equipped with surveillance equipment in their cars and uniforms to monitor their conduct in the course of carrying out their duties with an eye not only on protecting officers, but also to ensure transparency and improve the public perception of law enforcement.[148] Thus, herein lies the fatal inconsistency: *there is no difference between these cameras and the footage being captured by citizens*. If the police officers are subject to the lens of a camera (and all of the "intimidations" that come along with it), it should not matter who is standing behind it.[149] In fact, setting aside the robust interest in allowing a civilian to record matters of public interest, having independent civilian recordings will further the benefits sought to be gained by having dashboard and body cameras,

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145 *See* Rania Khalek, *15 Years in Prison For Taping the Cops? How Eavesdropping Laws are Taking Away our Best Defense Against Police Brutality*, ALTERNET, Jul. 27, 2011 (noting that James Pasco, executive director of the Fraternal Order of the Police (FOP) "argues that videotaping police officers in public should be illegal because it can intimidate officers from doing their jobs"); Don Terry, *Eavesdropping Laws Mean that Turning on an Audio Recorder Could Send You to Prison*, N.Y. TIMES, Jan. 23, 2011, at A29B ("Mark Donahue, president of the FOP, said his organization 'absolutely supports' the [Wiretap Acts] as is . . . and added that allowing the . . . recording of police officers while performing their duty 'can affect how an officer does his job on the street.'").

146 ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

147 Police already have at their disposal tools to prevent a civilian's interference with police investigations, such as obstruction of justice or disturbing the peace charges. *See* Balko, *supra* note 1.

148 *See generally* notes 139–144 and accompanying text.

149 *See* Khalek, *supra* note 145. *But see* Peter Hermann, *Judge Says Man Within Rights to Record Police Traffic Stop,* THE BALTIMORE SUN, Sept. 27, 2010 ("Harford County State's Attorney Joseph I. Cassilly warned that people armed with cameras might soon point their lenses at car accident scenes 'and eavesdrop as police take medical history' from patients.").

including footage from different angles that can document evidence and witnesses the police cameras may fail to capture.[150]

On the other hand, one concern is that civilian videos can be edited and taken out of context to reflect negatively on law enforcement officials, whereas with dashboard cameras or other forms of police security videos, the evidence is in the hands of law enforcement at all times and is admissible under the rules of evidence.[151] However, critics rightly counter by asserting that the protection of law enforcement's public perception is an insufficient rationale for prohibiting civilian recordings, as it is easy to discern if a video has been edited, and there are no guarantees that merely because a video is in police custody it will not be altered, or even worse, deleted.[152] In his dissent in *Alvarez*, Judge Posner also makes note of a potential "slippery slope" when it comes to allowing civilian-on-police recording, in that it potentially subjects any number of civilians who confide in police officers or seek emergency aid from being recorded by third-parties.[153] While his repeated use of hypotheticals to support his opposition to the ruling adds color to his argument, its logic is sparse, and ultimately fails to conceal his sheer distaste and predisposition against libertarianism. By appealing to privacy concerns of civilians conversing with the police, his argument is flawed—those civilians relinquished any privacy expectations by engaging in that very conversation with the police officer—and a police officer should not be cloaked with a greater privacy expectation because of the subject of his conversation, as such distinction would trivialize the robust First Amendment rights possessed by the civilian recorder.

Perhaps a more compelling contention in favor of prohibiting civilian-on-police recordings is the fact that in modern society, drawing the line between a police officer in his private capacity as opposed to his official

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150 *See supra* notes 97–104 (discussing benefits of civilian recordings).

151 *See* Balko, *supra* note 1 (discussing the main concern with allowing civilian recordings of police is that there is "no chain of custody with these videos" and that "activists will tamper with videos or use clips out of context to make police officers look bad").

152 *Id.*

153 Judge Posner notes that:

> A person who is talking with a police officer on duty may be a suspect whom the officer wants to question; he may be a bystander whom the police are shooing away from the scene of a crime or an accident; he may be an injured person seeking help; he may be a crime victim seeking police intervention; he may be asking for directions; he may be arguing with a police officer over a parking ticket; he may be reporting a traffic accident.

Id. He further argues that:

> If a person has been shot or raped or mugged or badly injured in a car accident or has witnessed any of these things happening to someone else, and seeks out a police officer for aid, what sense would it make to tell him he's welcome to trot off to the nearest police station for a cozy private conversation, but that otherwise the First Amendment gives passersby the right to memorialize and publish (on Facebook, on Twitter, on YouTube, on a blog) his agonized plea for help?

Id.

capacity is an arbitrary and artificial exercise. While theoretically public officials should have diminished expectations of privacy in the course of their duties, today's modern world dissolves the metaphoric wall between the spheres of public official and private actor.[154] With the ability to record and disseminate video to the public via social networking sites and YouTube, the recorded acts of a police officer on-duty can necessarily "spill over" into his personal life off-duty, where he is afforded the same protections as any other citizen, and thereby intrude on his privacy.[155] Thus, the argument follows then that police officers, in today's society, should enjoy the same privacy protections as ordinary civilians, regardless of whether they are on- or off-duty. An examination of this notion, however, evidences the fact that the only risk of a potential "spill-over" is not from the interception of conversations, as prohibited under the Wiretap Acts, but rather the dissemination of that recording to the public. Hence, it may be proper to postulate that in order to strike a proper balance, it is essential to allow civilians to *record* on-duty police (legal), while on the same token prohibit the dissemination of said legal recordings to the public. Such a balance provides the various evidentiary benefits previously discussed,[156] while at the same time offering meaningful privacy protections in modern society.[157]

E. *Defects in the State Statutes: A Closer Look*

At the heart of this issue are the state statutes that, instead of following in the mold of the Federal Wiretap Act, have impermissibly deviated from the federal standards and in turn created a muddled statutory scheme that has perverted the ambitions and efficacy of the Wiretap Acts. As previously discussed in Part I(B), the key areas of discrepancy between the Federal and State Acts are the exceptions to the general prohibition against recording conversations. While a majority of states tailor their statutes after the Federal Wiretap Act, a handful of states substantially increase the rigors of their regulation. Two of such minority states, Illinois and Massachusetts, not only eliminate the one-party consent rule, and require all-party consent, but also

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154 *See generally* Geoffrey Baym, *The Daily Show: Discursive Integration and the Reinvention of Political Journalism*, POL. COMM. 273 (2006).

155 *See* Balko, *supra* note 1 ("Police officers don't check their civil rights at the station house door.") (internal quotations omitted) (quoting James Pasco).

156 *See supra* notes 97–104 (discussing the benefits of allowing civilians to record on-duty police officers).

157 *See generally* Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) ("[T]here are important interests to be considered on both sides of the constitutional calculus. In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to . . . an intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place.").

apply to *any conversation*, regardless of an expectation of privacy.[158]

The all-party consent requirement, while a substantial deviation from the federal standard, creates a conduit for meaningful protection of the legitimate privacy rights and expectations of individuals' conversations by requiring that each and every individual to a conversation must consent to being recorded, and thereby translates into the tangible condition that each party will have either actual or implied knowledge that they are subject to the recording. In turn, because of such knowledge, no party can assert a reasonable expectation of privacy in their conversation. However, it is the combination of the all-party consent requirement and the lack of a privacy exception that taints the Wiretap Acts, transforming them into draconian measures susceptible to abuse.

1. Illinois Wiretap Act

Due to their deviations from the Federal Wiretap Act, the Illinois and Massachusetts Acts are outliers and aberrations among State Wiretap Acts, and provide prime examples of statutory schemes that are the cause for the recent proliferation of Wiretap cases.[159] Illinois is the only state where a wiretapping statute explicitly criminalizes the recording of conversations regardless of privacy expectations, while at the same time requires all parties to consent to the recording.[160] Consequently, the act operates independently from any subjective or objective expectations of privacy, and applies to any and all conversations. Furthermore, it is of no consequence if the recording is open and patently obvious, as opposed to hidden or surreptitious; the only way to avoid violating the Illinois Act is to obtain consent of all parties. For instance, if a civilian records a police officer's conversation at an arena filled with 50,000 fans without his consent, then technically the civilian has violated the Illinois Act. This example demonstrates how the Illinois Act patently misses the mark of the aims of the Wiretap Acts in general—the Act operates autonomously from the privacy rights of individuals (regardless of whether it is a public official or ordinary civilian), and includes conduct that is not rationally related to the evils the legislation sought to prohibit.[161] Thus, while the all-party consent rule serves to protect the

158 *See supra* notes 26, 29 and accompanying text.

159 *See* Lee, *supra* note 89 (discussing how the Illinois act is an aberration and how it's absurd to criminalize the recording of police).

160 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2012) (emphasis added). While no other state explicitly criminalizes the recording of conversations regardless of the lack of a reasonable expectation of privacy, eight states' criminal wiretapping statutes are silent on the issue, neither explicitly criminalizing such recordings, nor expressly recognizing that the subject of a recording must have a reasonable expectation of privacy in the communication. *See* ALASKA STAT. § 42.20.310 (2010); ARK. CODE ANN. § 5-60-120(a) (West 2010); CONN. GEN. STAT. § 52-570d(a) (2011); IND. CODE § 35-33.5-1-5 (2011); MONT. CODE ANN. § 45-8-213(1)(c) (West 2009); N.M. STAT. ANN. § 30-12-1(B) (West 2010); N.Y. PENAL LAW §§ 250.00(1) (McKinney 2011); OR. REV. STAT. § 165.540(1)(c) (2011).

161 *See* Lee *supra* note 89 (pointing out that Illinois Wiretap Act criminalizes any recording without

legitimate privacy expectations of the parties to a conversation by creating a higher bar to lawful recording,[162] its function cannot be served when there is no reasonable privacy expectation to be protected in the first place. Therefore, by requiring all-party consent to *any* conversation (private or non-private), the Illinois Act sweeps too broadly and criminalizes—as a felony—a class of wholly innocent conduct that has nothing to do with privacy intrusions.[163]

For example, in *Allison*, the conversations for which defendant Allison was arrested took place in circumstances that could not reasonably manifest expectations of privacy—the *open* recording of on-duty police officers on the civilian's property and the recording of a judge during a hearing at a busy courthouse.[164] Both recordings took place in public areas in the presence of others, and thus the officials neither possessed an objectively reasonable expectation of privacy (because they are public officials acting in the course of their duties), nor could they exert a reasonable subjective expectation of privacy. Yet, because Allison did not receive their consent, their recorded public conversations led to the criminalization of conduct that under Federal and other state acts would be lawful.

For instance, in *Graber*, defendant Graber recorded his interaction with police on a public highway, where similar to the *Allison* case, the public officials could not exert a reasonable expectation of privacy. While Maryland, similar to Illinois, requires all-party consent, it does include the privacy exception that is essential to preserving the efficacy of the Wiretap Acts.[165] Because the trial judge easily concluded the officers had no such privacy expectation (no subjective or objective privacy expectation), the case was easily dismissed.[166] This stark distinction clearly evidences the sole importance of the privacy exception to a uniform and common sense application of the Wiretap Acts.

2. Massachusetts Wiretap Act

The Massachusetts Wiretap Act, while substantially similar to the Illinois Act, offers a significant "escape hatch" from liability in that only the "surreptitious recording" of *any* conversation is prohibited. Thus, only a recording made in a *secretive manner*, without the consent of all parties to

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regard to expectations of privacy, even if those events that are being recorded occur in the open, in public, for anyone to see and hear and otherwise observe).

162 *See supra* notes 97–104 and accompanying text.

163 *See* sources cited *supra* note 83 and accompanying text (discussing the problems with the Illinois Act).

164 *See supra* notes 73–78 and accompanying text.

165 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (West 2012); *see also supra* note 71 (discussing requirements of Maryland Wiretap Act).

166 *See* Maryland v. Graber, No. 12-k-10-647, at *15 (Md. Cir. Ct., Harford Cnty., Sept. 27, 2010) (noting that police officer on highway had no subjective expectation of privacy in his conversation with civilian, nor did he have an objective expectation because he was within his scope of his public duties).

the conversation, violates the Massachusetts Act.[167] The negative inference resulting from this surreptitious recording requirement is that a recording made in plain view will escape liability by automatically imparting onto the parties to the conversation actual or implied knowledge that they are subject to being recorded (the plain view doctrine).[168] This doctrine, acting itself as an "exception to the exception," reveals that the surreptitious requirement is a mere prophylactic, similar to the consent requirement, employed to safeguard individuals' privacy rights in their conversations, and that its protections are not co-extensive with those afforded by the privacy exception that accompanies the Federal and majority of State Wiretap Acts.

While the Massachusetts Act places a meaningful restriction on the recordings that are unlawful, the crucial peculiarity is that the restriction is on the *manner* of recording, not the conversation itself. Instead, the surreptitious requirement, together with the plain view doctrine, seeks to protect one specific type of privacy intrusion—secretive recording—and in effect serves as a conduit to only nullify the consent requirement by putting the party on notice that they are being recorded.[169] On one hand, it is valid to conclude that if the recording is made in plain view, knowledge of that recording is imputed upon the parties to that conversation, thus furnishing their consent to that recording, and in turn, diminishing their expectation of privacy.[170] However, this chain of presumption can lead to trivializing the legitimate privacy expectations of the parties to the conversation, the faulty link being that there will be instances where the subject of the recording is actually unaware of the plain view recording of his private conversation, and the implication of knowledge, as opposed to requiring actual knowledge, would serve to artificially deteriorate any and all of his privacy expectations.[171] Therefore, the fact that under the Massachusetts Act, an individual's privacy expectations in his conversation can be intruded so long as the recording device is held in the open demonstrates that a restriction on the manner of recording is not equivalent to the presence of a privacy exception in the statute.

In addition, not only are the safeguards afforded by the surreptitious requirement not co-extensive with those protections afforded by the privacy exception, but the requirement itself is problematic in its application and leads to untenable results. For instance, recent advances in technology may

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167 MASS. GEN. LAWS ANN. ch. 272 § 99(B)(4) (West 2012); *see also supra* note 26 (discussing the surreptitious requirement of the Massachusetts Act).

168 *See* Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (suggesting that if defendant held recording device in plain view, no violation of statute would exist); *see also* Skehill, *supra* note 13; *supra* note 68 (discussing the meaning of surreptitious recording under the Massachusetts Wiretap Act).

169 *See* Glik v. Cunniffe, 655 F.3d 78, 87 (1st Cir. 2011) (discussing that the secrecy inquiry turns on notice); *Hyde*, 750 N.E.2d 963 (inferring knowledge equals consent); *see also* Skehill, *supra* note 13, at 1009 ("Once a police officer realizes he is being recorded, it appears consent is no longer required.").

170 *See* Skehill, *supra* note 13, at 1010.

171 *See Glik*, 655 F.3d at 88 (noting the use in plain view of a device commonly known to record audio is, on its own, sufficient evidence from which to infer the subjects' actual knowledge of the recording).

lead to issues in determining whether a recording was made in secretive manner or in plain view and "force a court to decipher at what point the recording went from unlawful to lawful."[172] Furthermore, in situations where an individual has no legitimate expectation of privacy, and thus subject to being lawfully recorded under the majority of Wiretap Acts, the mere fact that the recording was made in secret would lead to criminalization.[173] For instance, in *Glik*, defendant Glik recorded the on-duty police officers in a public park while they were acting within the scope of their duties making an arrest. Surely, not only is it correct to contend that the officer's had no objective privacy expectations due to their public official status, but additionally no subjective expectations as they were carrying out conversations in perhaps the most public of settings in the City of Boston. However, in dismissing the charges against him, the trial court specifically noted that Glik made the recording openly, and because of this reason, and this reason alone, he did not violate the Massachusetts Wiretap Act. It follows then, that had Glik concealed his recording, he would have been prosecuted under the Act, regardless of the severely diminished objective and subjective privacy expectations of the officers. Not only does this lead to an illogical conclusion, but it necessarily limits the benefits of recording law enforcement officials and defeats the First Amendment right to gather information of public concern.[174]

3. Privacy Exception: The Crucial Piece of the Puzzle

While both the Illinois and Massachusetts Acts lack the privacy exception in conjunction with the all-party consent rule, the issue persists in states that adopt the one-party consent rule, but lack or are silent as to the privacy exception.[175] It is well settled that in order for the individual recording a conversation to invoke the privileges of the consent exception, he must be a party to that conversation.[176] Thus, in a scenario where a third-party civilian bystander seeks to record an interaction between a police officer and another civilian (e.g., an arrest), that third-party cannot utilize the consent exception because he is not a party to that interaction. Furthermore, if the applicable Wiretap Act lacks the privacy exception, then the third-party would not be able to lawfully record—independent of any

172 Skehill, *supra* note 13, at 985 ("Everyday devices such as cell phones, digital cameras, and MP3 players allow people to make recordings with the click of a button, making some plain view recordings practically impossible to detect."); *see Glik*, 655 F.3d at 87 (noting the police officers' argument that Glik's "use of a cellphone was insufficient to put them on notice of recording . . . [because] a cellphone . . . has numerous discrete functions, such as text messaging, internet browsing video gaming, and photography.").

173 *See supra* notes 26, 29 and accompanying text.

174 *See* Skehill, *supra* note 13 (discussing the benefits of surreptitiously recording on-duty police officers).

175 *See supra* note 160 (listing states which do not explicitly provide for a privacy exception in their Wiretap Acts).

176 *See supra* notes 14–15.

actual privacy expectations—before obtaining consent of one of the parties (e.g, the civilian party). Therefore, the result is that an on-duty police officer acting in a public setting in front of a massive crowd, with no reasonable privacy expectations, is spared from being recorded by others, unless the third-party first received consent from the civilian interacting with the officer.

While it is true that perhaps the ability to record a conversation as an outsider, as opposed to a party to that conversation, should be limited, the First Amendment and societal implications of the need to monitor police and hold them accountable are, on balance, the same. A police officer should not be shielded from scrutiny merely because of who is holding the camera. It is clear then, as demonstrated by the preceding hypothetical that the Wiretap Acts do not become tainted only by the combination of the all-party consent rule and the lack of the privacy exception together, but rather are contaminated when the respective Wiretap Act fails to provide for the privacy exception, regardless of the consent rule. By allowing the Wiretap Acts to operate independently from the privacy expectations of the parties immersed in the conversation not only distorts the Wiretap Acts' fundamental statutory scheme, but also permits their oppressive application by law enforcement officials.

4. Preferential Treatment of Law Enforcement Officials

Not only is the failure of the Wiretap Acts to adopt the vital expectation of privacy exception to blame for the recurring obstinate application of the statutes, but so are the Wiretap Acts' deferential treatment of police officers over civilians. For instance, the Illinois Act has a broad exception allowing uniformed police, at their discretion and without a warrant, to record their conversations with civilians during an "enforcement stop," an expansive term that includes, but is not limited to, traffic stops, pedestrian stops, motorist assists, roadside safety checks, emergency assistance, and requests for identification.[177]As a result, police may record all of their conversations with civilians, while civilians are precluded from recording the same conversations. Rather than advancing the Acts' ambitions in delineating a uniform, limited basis when law enforcement is able to record civilians, the Illinois Act creates near-limitless opportunities for law enforcement to exercise discretion and intercept conversations. Furthermore, perhaps most troubling is the Illinois Act's heightened penalty for civilian-on-police recording. Recording police (or prosecutors or judges) is deemed a class 1 felony, punishable with a sentence ranging from four to

177 720 ILL. COMP. STAT. ANN. 5/14-3(h) (West 2012). Furthermore, police may record conversations with a civilian who is an occupant of a vehicle and conversations during the use of a taser or similar weapon or device if the device is equipped with audio recording technology. *Id.* 5/14-3(h-5).

fifteen years in prison.[178] However, the recording of others (i.e., ordinary civilians) is a class 4 felony, with a sentence of one to three years.[179] The basis for the discrepancy in punishment is unclear, and rather is the direct antithesis to the core of the Wiretap Acts, which strives to protect the rights of private citizens, while curtailing those of law enforcement—not the other way around.

III. Proposal

The improper arrests of civilians for the recording of on-duty police officers is a compelling legal issue that needs to be addressed by both state legislatures and the judiciary, as the problem will only be exacerbated by the further advancement of consumer technologies and perpetuated by the poorly drafted Wiretap Acts.[180] To alleviate the unyielding, conflicting pressures between the outdated Wiretap Acts, the First Amendment, and societal expectations, there are numerous potential avenues that states can pursue.

One possible solution is to directly legislate an exemption into the Wiretap Acts to specifically allow the recording of on-duty police officers acting in their official capacity. For instance, the statute could directly carve out a categorical exemption permitting civilian-on-police recordings, of any conversation the officers have while on duty, regardless of their consent, and regardless of the manner in which the recording is made (e.g., surreptitious). Furthermore, a key aspect of this exemption would be to provide for a private right of action for civilians to pursue civil suits against those officers who detain and arrest individuals for making said recordings—a necessary tool to not only increase the accountability of officers in their exertion of authority, but to also deter any future misuse of these Acts by police officers under similar circumstances.[181] In addition, the private right of action could be limited to instances where the recording did not interfere with the officer's performance of their duties.[182] However, garnering popular support

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178 *Id.* 5/14-4(b); *Id.* 5/5-4.5-30 (West 2012).

179 *Id.* 5/14-4(a); *Id.* 5/5-4.5-45.

180 *See supra* note 39 (discussing Pennsylvania District Attorney Freed's comments on the Wiretap Act, finding that "[i]t is not the [clearest] statute that we have on the books," and adding "it could need a look, based on how technology has advanced since it was written"); *see also* sources cited *supra* note 89 (noting ACLU Legal Director Harvey Grossman's assertion that the Illinois Act is an "aberration," and finds it "virtually unheard of for law enforcement officers in other states in our country to be able to use [wiretap] laws as a weapon against citizens who seek to do nothing more than record their activities and oral expressions").

181 *See* Balko, *supra* note 1 (noting the importance of the private of action, since a right does not mean much if there are no consequences for government officials who ignore it).

182 Recently, bills have been introduced in a handful of states to allow the direct exemptions of civilian-on-police recordings. For instance, in Connecticut, Senator Martin Looney (D-New Haven) introduced a bill in January 2011 concerning the recording of police. The proposed bill provides "[t]hat the general statues be amended to authorize a person to bring a civil action for damages against a police officer who has interfered with such person's right to photograph or videotape an event if such person's actions did not

for such bills may prove difficult, as such a categorical, "blanket" exemption may lead to the sentiment that police will be hindered from performing their duties, especially in emergency situations, and therefore may be an impractical solution to this developing issue.[183]

Perhaps a better course to take would be to alter the statutory exceptions as already provided for under the Wiretap Acts. With respect to the consent exceptions,[184] state legislatures could alleviate the recent multitude of misapplied Wiretap Acts by amending said Acts to provide that an on-duty police officer is not a party from which consent needs to be obtained (Police Consent Exemption) in order to lawfully record. Essentially, then, this would transform all-party consent states into one-party consent states when the recorded conversation occurs between a police officer and a civilian—the effect being that a civilian in that conversation would be permitted to record the police officer without violating the respective Wiretap Act.[185] By doing so, a logical result can be obtained, as the Police Consent Exemption is in line with the fundamental privacy rights of a police officer—once the officer is in the "public eye" (e.g., acting in the scope of his public duties), he has a severely diminished expectation of privacy,[186] and the prophylactic protection afforded by the consent requirement is no longer functional, nor necessary.[187] While the Police Consent Exemption would be a useful tool to rectify the Wiretap Acts, it does not completely remedy the problem. For instance, even in those circumstances where a police officer is not a party from whom consent needs to be obtained, a third-party bystander would still be subject to penalty under the Acts for his interception of the conversation without the

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prevent or hinder the police officer performing his or her duties." *See* S.B. 788, 2011 Gen. Assemb., Jan. Sess. (Ct. 2011) (on file with author); *see also* Balko, *supra* note 1 (discussing Illinois State Representative Chapin Rose's 2006 introduction of a bill to amend the Wiretap Act, making it explicitly legal for citizens to record on-duty police officers and public officials).

183 *See* Hugh McQuaid, *Senate Passes Watered-Down Police Recording Bill*, NEW HAVEN INDEPENDENT, Jun. 3, 2011 (noting the critics of the proposed Connecticut legislation). "Sen. Len Fasano, R-North Haven, said he didn't like the idea of the bill. Police officers arriving at a potentially dangerous crime scene now must also consider whether it's appropriate or legal for people to be recording, he said." *Id.* "Senate Minority Leader John McKinney said cops already have enough to worry about. They must consider protecting themselves, the public, and the crime scene." *Id.* "I don't want that police officer to be thinking for a second, 'wait a minute, I've got this new law I might be liable. Oh darn. What am I going to do?' he said. 'I think that takes away from them doing their best job.'" *Id.* The success of these proposal bills has been lackluster. For instance, the Illinois bill died in committee, and was never brought up for debate. Balko, *supra* note 1 (noting Rep. Chapin Rose's comment on the futility of introducing the bill again, "because there is just no interest in [Illinois] for this sort of thing"). However, there may be some hope in Connecticut, albeit a diluted one. The Connecticut Senate passed Sen. Looney's proposal 22-14, in a "watered-down" form, and it is now up for vote in the House of Representatives. *Id.*

184 *See supra* notes 19–29 (discussing the state variations of the consent exception).

185 *See supra* notes 20–31.

186 *See supra* notes 123–134 and accompanying text (discussing the diminished privacy expectations of a police officer in his on-duty conversations).

187 *See supra* notes 161–163 (noting that the all-party consent requirements do not serve their purpose when they apply to civilian-police conversations).

civilian's prior consent.[188]

Consequently, focus must necessarily turn to the vital privacy exception to mitigate the foregoing issue.[189] The utility of the privacy exception in the proper application of these Acts is undeniable, and as previously noted in Part II(E), states that explicitly lack or are silent with regards to a privacy exception are, not too coincidentally, those which have seen a proliferation of recent wiretap cases.[190] If legislatures amend their Acts and specifically tailor their definition of "communications" to mirror the Federal Wiretap Act,[191] thereby providing for a privacy exception, this persistent legal issue could be substantially ameliorated—all on-duty police officers' conversations would be subject to being recorded by civilians in circumstances in which they cannot exert a reasonable expectation of privacy.[192] It follows that because a law enforcement official, acting within the scope of his public duties, does not speak in his private capacity, and has no expectation of *privacy*, but rather an expectation of *public accountability*, he per se cannot exert an objectively reasonable privacy expectation.[193] As a corollary, this per se objectively unreasonable privacy rule (per se rule), that accompanies the authority conferred upon law enforcement officials, would subject a police officer's conversations in the course of his duties to the lawful recording by the civilian parties to whom he converses and even third-party bystanders (as consent would no longer be an issue).[194]

Moreover, not only does recognition of the per se rule subordinate police officer privacy rights to those of civilians (as was originally intended by the Acts) by setting a higher bar for the government to demonstrate an intrusion into the police officer's privacy, but it also provides a baseline of privacy protection for law enforcement officials (unlike directly legislating a categorical exemption to allow civilian-on-police recording at all times). For instance, if the government can rebut the per se unreasonable presumption by demonstrating, inter alia, exigent circumstances, an abundant subjective expectation of privacy, or perhaps even an increased intrusion, then the police officer's conversation may garner protections of the Wiretap Acts,

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188 *See supra* notes 179–180 and accompanying text.

189 *See supra* note 15 and accompanying text (discussing the reasonable expectation of privacy exception).

190 *See, e.g.*, Glik v. Cunniffe, 655 F.3d 48 (1st Cir. 2011); Order on Motion, *supra* note 78; *see also supra* Part III.D (demonstrating the importance of the privacy exception to the application of the Wiretap Acts).

191 *See* 18 U.S.C. § 2510(2) (2006) (setting forth the "oral communication" definition in the Federal Wiretap Act); *see also supra* note 118 (discussing the federal expectation of privacy exception).

192 *See supra* note 15.

193 *See supra* note 133 and accompanying text; *supra* notes 146–155 (discussing the diminished privacy expectations of on-duty police officers).

194 *See supra* note 107 (discussing that a statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties; and that such action impedes the free flow of information concerning public officials and violates the First Amendment right to gather such information). This per se rule recognizes the necessity of subordinating the privacy interests of law enforcement to the rights of civilians.

subjecting the civilian recorders to criminal penalties.[195] Moreover, while it is patently clear that the privacy exception is necessary for resolving this specific legal issue, such exception would have a broader, if not more significant consequence—allowing the Acts to serve their underlying purpose by protecting legitimate privacy rights, while at the same time criminalizing only those recordings which are bona fide privacy intrusions—and in turn striking the necessary balance between First Amendment rights and privacy expectations.[196]

While the above proposed solutions are focused on the Wiretap Acts themselves, concentrated towards decriminalizing civilian-on-police recordings directly, another potential response deals with the recognition of the First Amendment right to record a police officer in the course of his public duties.[197] If courts throughout the United States continue to recognize such a right, a cross-jurisdictional, wide-spread acceptance will serve to enhance the clarity of the right and it will thereby become "clearly established" under the §1983 rubric—the effect of which will strip police of their qualified immunity protection, making them susceptible to civil law suits if they arrest civilians for recording their on-duty activities.[198] It is, however, imperative to point out that such recognition of the right will not necessarily rectify the issue all together: civilians may still be subject to arrest under the terms of the current Wiretap Acts, and the First Amendment recognition would only protect recordings of officers in *public* (still be subject to time, place, and manner restrictions). However, by subjecting officers to potential lawsuits will have the effect of deterring police from using the Acts to intimidate and coerce civilians, and at the same time, place a great deal of pressure on the legislatures to amend the Wiretap Acts to conform with the robust First Amendment rights of civilians.

CONCLUSION

The current form of the State Wiretap Acts creates an inexplicable double standard—providing police with near limitless discretion to conduct police-on-civilian recordings and protecting them from public scrutiny, while at the same time restricting civilian rights to record police and subjecting them to arrest and potential prosecution.[199] Not only are these

195 An example of an increased intrusion, for instance, could be the dissemination of the video via social networking sites or YouTube, as apart from the actual interception of the conversation. *See supra* notes 154–157 and accompanying text.

196 By inputting the privacy exception into the wiretap acts, the statutes can no longer operate independently of privacy expectations, and will serve to criminalize conduct never intended.

197 *See* Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) ("[T]hough not unqualified, 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*." (emphasis added)).

198 *See supra* note 40 (discussing qualified immunity doctrine).

199 *See supra* note 113 and accompanying text.

statutes hopelessly out of date, but their deviations from the Federal Wiretap Act have provided law enforcement officials the tools to intimidate civilians in the course of the valid exercise of their rights, not to mention undermining respect for the law.[200] While courts have slowly come to the realization that a remedy needs to be fashioned, the recognition of the First Amendment right to record an on-duty police officer is an insufficient solution.[201] With the benefits of civilian recordings undeniable in today's modern society, the burden falls on the state legislatures to tailor their statutes to resemble the Federal Wiretap Act, and provide the necessary privacy exception.[202] Accordingly, by recognizing that a law enforcement official in the scope of his public duties has a per se diminished expectation of privacy, and instead an expectation of public accountability, the unjust arrests of civilians for the recording of on-duty police officers would then be significantly minimized—preventing the Wiretap Acts from operating independently of legitimate privacy expectations will ensure that only the meaningful intrusions will be punished. Therefore, while there may be instances when the civilian does not have an affirmative First Amendment right to record the on-duty police officer, he still then cannot otherwise be subject to arrest by recording—only his right to pursue a civil suit against the officer would be exhausted.

The seminal decision of *ACLU v. Alvarez* appears to have initiated a process of regulatory refinement. Recently, the Illinois House of Representatives approved an amendment to their Wiretap Act whereby a civilian would not be subject to criminal penalty if they record a law enforcement officer acting in their official capacity in a public place; but whether the exception survives the Senate and is enacted into law still remains to be seen as the Senate is on recess until the fall of 2012.[203] However, the shift in jurisprudence recognizing the need to decriminalize this "everyday activity" and the recently acquiesant legislatures acceding to the need to more appropriately tailor the statutes' means to their ends indicates demise of these draconian Wiretap Acts. While the future of this legal issue, however, remains uncertain, one thing is clear—the right of citizens to record law enforcement officials is a critical check and balance on the authority conferred to them. Even if states are reluctant to allow that right in all circumstances, by instead decriminalizing civilian-on-police recordings under the Wiretap Acts, the question *of "who watches the watchmen?"* can affirmatively be answered—"*We Do*."

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200 *See* Balko, *supra* note 1 (discussing Illinois State Rep. Chapin Rose's comments in regards to the state of the wiretapping laws, noting "when you have a law that prohibits something your average Joe thinks is perfectly legal, it undermines respect for the rule of law."). Rose adds: "Everyone has a camera on his cell phone now, and we're making what lots of people in this state do every day . . . a felony." *Id.*

201 *See supra* note 198 and accompanying text.

202 *See supra* notes 171–172 and accompanying text.

203 *See* Ryan Voyles, *House Passes Nekritz Bill Allowing Videotaping of Police*, DAILY HERALD, May 22, 2012, *available at* http://www.dailyherald.com/article/20120522/news/705229559/.