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# **POLICE PRIVACY IN THE IPHONE ERA?: THE NEED FOR SAFEGUARDS IN STATE WIRETAPPING STATUTES TO PRESERVE THE CIVILIAN'S RIGHT TO RECORD PUBLIC POLICE ACTIVITY**

**BY JESSE HARLAN ALDERMAN\***

***ABSTRACT:** The advent of iPhones, Blackberries, and other ubiquitous cellular devices instantly capable of capturing audio and video recordings has led to increased publicity of police misconduct, and a rise in the admission of evidence, inculpatory and exculpatory, gathered by “citizen journalists,” ordinary bystanders, or victims themselves. The probative value of such “iPhone evidence” and its public utility in exposing police abuses cannot be understated. However, a handful of states have criminalized the mere gathering of such videos under state wiretapping statutes that prohibit a broad range of nonconsensual recording, even of police officers in their public capacities. This Article argues that the right of citizens to openly or surreptitiously record police performing their public duties, without fear of punitive and retaliatory prosecution, must be expressly safeguarded in state wiretapping statutes. This protection is rooted in background principles of the Fourth Amendment, which militate against conferral of privacy rights for public police actions; the First Amendment, which protects the right of the public to receive information and concomitantly the right to record police; and other salient public policy considerations. A Table of State Authorities, summarizing the relevant characteristics of all state wiretapping laws, and the federal counterpart, is also provided.*

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## INTRODUCTION

The cell phone videos are chilling to watch. It's New Year's night, after the calendar turned to 2009, and the grainy images show Bay Area Rapid Transit police officers responding to a fight on an Oakland subway platform. All of a sudden, Officer Johannes Mehserle pins 22-year-old Oscar Grant face down against the ground, draws his gun, and fires. Grant died instantly. The passengers watching from an idling train, in turns, scream, cry, or stand motionless in disbelief. Mehserle was swiftly charged with murder.<sup>1</sup>

In the age of the iPhone, where most Americans carry at least one mobile device capable of recording audio and video with the click of button, it was little surprise that the passengers captured the footage on cell phones equipped with digital video cameras and audio-recording capability. Nor is it hard to believe that the videos instantly appeared on YouTube and social media websites. What is surprising, if not shocking, however, is that in a handful of states, the videos might never see the inside of a courtroom, suppressed beneath state wiretapping statutes that prohibit a broad range of nonconsensual recording, even of police officers in their public capacities. In fact, in a few states, the "citizen journalists" who documented the murder would be the ones charged with felonies. The crime: violating the personal privacy of an officer on public duty.

Most state wiretapping laws are written or construed to exclude recordation of police in the fulfillment of their public duties, or, at minimum, exempt from criminal penalty the type of public activity recorded in the Oscar Grant killing. But some states such as Massachusetts and Illinois punish much non-consensual recording and even confer personal privacy rights to police officers in public, as oxymoronic as it sounds. In these states, the video recordings of the Oscar Grant murder, shot anonymously from behind the tinted windows of a train car, might not only be inadmissible evidence; they also might be the fruit of a criminal act.

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1. See Demian Bulwa, Wyatt Buchanan & Matthew Yi, *Behind murder charge against BART ex-officer*, S.F. CHRON., Jan. 15, 2009, at A1, available at 2009 WLNR 773018.

This Article argues that the right of citizens to record police officers performing their public duties, without fear of punitive and retaliatory prosecution, must be expressly safeguarded in state wiretapping statutes. Part I provides discussion of the disparate elements of state wiretapping statutes, explains the components of the relevant federal law, and discusses controlling state and federal jurisprudence. A Table of State Authorities, summarizing the relevant characteristics of all state wiretapping laws, and the federal counterpart, is provided at Appendix 1. Part II argues for a broad statutory exception for the recordation of police in the public fulfillment of their duties, whether taped openly or surreptitiously. The arguments in Part II stem from background principles of the Fourth Amendment, which militate against conferral of privacy rights for public police actions; the First Amendment, which protects the right of the public to receive information and concomitantly the right to record police; and other public policy considerations.

#### I. STATE & FEDERAL WIRETAPPING LAWS CONTROLLING RECORDATION OF PUBLIC POLICE ACTIVITY

An examination of the wiretapping statutes and their subsequent judicial interpretations in state courts and the federal circuits reveals a mosaic of inconsistency and disagreement.<sup>2</sup> Every state except Vermont,<sup>3</sup> as well as the U.S. Congress, has adopted a statute criminalizing some forms of nonconsensual interception of oral communications by use of electronic recording devices.<sup>4</sup> However, the manifold state laws, and

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2. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 40 DEPAUL L. REV. 837, 840 (1998). This Article uses the term "wiretapping" broadly to describe statutes that prohibit non-consensual recording, eavesdropping, or other activity beyond pure wiretapping, that is, intercepting communications from a telephonic or other electronic cable.

3. While Vermont has never passed a wiretapping or eavesdropping statute, the Vermont Supreme Court has held that the state constitution's privacy provision protects individuals from certain types of wiretapping or illicit recordation. See VT. CONST. ch. 1, art. 11; *infra* Table of State Authorities, at app. 1.

4. *Id.*; see also THE REPORTERS COMMITTEE TO PROTECT FREEDOM OF THE PRESS, A PRACTICAL GUIDE TO TAPING PHONE CALLS AND IN-PERSON CONVERSATIONS IN THE 50 STATES AND D.C. (2008), available at

their federal counterpart, often depart from one another based on three critical distinctions: (1) whether criminal punishment requires a surreptitious or otherwise concealed recording or whether open recording is still prohibited; (2) whether the consent of one party to the conversation, typically the recording party, insulates the recorder from criminal liability or whether the interception remains illicit absent the consent of all parties to the communication; and (3) whether the statute's penalties apply when the party recorded owns no "reasonable expectation of privacy" or is otherwise exempted by virtue of the party's status as a public official or police officer.

This Part will analyze controlling Supreme Court decisions that have broadly informed state wiretapping statutes and jurisprudence, the federal wiretapping statute, and several exemplary state statutes, including one-party and all-party consent statutes that include and exclude reasonable expectation of privacy exceptions. This Part also examines relevant state court interpretations, finding police officers in the course of their public duties either fit within the privacy protections offered by the controlling wiretap laws, or, as this Article argues is necessary to fulfill important constitutional and public policy objectives, fall outside the scope of those statutes.<sup>5</sup>

### *A. Federal Law*

Supreme Court pronouncements of an individual privacy right against nonconsensual wiretapping, and subsequent federal laws memorializing that recognition, are of relatively recent vintage.<sup>6</sup> Prior to

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<http://www.rcfp.org/taping> . With some nuance, all state, and the federal wiretapping laws only punish recording of oral or wire communications, which would include videotaping by means of a camera, cellular phone, or other device with any audio capability. *See e.g.*, MASS. GEN. LAWS ch. 272, § 99(B)(1)-(2), (C) (2010). Many states also criminalize nonconsensual videotaping where the subject of the video demonstrates a reasonable expectation of privacy. MD. CODE ANN., CRIM. LAW §§ 3-901-903 (West 2010) (classifying as a criminal misdemeanor any use of a hidden camera in a bathroom or dressing room or on private property "to conduct deliberate surreptitious observation of an individual" or in a private place with prurient intent).

5. *See infra* Sections I.A.-I.C.

6. *See Katz v. United States*, 389 U.S. 347, 353 (1967); *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

1967, private persons and federal and state law enforcement agencies routinely deployed electronic surveillance devices to record conversations, without judicial supervision or even breaking the law.<sup>7</sup> In the 1928 case *Olmstead v. United States*, the Supreme Court upheld against constitutional challenge the right of police to wiretap the home telephone of a criminal suspect where the police made no physical trespass upon a proprietary interest of the defendant.<sup>8</sup>

However, nearly four decades later, the Warren Court overruled *Olmstead*, holding in *Katz v. United States* that individuals own a personal privacy right in their conversations and that right need not be tethered to any cognizable property interest.<sup>9</sup> Justice Stewart, writing for the Court, reasoned that the Fourth Amendment<sup>10</sup> protects “people, not places,” and even in some public settings, such as a phone booth, individuals do not forfeit the protection of the Constitution’s prohibition on unwarranted wiretapping.<sup>11</sup>

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7. See Bast, *supra* note 2, at 840.

8. *Olmstead*, 277 U.S. at 464. The police were able to record the telephone by placing electronic taps on the telephone wires outside the home. *Id.* at 457. In 1952, the Court once again upheld a Fourth Amendment challenge to evidence obtained without a warrant when a police informant wore a microphone under his shirt, which transmitted the conversation to Narcotics Bureau agents. *On Lee v. United States*, 343 U.S. 747, 751 (1952). In *Lopez v. United States*, the Court affirmed the admissibility of evidence obtained, without a warrant, by an officer who used a pocket recorder to secretly tape a conversation with the defendant. 373 U.S. 427, 440 (1963).

9. *Katz*, 389 U.S. at 353. In *Katz*, FBI agents attached a listening device to a public phone booth where the defendant discussed his involvement with an interstate betting ring. *Id.* at 348.

10. Unwarranted wiretapping, it was argued, offended the Fourth Amendment’s guarantee of freedom from “unreasonable searches and seizures.” See U.S. CONST. amend. IV. The Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

11. *Katz*, 389 U.S. at 351–52.

*Katz*'s most enduring legacy, however, is found in Justice Harlan's concurring opinion, which established a two-tiered test for constitutional protection of personal conversations.<sup>12</sup> The test required "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>13</sup> Notably, Justice Harlan's two-pronged "reasonable expectation of privacy" test has since become the "touchstone" of Fourth Amendment jurisprudence.<sup>14</sup> In the intervening years, the Court has interpreted Harlan's test in such a way to dramatically retreat from the rather broad Fourth Amendment protections suggested by the *Katz* majority.<sup>15</sup> As examples, the Court has affirmed the admissibility of evidence, over Fourth Amendment objections, where police observed or recorded defendants, without a search warrant, by entering open fields on private property, flying a helicopter over a private home, and rooting through garbage.<sup>16</sup> In all cases, the Court held that the defendants could not invoke the Fourth Amendment where analysis under the objective prong of Justice Harlan's test failed to demonstrate a privacy expectation "society is willing to accept . . . as reasonable."<sup>17</sup>

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12. *Id.* at 361 (Harlan, J., concurring); see also Bast, *supra* note 2, at 842 (stating that Harlan's concurrence "eclipsed the majority opinion as precedent").

13. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

14. See *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)) "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Id.*

15. See *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding under prong two of Harlan's test that society is not willing to recognize as reasonable a privacy expectation in trash because trash is affirmatively exposed to the public for municipal pick-up and susceptible to observation by "snoops"); *Ciraolo*, 476 U.S. at 213 (deciding that police do not have to "shield their eyes" when observing illegal conduct as passersby or when surveilling property from public airspace); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (holding under prong two that expectation of privacy in open fields is not one that "society recognizes as reasonable" because open fields can be casually entered or surveyed by police).

16. See, e.g., *Greenwood*, 486 U.S. at 40; *Ciraolo*, 476 U.S. at 213; *Oliver*, 466 U.S. at 179 (finding no protected 4th Amendment right in garbage, airspace surveillance, or open fields).

17. *Ciraolo*, 476 U.S. at 207. See also *Greenwood*, 486 U.S. at 40 (finding no reasonable expectation of privacy in garbage); *Oliver*, 466 U.S. at 179 (finding no reasonable expectation of privacy in open fields).

One year after *Katz*, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), using Justice Harlan's concurrence as the template for codification of the Court's newly minted personal privacy right against illicit wiretapping.<sup>18</sup> Title III proscribes the interception and disclosure of any oral, wire, or electronic communication, unless the recorder is a party to the communication, or one party to the communication offers prior consent.<sup>19</sup> Thus, Title III is a one-party consent statute.<sup>20</sup> The definition of "oral communication" mimics the language of Justice Harlan's concurrence, and, as such, courts have interpreted Title III to punish interception of spoken communications only where the recorded party demonstrated an objective and subjective expectation of privacy.<sup>21</sup> Title III provides

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18. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351 Stat. 197 codified as amended at 18 U.S.C. §§ 2510–2522 (2008); *see also* PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 9 (1995) (writing "[t]his law was passed largely in response to the Supreme Court ruling *Katz v. United States* and because of congressional interest in organized crime") (citation omitted).

19. 18 U.S.C. §§ 2511(1)(a) (proscription of unauthorized interception); § 2511(1)(c) (proscription of disclosure); § 2511(2)(d). Section 2511(2)(d) states:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent . . . unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . .

*Id.* Title III defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device." *Id.* at § 2510(4).

20. *Id.* at §§ 2511(2)(c)–(d). It is important to note that Title III, like most state laws only punishes interception of oral communication, so mere video surveillance without capturing any audio sound is not criminalized. *See* Derrick Nunnally, *Specter Wants to Extend U.S. Privacy Curbs to Web-cam Use*, PHILA. INQUIRER, Mar. 30, 2010, at B1 (Senator Arlen Specter proposed amending Title III to punish video interception, without sound, after school officials in a Philadelphia suburb were caught monitoring students with web cameras secretly installed on school-issued laptop computers).

21. 18 U.S.C. § 2510(2) (defining "oral communication" as statements "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"); *see United States v.*



procedural steps for law enforcement officers to obtain court orders to wiretap suspects of certain enumerated offenses and prohibits the admissibility of communications obtained in contravention of the Act.<sup>22</sup> The penalty for illegal interception of oral communications is a maximum five years in prison, and the Act also creates a civil remedy for aggrieved parties.<sup>23</sup>

At least one federal court has addressed, albeit obliquely, the question of whether police officers in the public performance of their duties enjoy a reasonable expectation of privacy, such that their oral communications qualify for Title III's safeguards against non-consensual wiretapping.<sup>24</sup> The Court of Appeals for the Eighth Circuit appeared eager to answer in the negative.<sup>25</sup> In *Angel v. Williams*, officers in Webb City, Missouri, who beat a prison inmate were fired after an electronic device surreptitiously recorded the incident.<sup>26</sup> In dismissing their civil complaint, brought under the private cause of action created by Title III, the court held that communications "between police officers and a prisoner" recorded "in a public jail" do not enjoy an objective expectation of privacy.<sup>27</sup> The court's treatment of the issue is terse but likely reflects recognition that both the highly public setting and highly public nature of the officers' duties subordinate any privacy expectation.<sup>28</sup>

The *Angel* court was careful to distinguish *United States v. McIntyre*, decided fifteen years earlier in the U.S. Court of Appeals for the Ninth Circuit.<sup>29</sup> There, the chief of police of Globe, Arizona, recorded all activity in the assistant chief's office with a microphone

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McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978) ("The legislative history behind [Title III] reflects Congress's intent that *Katz v. United States* serve as a guide to define communications that are uttered under circumstances justifying an expectation of privacy.") (citation omitted).

22. 18 U.S.C. §§ 2518, 2520.

23. *Id.* at §§ 2511(4)(a), 2520.

24. *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993).

25. *Id.*

26. *See id.* at 787.

27. *Id.* at 790.

28. *See id.*

29. *Id.*

concealed inside a briefcase.<sup>30</sup> The court, while noting that “[a] police officer is not, by virtue of his profession, deprived of the protection of the Constitution,” constrained its holding to the peculiar facts of the case.<sup>31</sup> The recordings constituted “oral communications” within the meaning to Title III because they were intercepted inside a private office and not recorded as part of “a regulatory scheme,” “office practice,” or “internal affairs investigation.”<sup>32</sup>

### *B. State Laws*

Title III expressly preempts state wiretapping laws.<sup>33</sup> Thus, states must, at minimum, extend the same degree of privacy protections.<sup>34</sup> Indeed, at least 21 states and the District of Columbia have passed statutes identical or fundamentally similar to Title III.<sup>35</sup> However, other states have passed laws substantially more restrictive than Title III, often while adding significant variations. This Section discusses several state statutes and important judicial interpretations in the relevant jurisdictions. Ten states proscribe the recording of any oral communication absent all-party consent, while Connecticut and Nevada only require all-party consent for pure wiretapping (that is, recording the contents of an electronic wire communication).<sup>36</sup> Oregon requires all-

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30. *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978).

31. *Id.* at 1224.

32. *Id.* It is critical to note that the police exception to wiretapping statutes advocated by this Article would similarly fail to encompass the facts of *McIntyre*, since the proposed exception is only intended to capture public police conduct, such as field stops, interrogations, searches, and arrests, and not internal affairs, strategy communications, or private telephone discussions.

33. *See Bast*, *supra* note 2, at 845.

34. *Id.*

35. *See infra* Table of State Authorities, at app. 1. These states are Alabama, Arizona, Idaho, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. *See id.*

36. *See infra* Table of State Authorities, at app. 1. Connecticut is an all-party consent state for interception of telephonic or other wire communications but requires only one-party consent for mechanical recording of other conversations. CONN. GEN. STAT. §§ 53a-187 to -189b (2010). There is no reasonable expectation of privacy requirement, however, for any aural recording, while visual recording is only

party consent for recordation of non-wire conversations but one-party consent for interception of wire communications.<sup>37</sup> This Section divides the discussion of several exemplary state statutes into three categories: (1) all-party consent states with reasonable expectation of privacy requirements; (2) all-party consent states, without reasonable expectation of privacy requirements; and (3) one-party consent states.

### 1. All-Party Consent; Reasonable Expectation of Privacy Required<sup>38</sup>

#### *a. California*

California's wiretapping statute bifurcates communications into two classes — wire communications and confidential communications.<sup>39</sup> The state flatly criminalizes the recordation of telephonic, electronic, and other wire communications, without the consent of all parties, whether the recorded party displays a reasonable expectation of privacy or not.<sup>40</sup> However, the recording of “confidential communications” is only illegal

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prohibited for persons in “plain view” without a “reasonable expectation of privacy.” *Id.* Nevada only punishes surreptitious recording in all cases. NEV. REV. STAT. §§ 200.620, 200.650 (2010). The statute requires that just one-party consent for secret recording of non-telephonic conversations and further demands the recorded party own a reasonable expectation of privacy. *Id.* There is no reasonable expectation of privacy requirement for telephonic recording. *Id.*

37. *See infra* Table of State Authorities, at app. 1. Oregon criminalizes wiretapping by any third party without the consent of one party and recording any non-wire conversation without “specifically inform[ing]” all parties. OR. REV. STAT. §§ 133.721, 165.535–.543 (2010). The statute is inapplicable inside a person’s home, and at “[p]ublic or semipublic meetings such as governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events . . . [r]egularly scheduled classes or similar education activities in public or private institutions,” and during “interviews conducted by peace officers at law enforcement facilities.” *Id.* Recording is still not permitted in the enumerated exceptions if the recording device is concealed. *Id.*

38. The states in this category are California (for non-wire recordings), Florida, Maryland, Michigan, Nevada (for surreptitious recording of non-telephonic private conversations), New Hampshire, Oregon (public meeting and police interview exception), Pennsylvania, and Washington. *See infra* Table of State Authorities, at app. 1.

39. CAL. PENAL CODE §§ 631–632 (West 2010).

40. *Id.*

if the recorded party owns a reasonable expectation of privacy.<sup>41</sup> The definition of “confidential communications” exempts public gatherings, hearings, or communications where the recorded party would not reasonably expect to be overheard.<sup>42</sup>

It is unclear whether parties who record police officers in the performance of their public duties would enjoy *per se* immunity from prosecution under the “confidential communication” clause.<sup>43</sup> California courts have interpreted the provision in ways that might militate against blanket insulation from prosecution.<sup>44</sup> For instance, while the California Court of Appeals has held that a television station that surreptitiously recorded a business meeting on an outdoor restaurant patio did not contravene the statute, it also sustained the conviction, in *People v. Gibbons*, of a man who used a hidden camera to record sexual intercourse in his bedroom.<sup>45</sup> If the *Gibbons* holding could be extended in a non-sexual context to grant third parties inside a private residence a reasonable expectation of privacy, then recording of police searches, interviews, and other official conduct in the interior of a home or car might similarly be prosecuted.<sup>46</sup>

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41. *Id.*

42. *Id.* at § 632. The California code states:

“[C]onfidential communication” includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

*Id.*

43. *Id.* See also *Wilkins v. Nat’l Broad. Co.*, 84 Cal. Rptr. 2d 329, 336 (Cal. Ct. App. 1999); *People v. Gibbons*, 263 Cal. Rptr. 905, 907-09 (Cal. Ct. App. 1989).

44. See, e.g., *Gibbons*, 263 Cal. Rptr. at 907-09 (visitors at a home for purpose of sex enjoyed expectation of privacy when blinds were drawn and door closed).

45. See *Wilkins*, 84 Cal. Rptr. 2d at 336; *Gibbons*, 263 Cal. Rptr. at 907-09.

46. See *Gibbons*, 263 Cal. Rptr. at 907-09.

*b. Pennsylvania*

The Pennsylvania Wiretapping and Electronic Surveillance Control Act essentially tracks Title III, word-for-word, with the notable departure in the law's all-party consent requirement for permissible interception of oral communications.<sup>47</sup> Like Title III, recorded parties must enjoy a justifiable expectation of privacy for criminal liability to attach to the interceptor.<sup>48</sup>

The Pennsylvania Supreme Court has confronted the issue of whether police in the performance of their public duties enjoy a cognizable privacy interest under the statute.<sup>49</sup> In *Commonwealth v. Henlen*, a prison guard became a suspect in a theft at the Mercer County Jail.<sup>50</sup> A Pennsylvania state trooper conducted a custodial interrogation of Henlen at the jail.<sup>51</sup> The trooper took notes and allowed another prison official to observe the interview.<sup>52</sup> Henlen surreptitiously recorded the conversation and submitted the tape as part of an internal affairs complaint against the trooper, yet he was charged and convicted for illegally intercepting the communication.<sup>53</sup> The Court reversed Henlen's conviction, finding under Justice Harlan's two-part formula that since oral police interrogations are customarily recorded, the trooper owned no objective expectation of privacy.<sup>54</sup> Further, since he took notes for a possible police report and allowed a third party to observe, the trooper also did not demonstrate a subjective privacy expectation.<sup>55</sup> Though *Henlen* remains valuable currency for civil rights advocates in search of a broad police exception to wiretap laws, the court declined to reach Henlen's broader "argument that a police officer acting in his official

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47. 18 PA. CONS. STAT. §§ 5701-5704 (2010).

48. *Id.* at § 5702.

49. *Commonwealth v. Henlen*, 564 A.2d 905, 906-907 (Pa. 1989).

50. *Id.* at 905.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 906-07; *see also* *Gunderman v. Commonwealth Unemployment Comp. Review Bd.*, 505 A.2d 1112 (Pa. Commw. Ct. 1986) (holding no violation of wiretapping statute for secretly recording hearing before unemployment compensation board).

55. *Henlen*, 564 A.2d at 906-07.

capacity implicitly consents to having his activities monitored” and thus waives any statutory protections.<sup>56</sup>

*c. Washington*

The state of Washington’s wiretapping law imposes criminal penalties on anyone that intercepts “private conversations” without the consent of all parties.<sup>57</sup> By operation of the statute, a recording party gains consent by announcing an intent to record in a “reasonably effective manner,” and also recording the announcement.<sup>58</sup> An intermediate appellate court, in a strenuously worded opinion, declined to include surreptitious recording of a police officer within the ambit of the prohibition on interception of “private communications.”<sup>59</sup> In *State v. Flora*, James Flora was questioned by two officers who called him a “nigger” a year earlier.<sup>60</sup> During this second encounter, Flora hid a live tape recorder in a stack of papers.<sup>61</sup> The police discovered the recorder and arrested Flora for unlawful interception of a private conversation.<sup>62</sup>

The court reversed Flora’s conviction.<sup>63</sup> In accord with Washington precedent, the court repeated the operative definition of “private conversation,” as a “secret . . . intended only for the persons involved [who] . . . hold[] a confidential relationship to something . . . ; not open or in public.”<sup>64</sup> Moreover, the court refused to “support the proposition that police officers possess a personal privacy interest in statements they make as public officers effectuating an arrest.”<sup>65</sup> The

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56. *Id.* at 907.

57. WASH. REV. CODE § 9.73.030(1)(b) (2010).

58. *Id.* at § 9.73.030 (3).

59. *State v. Flora*, 845 P.2d 1355, 1357-58 (Wash. Ct. App. 1992).

60. *Id.* at 1355.

61. *Id.* at 1356.

62. *Id.*

63. *Id.* at 1357-58.

64. *Id.* at 1357 (citing *State v. Slemmer*, 738 P.2d 281, 284 (Wash. Ct. App. 1982)). See also *State v. Bonilla*, 598 P.2d 783, 785 (Wash. Ct. App. 1979) (using the quoted definition of “private communication”); *State v. Forrester*, 587 P.2d 179, 184 (Wash. Ct. App. 1978) (attributing the ordinary & usual meaning of private communication).

65. *Flora*, 845 P.2d at 1357.

opinion relied on the legislative intent of the statute, which was to protect an individual's right to privacy.<sup>66</sup> As such, the court distinguished functions performed by police *qua* police from the personal privacy interests of officers acting outside their official capacity, which could be deserving of protection.<sup>67</sup> The court's clarion holding dovetails precisely with this Article's proposal for statutory fixes to the anomaly of awarding personal privacy protection under state wiretapping laws to police officers performing their public duties.<sup>68</sup> As the court wrote: "We decline the State's invitation to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity."<sup>69</sup>

## 2. All-Party Consent, No Reasonable Expectation of Privacy

### *a. Illinois*

The Illinois Eavesdropping Act is arguably the most draconian in the nation.<sup>70</sup> In fact, the state Legislature amended the statute to expressly purge the requirement — that courts might impute from constitutional jurisprudence — that a recorded party demonstrate a reasonable expectation of privacy.<sup>71</sup> Illinois imposes criminal penalties on any person, including law enforcement officers, who use an eavesdropping device to record the part or whole of any conversation, unless the interceptor has gained the consent of all parties.<sup>72</sup> Most

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66. *Id.*

67. *Id.* at 1358.

68. *See id.* at 1357-58.

69. *Id.* at 1358.

70. *See* 720 ILL. COMP. STAT. §§ 5/14-1, to 2 (2010) (containing no surreptitious-only requirement, all party consent, and statutory language expressly disclaiming a reasonable expectation of privacy requirement).

71. *See id.* at § 5/14-1(d). *See also* Commonwealth v. Hyde, 750 N.E.2d 963, 970 n.10 (Mass. 2001) (explaining legislative history of the amendment by the Illinois legislature and disclaiming the reasonable expectation of privacy requirement).

72. 720 ILL. COMP. STAT. § 5/14-2(a)(1)(A). The operative definition of eavesdropping device is "any device capable of being used to hear or record oral conversation," even if the conversation takes place face-to-face. *Id.* at § 5/14-(1)(a).

importantly, Illinois defines the term “conversation” as “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.”<sup>73</sup> Illinois’ statute captures both open and surreptitious recording.<sup>74</sup> The statute carves out narrow exceptions for police who intercept communications pursuant to a court order and for any person who records a public meeting as defined by the state’s Open Meetings Statute.<sup>75</sup>

In 1986, the Supreme Court of Illinois, in *People v. Beardsley*, added a one-party consent and reasonable expectation of privacy gloss to the statute — specifically in the context of a suspect who recorded police during a traffic stop.<sup>76</sup> When pulled over for traveling 67 miles per hour in a 55-mile-per-hour zone, Robert Beardsley refused to speak to the responding McHenry County sheriff’s deputy and, instead, began recording the exchange with a microphone held six inches below the car’s door panel.<sup>77</sup> The deputy immediately noticed the microphone and told Beardsley that he did not consent to a recording.<sup>78</sup> Still refusing to surrender his driver’s license, Beardsley then was placed in the back seat of a squad car.<sup>79</sup> The deputy and his partner spoke in the front seat, while this time Beardsley openly recorded the conversation.<sup>80</sup> Beardsley was taken to county jail and booked for speeding and criminal eavesdropping.<sup>81</sup> At the time, the Illinois statute contained no reasonable expectation of privacy clause but neither had the legislature yet expressly disclaimed the requirement of a cognizable privacy interest.<sup>82</sup>

In holding that the Illinois law punishes only surreptitious recording of objectively and subjectively private conversations, the court

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73. *Id.* at § 5/14-1(d).

74. *See id.*

75. *Id.* at § 5/14-(2)(b).

76. *See People v. Beardsley*, 503 N.E.2d 346, 352 (Ill. 1986), *superseded by statute*, 720, ILL. COMP. STAT. § 5/14-1(d), *as recognized in Hyde*, 750 N.E.2d at 970, n.10.

77. *Id.* at 347.

78. *Id.*

79. *Id.*

80. *Id.* at 348.

81. *See id.*

82. *See Commonwealth v. Hyde*, 750 N.E.2d 963, 970 n.10 (Mass. 2001).



did not address the privacy rights of police officers *qua* police officers, and, instead, stressed the deputies' forfeiture of any privacy expectation by speaking within earshot of Beardsley.<sup>83</sup> To reach its decision, the court relied on the common law definition of eavesdropping — “to listen secretly to what is said in private” — and the reasoning of the U.S. Supreme Court in *Lopez v. United States* that recording by parties who overhear or participate in conversations is justified by the reality that they are apt to otherwise repeat or later testify as to what they heard.<sup>84</sup> The court's reasoning was concededly strained, and may have been a pretext for abolishing the disfavored all-party consent requirement in a troubling set of circumstances. Nonetheless, in response to *Beardsley*, the Illinois legislature amended the statute to clarify that the monitoring of conversations, without all-party consent, is illegal even if the parties did not intend “their communication to be of a private nature.”<sup>85</sup> Sadly, since the Illinois law applies equally to police officers and private citizens, the amendment evinces Illinois lawmakers' clear intent to proscribe both open and surreptitious recording of police officers, even in the public performance of their official duties. Indeed, in June 2010 the American Civil Liberties Union (ACLU) filed a federal lawsuit under 42 U.S.C. § 1983 (§ 1983) against the Cook County State's Attorney's Office, challenging the constitutionality of the statute, on behalf of six Illinois residents charged with felonies for openly filming encounters with police on their cellular phones.<sup>86</sup>

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83. *Beardsley*, 503 N.E.2d at 352.

84. *Id.* at 349 (quoting *People v. Klingenberg*, 339 N.E.2d 456 (Ill. App. Ct. 1975)). *See also id.* at 350-51 (discussing *Lopez v. United States*, 373 U.S. 427, 437 (1963)).

85. *See Hyde*, 750 N.E.2d at 970 n. 10 (citing 720 ILL. COMP. STAT. § 5/14-1(d) (1996)).

86. Becky Schlikerman & Kristen Mack, *Suit hits ban on recording the police: ACLU challenges state's eavesdropping law*, CHI. TRIB., Aug. 20, 2010, at A1. Two of the plaintiffs, Adrian and Fanon Perteet, were passengers in a friend's car at a McDonald's drive-through when officers approached the car, suspecting the driver of operating under the influence. *Id.* at 11. Fanon Perteet began filming the officer's exchange on his cell phone to build an evidentiary record in case of arrest, at which point he, rather than the driver, was removed from the car. *Id.* When Adrian Perteet also began recording his brother's removal, both men were arrested and charged with felony eavesdropping under 720 ILL. COMP. STAT. § 5/14-2(a)(1). *See id.* They

*b. Massachusetts*

Per statute, in Massachusetts, anyone who secretly records any oral communication without the consent of all parties is guilty of the crime of unlawful interception.<sup>87</sup> The operative definition of “oral communication” encompasses all “speech,” unless transmitted over public airwaves.<sup>88</sup> Police officers are subject to the statute’s proscriptions, unless acting under a lawfully issued court order to investigate only statutorily enumerated offenses committed in furtherance of an organized criminal enterprise.<sup>89</sup> The law prohibits only surreptitious recording and lacks any reasonable expectation of privacy provision.<sup>90</sup>

In 2001, the Supreme Judicial Court of Massachusetts jolted the state’s legal and journalistic communities with its expansively worded opinion in *Commonwealth v. Hyde*.<sup>91</sup> In affirming the conviction of

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pled guilty to attempted eavesdropping, a misdemeanor, and as part of the plea were required to formally apologize to the police officers. *Id.* Steven Silverman, a defense attorney, called the case against the Perteet brothers “contempt of cop,” and said “These are archaic statutes, made in a time when technology was different. The laws need to catch up.” *Id.* A spokesman for the ACLU said laws such as this create a double-standard, where only police are allowed to collect and present evidence arising from an encounter with police. *Id.* However, Mark Donahue, president of the Fraternal Order of Police in Chicago, said he believes allowing civilians to make audio recordings of arrests “could potentially inhibit an officer from proactively doing his job.” *Id.*

87. MASS. GEN. LAWS ch. 272, § 99(B)(4) (2010) (defining “interception” to mean “to *secretly* hear, *secretly* record, or aid another to *secretly* hear or *secretly* record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . . .” ) (emphasis added); *Id.* at § 99(c)(1) (prohibiting the willful “interception of any wire or oral communication”). The statute imposes maximum penalties of ten thousand dollars in fines and five years in prison, or both. *Id.*

88. *Id.* at § 99(B)(2).

89. *Id.* at §§ 99(D)-(N).

90. *Id.* at §§ 99(B)-(C).

91. See generally Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981 (2009); Roger Michel, *Criminal Law: Electronic Surveillance — General Laws chapter 272*,

Michael Hyde, who secretly recorded a contentious traffic stop, the court rather flatly stated that all surreptitious recording of anyone, regardless of the public display or function of the recorded party, is *per se* illegal.<sup>92</sup> The court interpreted the legislature's purposeful omission of a reasonable expectation of privacy provision to reflect a clear intent to protect all citizens in Massachusetts, whether private citizens, public officials, police, or, as is the unmistakable implication, political speakers standing on a soapbox with a megaphone.<sup>93</sup>

It all started one night in 1998, when Abington, Massachusetts, police officers stopped Hyde and a companion because Hyde's Porsche convertible had a broken taillight and an excessively loud exhaust system.<sup>94</sup> Three more officers arrived and the stop escalated into quick confrontation.<sup>95</sup> The officers searched the car and Hyde complained that the officers targeted him because of his "long hair."<sup>96</sup> The officers countered with profane rejoinders.<sup>97</sup> Though the police merely gave Hyde a "verbal warning," he filed an internal affairs complaint and offered the tape as proof of harassment.<sup>98</sup> Instead, the department filed a criminal complaint against Hyde and he was later charged with illegal interception of oral communications.<sup>99</sup>

On certification before the state's high court, Hyde, with the ACLU filing an amicus brief, argued: (1) the legislature enacted the

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section 99, 86 MASS. L. REV. 62 (2001) (acerbically criticizing Hyde); Jeff Jacoby, *SJC Drops Ball on Privacy*, BOSTON GLOBE, Aug. 27, 2001, at A9 (arguing against positive privacy rights for police officers); Editorial, *Public Conduct vs. 'Private' Speech*, BOSTON HERALD, July 21, 2001, at 16, available at 2001 WLNR 287853 (disagreeing with Hyde).

92. *Commonwealth v. Hyde*, 750 N.E.2d 963, 967-70 n.10 (Mass. 2001).

93. *Id.*

94. *Id.* at 964.

95. *Id.*

96. *Id.* The tape catches Hyde saying the stop was a "bunch of bullshit" and accusing the officers of discrimination. *Id.*

97. *Id.* One officer is heard snapping "[d]on't lay that shit on me," and another officer called Hyde "an asshole." *Id.* Though not memorialized on Hyde's recording, the passenger testified at trial that while he was frisked an officer threatened to conduct a field sobriety test that the officer "promised" he would fail. *Id.* at 964 n.1.

98. *Id.* at 965.

99. *Id.*

statute to protect private citizens from overzealous police intrusion, not the contrary; (2) Title III's justifiable expectation of privacy language should be instructive in interpreting the outer boundaries of the Massachusetts counterpart; and (3) policy considerations demand that public police actions not be cloaked behind the curtain of individual privacy.<sup>100</sup>

Pointing to the "plain language" of the statute, the Court wrote that the statute unambiguously extends protection from non-consensual, surreptitious recording to all "members of the public, including . . . police officers or other public officials interacting with members of the public."<sup>101</sup> Discussing the legislative history of the amendment, the majority found that the Massachusetts legislature sought to "create a more restrictive electronic surveillance statute than comparable statutes in other States."<sup>102</sup> The majority also argued that a contrary law could unfairly subject police officers to public approbation, especially since, in the unsubstantiated estimation of the majority, official misconduct is so rare that it justifies no exception.<sup>103</sup> The majority also warned that a police exception would give an upper hand to criminals who might strategically mount cameras on drug warehouses, for instance, or otherwise tape encounters with police hoping to seize on "hypothetical police abuse" at trial.<sup>104</sup> Further, the court also feared a judicially crafted

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100. *See id.* at 965-66; Brief of Amicus Curiae ACLU in Support of Appellant at 16-43, *Hyde*, 750 N.E.2d 963 (No. SJC-08429), at \*8 - \*34, 2000 WL 34610712.

101. *Hyde*, 750 N.E.2d at 967.

102. *Id.* In 1968, the Massachusetts Legislature inserted the all-party consent requirement into the law, when one-party consent was the prevailing rule in most jurisdictions throughout the Commonwealth. *Id.*

103. *Id.* at 969 ("The value of obtaining probative evidence of occasional official misconduct does not justify a failure to enforce the clear terms of the statute.").

104. *Id.* The court also wrote that a police exception would:

encourage drug manufacturers to mount hidden video cameras in their facilities so they can capture the moment of truth when the police execute a search warrant and would authorize drug dealers secretly to tape record conversations with suspected undercover officers or with informants in order to protect the dealers' rights against hypothetical police abuse.

*Id.*

expectation of privacy requirement would incentivize untrammelled recordation of undeserving public employees, like public school teachers and meter maids.<sup>105</sup>

In a sharp dissent, two justices evoked the most infamous surreptitious recording of public police action in the nation's history: the Rodney King tape.<sup>106</sup> The dissent concluded, rightfully, that in Massachusetts, George Holliday's grainy video of four Los Angeles police officers savagely beating King with nightsticks would amount to nothing more than inadmissible evidence against the officers, and worse yet, competent evidence against Holliday in an illegal interception case.<sup>107</sup> Moreover, the dissent declined to find any legislative intent to inoculate police officers against recordation of their public duties.<sup>108</sup> The

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105. *Id.* The court noted:

[An exception] would permit the untrammelled interception of communications by legislators, executive officers and agents, judicial officials, municipal officers, among others, on the erroneous supposition that public accountability requires the practice. It is not our function to craft unwarranted judicial exceptions to a statute that is unambiguous on its face, and, particularly, not to attempt to do so by subjecting police and public officials to sinister accusations or by evoking unwarranted fears that legitimate interests of the media may be harmed by the statute.

*Id.* at 970.

106. *Id.* at 971 (Marshall, C.J., dissenting).

107. *Id.* at 972. The dissent notes that the commission tasked with investigating the King beating stressed just how valuable the video was, since at least in L.A., it was common police practice to disregard internal affairs complaints:

Our commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful, since the efforts of King's brother . . . to file a complaint were frustrated, and the report of the involved officers was falsified.

*Id.* at 972 (quoting REPORT OF INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT ii (1991)). See also *United States v. Koon*, 34 F.3d 1416, 1426 (9th Cir. 1994)(challenging the admissibility of recording against the officers).

108. *Hyde*, 750 N.E.2d at 974 (Marshall, C.J., dissenting).

The legislative intent as reflected in the statutory language is explicit: to protect the privacy interests of citizens. While the

dissent also noted that judicial practice in Massachusetts declines to treat public officials as “persons” unless expressly designated by definition in the statute.<sup>109</sup> The dissent deftly neutralized the majority’s fear that ordinary civil servants would otherwise face a deluge of recording by distinguishing police, writing: “We hold police officers to a higher standard of conduct than other public employees, and their privacy interests are concomitantly reduced.”<sup>110</sup> The dissenting justices stressed that the public holds an insuperable democratic interest in monitoring the performance of public officials.<sup>111</sup> The statute cannot extinguish a potent avenue to this critical supervisory function.<sup>112</sup> The dissent also reasoned it would be perverse for the Legislature to arm police, who already wield “awesome powers,” with a tool for reprisal when caught in the act of abuse or misconduct.<sup>113</sup>

Perhaps emboldened by the sweeping ruling in *Hyde*, the Boston Police Department and other police forces in Massachusetts have arrested numerous people in recent years for the seemingly innocuous act of openly recording public arrests on their cellular phones.<sup>114</sup> Just as troubling, district attorneys are eagerly prosecuting, as felonies no less, cases where bystanders take out their cell phones and hold them in plain sight to record police activity on public streets,<sup>115</sup> despite the statute’s

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statutory language enacted to accomplish these purposes can be broadly read, there is no suggestion that the Legislature had in mind outlawing the secret tape recording of a public exchange between a police officer and a citizen.

*Id.*

109. *Id.* at 975 n.13 (citing *Commonwealth v. Voight*, 556 N.E.2d 115, 116 (Mass. App. Ct. 1990)).

110. *Id.* at 976.

111. *See id.*

112. *See id.*

113. *Id.* at 977. The dissent also feared the majority’s expansive interpretation of the statute would have a chilling effect on the media, since reporters violate the act by recording police in public or politicians at public meetings merely by concealing or not overtly displaying their tape recorders. *Id.*

114. *See* Daniel Rowinski, *Police Fight Cellphone Recordings: Witnesses taking audio of officers arrested, charged with illegal surveillance*, BOSTON GLOBE, Jan. 12, 2010, at A1.

115. *Id.*

unambiguous language and the *Hyde* court's admonition that only "secret" recording is proscribed.<sup>116</sup>

Simon Glik, who, ironically, was arrested for recording the arrest of a homeless man in the city's singularly quintessential public space, Boston Common, successfully defended the charge in court.<sup>117</sup> A municipal judge ruled that Glik could not have contravened the law by holding his Blackberry in plain view, and regardless, his civic right to document public police activity trumps any police "discomfort."<sup>118</sup> Similarly, a trial court dismissed felony charges against Jon Surmacz, who recorded Boston officers breaking up a house party, and prosecutors in Western Massachusetts declined to file charges against filmmaker Emily Peyton, who videotaped police in Greenfield arresting an anti-war protester.<sup>119</sup> Both prevailed because they recorded the police activity in "plain view."<sup>120</sup> Not all were so lucky: Jeffrey Manzelli, who recorded transit police officers making arrests at an anti-war rally, and Peter Lowney, who recorded Boston University police officers responding to a protest, were both convicted for allegedly concealing their video recorders in their jackets.<sup>121</sup>

There are no official statistics of arrests or convictions for unlawful interception under the Massachusetts wiretapping statute.<sup>122</sup> The cases discussed above only came to light because those arrested contacted the ACLU, suggesting that the numbers are far higher.<sup>123</sup> The

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116. *Hyde*, 750 N.E.2d at 971.

The problem here could have been avoided if, at the outset of the traffic stop, the defendant had simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight. Had he done so, his recording would not have been secret, and so would not have violated G.L. c. 272, § 99.

*Id.* (footnote omitted).

117. See *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008).

118. *Id.* at 4.

119. Rowinski, *supra* note 114, at A1.

120. *Id.*

121. *See id.*

122. *See id.*

123. *See id.*

trend of police officers offensively wielding the wiretapping law to vindictively arrest those who record their public actions on cell phones, even in plain view, is highly troubling. It appears the warning of the dissenters in *Hyde* that the statute could now be used by “police officers to conceal possible misconduct behind a cloak of privacy” was disturbingly prescient.<sup>124</sup>

*c. Montana*

The Montana Code defines the crime of “violating privacy in communications,” as, *inter alia*, recording a conversation without the knowledge of all parties.<sup>125</sup> Importantly, the statute criminalizes only interception only when the recording device is “hidden.”<sup>126</sup> Notably, the statute provides broad exceptions and does not demand compliance by “elected or appointed public officials or to public employees when . . . recording is done in the performance of official duty.”<sup>127</sup> The Montana Supreme Court has upheld this wide public official exception against a constitutional challenge for overbreadth.<sup>128</sup> Although the statute plainly immunizes police, the state’s high court has held that unwarranted police interception of communications may still violate privacy guarantees of state constitutional origin.<sup>129</sup> In fact, the court stated that the Montana constitution is not coextensive with the U.S. Constitution, and declined to follow *United States v. White*, where a divided Supreme Court determined that one-party consensual interception of communications by a person acting under color of law does not offend the Fourth

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124. *Commonwealth v. Hyde*, 750 N.E.2d 963, 976 (Mass. 2001) (Marshall, C.J., dissenting).

125. MONT. CODE ANN. § 45-8-213(1)(c) (2009).

126. *Id.*

127. *Id.* at § 45-8-213(1)(c)(i). Montana also exempts “persons speaking at public meetings,” and health care facilities. *Id.* at §§ 45-8-213(1)(c)(ii), 45-8-213(1)(c)(iv). Further, the statute contains a safety valve for parties who provide a warning of the recordation: “persons given warning of the . . . recording, and if one person provides the warning, either party may record.” *Id.* at § 45-8-213(c)(iii).

128. *See State v. Brown*, 755 P.2d 1364, 1368 (Mont. 1988), *overruled by State v. Goetz*, 191 P.3d 489 (Mont. 2008).

129. *Goetz*, 191 P.3d at 494–98; *see also* MONT. CONST. art. 2, §§ 10–11.



Amendment.<sup>130</sup> Montana courts have never ruled on whether, in the inverse circumstance, an individual is free to surreptitiously record police.<sup>131</sup>

### C. One-Party Consent

Among the states that have adopted one-party consent wiretapping statutes and enacted substantive variations from Title III, Indiana and New Mexico are the only states that punish wiretapping in its purest form — the use of a recording device to intercept electronic wire transmissions, namely telephone lines and Internet cables.<sup>132</sup> These laws appear to allow open or surreptitious recording of public police actions from a cellular phone or other recording device, but also are dangerously underinclusive in guarding individual privacy.<sup>133</sup>

Another four of the one-party consent states — Alaska, Arkansas, Kentucky, and New York — do not create safe harbors when the recorded party lacks reasonable expectation of privacy.<sup>134</sup> These laws potentially expose third parties that record even public police actions, like George Holliday, to criminal liability.<sup>135</sup> Furthermore, Arkansas exempts any person acting under color of law from the statute's prohibitions.<sup>136</sup>

Other states only criminalize surreptitious recording. For instance, Georgia only proscribes recording “in a clandestine manner” of

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130. *Id.*; see also *United States v. White*, 401 U.S. 745, 749 (1971) (discussing that warrantless electronic monitoring of face-to-face conversations, with the consent of one party to the conversation, does not constitute a search and, therefore, does not violate the Fourth Amendment); *Goetz*, 191 P.3d at 494–98.

131. See MONT. CODE ANN. § 45-8-213(1)(c); see also *Goetz*, 191 P.3d at 494–98 (discussing state constitutional protections of privacy and search and seizure).

132. See IND. CODE §§ 35-33.5-1-3.5 (2010); N.M. STAT. § 30-12-1 (2010).

133. See IND. CODE §§ 35-33.5-1-3.5; N.M. STAT. § 30-12-1.

134. See ALASKA STAT. §§ 42.20.310 to .320 (2010); ARK. CODE ANN. §§ 5-60-120, 5-16-101 (2010); KY. REV. STAT. ANN. §§ 526.010, 526.070 (West 2010); N.Y. PENAL LAW § 250.05 (McKinney 2010).

135. See ALASKA STAT. §§ 42.20.310.320; ARK. CODE ANN. §§ 5-60-120, 5-16-101; KY. REV. STAT. ANN. §§ 526.010, 526.070; N.Y. PENAL LAW § 250.00.

136. See ARK. CODE ANN. §§ 5-60-120, 5-16-101.

a “private conversation” in a “private place.”<sup>137</sup> Utah has a similar law.<sup>138</sup> The Iowa wiretapping statute insulates from prosecution any recording party who is “openly present and participating in or listening to a communication.”<sup>139</sup> In Kansas, criminal eavesdropping only occurs where the recording party enters “into a private place with intent to listen surreptitiously”; “a private place” is where “sounds would not normally be audible or comprehensible outside.”<sup>140</sup> Maine places a unique twist on the open-surreptitious distinction; the statute only permits criminal prosecution if the recorder is not “within the range of normal unaided hearing.”<sup>141</sup>

## II. ARGUMENTS IN FAVOR OF STATUTORY EXCEPTIONS FOR THE RECORDATION OF POLICE IN THE FULFILLMENT OF THEIR PUBLIC OBLIGATIONS

The right of citizens to record police officers performing their public duties, without fear of reprisal, must be expressly safeguarded in state wiretapping statutes. Problematically, the right of mere observers to record police is not protected by a naked one-party consent provision.<sup>142</sup> Moreover, while reasonable expectation of privacy clauses may grant the positive right to record police, woven into that right is a reciprocal sacrifice of protections for private parties.<sup>143</sup> Therefore, a specific police exception written into a state’s wiretapping statute is necessary to close

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137. GA. CODE ANN. §§ 16-11-60, -62 (2010). Private place is defined as “a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance.” *Id.*

138. UTAH CODE ANN. §§ 76-9-401 to -402, 77-23a-3 to -4 (2010).

139. IOWA CODE §§ 727.8, 808B.2 (2010).

140. KAN. STAT. ANN. §§ 21-4001 to -4002 (2010).

141. ME. REV. STAT. ANN. tit. 15, §§ 709–711 (2009).

142. *See, e.g.*, 18 U.S.C. § 2511(2)(d) (2006) (stating “[i]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent”).

143. *See supra* note 18 and accompanying text; *infra* note 154 and accompanying text (describing Supreme Court decisions that interpret the reasonable expectation of privacy test to winnow away Fourth Amendment protections).

any loopholes that exist in highly restrictive states like Illinois and Massachusetts where wiretapping laws may operate to shelter abuse by police, while still preserving the privacy rights that these broadly constructed statutes rightfully afford individuals.<sup>144</sup>

As evidenced by the constitutional and public policy considerations that follow, this Article concludes that there is fundamental democratic and practical evidentiary value in any recording of public police conduct, whether intercepted by a party to the conversation or not, and whether surreptitious or open.<sup>145</sup> In sum, this Article (1) declines to state a preference for one-party or all-party consent; and (2) argues more narrowly that all wiretapping statutes should include an express exception from criminal prosecution or civil liability for parties that, openly or surreptitiously, intercept communications made by police during public performance of their duties.<sup>146</sup> Part A of this Section discusses why a specific statutory exclusion for police is preferable to the broader reasonable expectation of privacy provisions, which do allow recording of police in many states, because such provisions could collaterally capture too many private individual communications, and subject citizens to greater state intrusions.<sup>147</sup> Part B argues that Fourth Amendment principles militate in favor of a specific statutory exception to criminalization of all recording of public police conduct.<sup>148</sup> Part C offers First Amendment arguments in favor of the exception.<sup>149</sup> Part D discusses public policy and other prudential reasons that states should amend their wiretapping laws to include police exceptions.<sup>150</sup>

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144. *See supra* notes 87-124 and accompanying text; *see also supra* note 18 and accompanying text; *infra* note 154 and accompanying text.

145. *See infra* notes 151-271 and accompanying text.

146. *See infra* notes 151-271 and accompanying text.

147. *See infra* notes 151-57 and accompanying text.

148. *See infra* notes 158-82 and accompanying text.

149. *See infra* notes 183-233 and accompanying text.

150. *See infra* notes 234-71 and accompanying text.

*A. Solving the Police Problem with a One-Party Consent Provision  
Collaterally Sacrifices Individual Rights*

Generally, one-party consent statutes would preclude criminal prosecution for interception of conversations between a police officer and a surreptitious recorder, such as Michael Hyde.<sup>151</sup> However, one-party statutes are glaringly underinclusive, as single-party consent still leaves third party recorders — such as Simon Glik or George Holliday — vulnerable to criminal liability.<sup>152</sup> Since mere onlookers are not parties to any communication, any subjective assent on their behalf does not operate as the requisite one-party consent under the plain language of most wiretapping statutes.<sup>153</sup>

Similarly, clauses that only protect parties who demonstrate a cognizable expectation of privacy are highly problematic for states that wish to provide private citizens a higher ceiling of protection than the constitutional minima required by many courts' rapidly ebbing Fourth Amendment jurisprudence.<sup>154</sup> If deployed to vindicate the right of the public to record open and official police conduct, these reasonable expectation of privacy provisions also blast a wide swath of collateral damage.<sup>155</sup> In other scenarios, these statutes subject private victims of overwrought state surveillance to the whim of the state judiciary's

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151. *See, e.g.*, 18 U.S.C. § 2511(2)(d) (2006).

152. *See id.*

153. *See id.*

154. *See, e.g.*, *United States v. Larios*, 593 F.3d 82, 91 (1st Cir. 2010) (denying motion to suppress surreptitious police wiretapping of cocaine deal because defendant had no objective privacy expectation as visitor to motel room); *United States v. Turner*, 209 F.3d 1198, 1199-1201 (10th Cir. 2000) (finding surreptitious police recording of defendant's conversation with companion in the back seat of patrol car, while police conducted unsuccessful car search, did not violate Title III because defendant's expectation of privacy was not objectively reasonable); *Kee v. City of Rowlett*, 247 F.3d 206, 208-13 (5th Cir. 2001) (dismissing civil suit under Title III because husband recorded without a warrant had no subjective expectation of privacy in oral prayers and statements at public gravesite of dead children where wife was suspect); *United States v. Harrelson*, 754 F.2d 1153, 1169 (5th Cir. 1985) (no reasonable expectation of privacy from third party wiretap in conversation between prison inmate and visiting wife). *See also supra* note 15 and accompanying text (describing cases where reasonable privacy has not been recognized).

155. *See supra* note 154 and accompanying text.

determination of whether their privacy interest is “reasonable.”<sup>156</sup> Worse yet, individuals could be left to defend themselves with only the fallow shield of Fourth Amendment protection that remains after three decades of Supreme Court hostility.<sup>157</sup> As such, nearly all wiretapping statutes introduce a tension between safeguarding individual privacy and permitting the dissemination of police recordings, which bear democratic and evidentiary relevance. To reach equipoise between these twin interests, this Article argues for an express statutory exception, protecting the recordation of public police activity.

*B. Arguments Based on Background Fourth Amendment Principles*

The history of most state wiretapping statutes evinces a legislative preference to protect individual privacy.<sup>158</sup> In fact, many wiretapping laws expressly declare the aim of protecting the individual in the preambles to statutory text.<sup>159</sup> For four decades, the Supreme Court has adhered to Justice Harlan’s two-tiered reasonable expectation of privacy formula to determine when invasions of privacy trigger constitutional protection under the Fourth Amendment.<sup>160</sup> As informed by numerous courts and mere common sense, police officers in the

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156. *See supra* note 154 and accompanying text.

157. *See supra* note 15 and accompanying text.

158. *See, e.g.*, MASS. GEN. LAWS ch. 272, § 99(A) (2010) (declaring, “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”); CAL. PENAL CODE § 630 (West 2010). The California Penal Code states:

The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

*Id.*

159. *Id.*

160. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

public performance of their duties do not own an objective expectation of privacy, or in other words, a privacy interest that society is willing accept as reasonable.<sup>161</sup> Therefore, police officers in their public capacities lack the requisite privacy interest to fall within the intended scope of wiretapping statutes.<sup>162</sup>

Under Justice Harlan's two-part inquiry, the first prong of the test, whether a person demonstrates an actual subjective expectation of privacy, is a question of fact, but the second prong, whether the expectation is "one that society is prepared to recognize as 'reasonable,'" is a question of law.<sup>163</sup> Though it is conceivable, albeit difficult to believe, that police officers could manifest a subjective expectation of privacy in their public actions, the controlling test functionally collapses into a single inquiry: is a police officer's expectation that his public actions will not be recorded "reasonable?"<sup>164</sup>

As a matter of law, most common scenarios where the public interacts with police officers already lack privacy protection under prevailing judicial interpretations.<sup>165</sup> Courts have generally concluded that conversations in open and public spaces – where the majority of police recordation likely occurs – countenances against finding an objective privacy expectation.<sup>166</sup> In the seminal *Katz* case, the Supreme Court stated flatly that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>167</sup> Of utmost importance, the Court also has found that communications during traffic stops – another fertile area where

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161. *See id.*; *Hornberger v. Am. Broad. Co.*, 799 A.2d 566, 595 (N.J. Super. Ct. App. Div. 2002); *State v. Flora*, 845 P.2d 1355, 1357-58 (Wash. Ct. App. 1992); *Commonwealth v. Henlen*, 564 A.2d 905, 906-07 (Pa. 1989).

162. *See Hornberger*, 799 A.2d at 595; *Flora*, 845 P.2d at 1357; *Henlen*, 564 A.2d at 907.

163. *See Hornberger*, 799 A.2d at 592 (citing *United States v. Clark*, 22 F.3d 799, 801 (8th Cir. 1994)).

164. *See id.*

165. *See Beckamer v. McCarty*, 468 U.S. 420, 438 (1984); *Kee v. City of Rowlett*, 247 F.3d 206, 217 n.21 (5th Cir. 2001); *Hornberger*, 799 A.2d at 593.

166. *See Kee*, 247 F.3d at 217 n.21; *Hornberger*, 799 A.2d at 593.

167. *Katz v. United States*, 389 U.S. 347, 351 (1967); *see also Wishart v. McDonald*, 500 F.2d 1110, 1113-14 (1st Cir. 1974) (stating "[t]he right to privacy . . . may be surrendered by public display").

recording an encounter with police would be of utility in a subsequent criminal proceeding – are akin to open and public conversations, and thus, fall outside the sphere of justifiable Fourth Amendment protection.<sup>168</sup> In *Beckamer v. McCarty*, Justice Marshall wrote: “the typical traffic stop is public, at least to some degree. Passersby on foot, or in other cars, witness the interaction of officer and motorist.”<sup>169</sup>

The locus of the communication is not the only factor that militates against an objective privacy expectation for public police action.<sup>170</sup> Importantly, the likelihood that a police communication will be publicly reported dilutes any privacy expectation.<sup>171</sup> This formulation is anchored in the same reasoning as the *Katz* Court’s admonition that knowing exposure of a conversation to the public is tantamount to a surrender of constitutional protection.<sup>172</sup> It is a mainstay of the police officer’s obligation to the public to accurately document and report communications made in an official capacity, whether via a log of activity, an arrest report, or an application for a search warrant. Under open records laws, these reports are almost universally available to the public and media, as they are intended to serve as a medium of transparency. Moreover, police routinely, in fact, frequently, testify in criminal trials as to the contents of conversations or interrogations with the accused. In short, under *Katz* and its progeny, the officer’s binding commitment to accurately report his actions, whether at trial or elsewhere, to the public creates the requisite exposure that, in turn, divests officers of any privacy right against recordation.<sup>173</sup>

Likewise, parties or witnesses to a police communication, where the officer is performing his public duties, whether an arrest, traffic stop

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168. *Beckamer*, 468 U.S. at 438; *see also* *Chambers v. Maroney*, 399 U.S. 42, 48 (1970). In *Chambers*, the Court held that individuals usually lack an objective expectation of privacy in an automobile because cars are exposed to the public. Additionally, vehicles can be moved quickly and therefore it is not practicable to require officers to secure a warrant. *Id.*

169. *Beckamer*, 468 U.S. at 438.

170. *See Katz*, 389 U.S. at 351.

171. *Kee*, 247 F.3d at 214 (enumerating six nonexclusive factors to weigh subjective expectation of privacy which include, *inter alia*, “the potential for communications to be reported”).

172. *See Katz*, 389 U.S. at 351.

173. *See id.*; *Kee*, 247 F.3d at 215.

or execution of search warrant, are regularly and necessarily called into court to repeat or testify about the encounter. Interception of police communications, therefore, is indistinguishable from the recordings protected by *Lopez v. United States*. In *Lopez*, the Court declined to suppress a recording of the defendant bribing an IRS agent who wore a wire because the agent could just as readily repeat or testify about the contents of the conversation, thus extinguishing any subjective privacy expectation.<sup>174</sup>

Importantly, several state courts have held that police, while fulfilling their public duties, forfeit an expectation of privacy that they might otherwise be entitled to as private civilians.<sup>175</sup> While it is true that police officers *qua* police officers do not sacrifice all constitutional rights, several courts have held that officers must expect a diminished measure of privacy protection in their interactions with the public.<sup>176</sup> The New Jersey Superior Court wrote, “police officers, because they occupy positions of public trust and exercise special powers, have a diminished expectation of privacy.”<sup>177</sup> Quoting the same authority, the New Jersey Superior Court held in *Hornberger v. American Broadcasting Company* that police officers lack a reasonable expectation of privacy in their communications with the public that could trigger the state wiretapping

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174. *Lopez v. United States*, 373 U.S. 427, 437-39 (1963).

175. *See Hornberger v. Am. Broad. Co.*, 799 A.2d 566, 595 (N.J. Super. Ct. App. Div. 2002); *State v. Flora*, 845 P.2d 1355, 1357-58 (Wash. Ct. App. 1992); *Commonwealth v. Henlen*, 564 A.2d 905, 907 (Pa. 1989).

176. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). In the famous Massachusetts case, *McAuliffe v. Mayor of New Bedford*, future U.S. Supreme Court Justice Oliver Wendell Holmes, wrote, “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,” in denying the First Amendment claims of an officer fired for his political beliefs. 29 N.E. 517, 517 (Mass. 1892). Justice Holmes’ blanket statement that police, in their public function, lack constitutional rights is no longer good law. *See Garrity*, 385 U.S. at 500. In *Garrity v. New Jersey*, the Supreme Court held “policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.” *Id.* Still, although officers *qua* officers retain constitutional protection, some rights may permissibly be restricted, as is the case with many public employees. *Id.*

177. *Hart v. City of Jersey City*, 706 A.2d 256, 259 (N.J. Super. Ct. App. Div. 1998); *see also Rawlings v. Police Dep’t of Jersey City*, 627 A.2d 602, 605 (N.J. 1993) (“As a police officer, plaintiff had a diminished expectation of privacy.”).



statute's ban on surreptitious third-party interception.<sup>178</sup> In *State v. Flora*, the Washington Appeals Court found that the awesome power wielded by police, the concomitant public need to supervise that authority, and the officer's role as public servant all coalesced to deny police in their public capacities a privacy interest deserving of constitutional or statutory protection.<sup>179</sup> Similarly, the U.S. Court of Appeals for the Eighth Circuit denied police officers the protection of Title III when interacting with suspects.<sup>180</sup> In dismissing a police officer's invasion of privacy tort action, the Kansas Supreme Court echoed the same reasoning, writing: "a public official, *a fortiori*, has no right of privacy as to the manner in which he conducts himself in office."<sup>181</sup> Contrary to the isolated case like *Commonwealth v. Hyde*, where the court engaged in an overinclusive read of the state's wiretapping statute to include protection of police, a majority of courts have rightfully declined police the shelter

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178. *Hornberger*, 799 A.2d at 595. In *Hornberger*, three Jamestown, New Jersey, police officers filed tort actions and brought suit under the New Jersey wiretapping statute, alleging that the television network ABC and three African American "testers" surreptitiously recorded private discussions among the officers. *Id.* at 570-71. The officers pulled over the three men, who were driving lawfully in a Mercedes Benz to test the conduct of police officers along the New Jersey Turnpike for a *Primetime Live* special on racial profiling called "Driving While Black." *Id.* at 571. While detained outside the car, the testers captured the officers on a hidden camera as they searched the car, and opened a small cosmetic case without consent. *Id.* at 571-72. Upon discovering the case, one officer remarked, "probably dope." *Id.* Since the "testers" were not parties to the conversation, the recording did not qualify as a one-party consent communication. *Id.* at 590. However, New Jersey's wiretapping law is modeled after Title III and contains a reasonable expectation of privacy requirement. *Id.* The court reasoned that the officers had no reasonable expectation of privacy capable of triggering the statute's protections because (1) the conversations occurred within earshot of the suspects, and more importantly, (2) police officers in the public performance of their duties do not possess personal privacy interests. *Id.* at 594.

179. See *State v. Flora*, 845 P.2d 1355 (1992); *supra* notes 59-69 and accompanying text.

180. *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993). See *supra* notes 24-29 and accompanying text.

181. *Rawlins v. Hutchinson News Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975). The court continued: "[s]uch facts are 'public facts' and not 'private facts.'" *Id.*

of individual privacy and the safe harbor of state wiretapping statutes, where officers are fulfilling their public obligations.<sup>182</sup>

*C. Arguments Based on Background First Amendment Principles*

While police officers lack a right to privacy in their public communications, the right of ordinary individuals to record police activity on increasingly ubiquitous cellular phones and mobile devices is constitutionally grounded.<sup>183</sup> First Amendment jurisprudence suggests that there is a positive constitutional liberty to gather and receive information regarding matters of public interest, and, within the ambit of this protected expression, to record public police actions without state interference.<sup>184</sup> This right stems from the Supreme Court's pronouncement in *Stanley v. Georgia* that the First Amendment "protects the right to receive information and ideas."<sup>185</sup> The right to receive information about public officials is necessary to inform and enable political discourse in a democracy.<sup>186</sup> Recordings of police heroism, from the harrowing images of the first responders to the September 11 attacks to a simple photograph of an officer rescuing a cat from a tree, are evocative of the nation's collective reverence for the police officer. Few would suggest that such images are outside the scope of the First Amendment. By the same logic, the cloak of privacy cannot obscure the Constitution's important function of maintaining uncongested channels of communication in the instances, however rare, where police betray the public trust.<sup>187</sup> In that vein, the video of the Rodney King beating was more powerful in its political message than any reaction speech or *ex post facto* report. After an explanation of *Bartnicki v. Vopper* — where the Supreme Court held that the First Amendment protects the right to

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182. See *supra* notes 92-116 and accompanying text (discussing the Massachusetts Supreme Judicial Court's ruling in *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001)).

183. See e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).

184. See *Stanley*, 394 U.S. at 564; *Robinson*, 378 F. Supp. 2d at 541.

185. *Stanley*, 394 U.S. at 564.

186. See *id.*

187. See *id.*; *Robinson*, 378 F. Supp. 2d at 541.

disseminate or publish recordings of public significance, even if another party illegally intercepted the recording<sup>188</sup> — this Section argues that recording public police activity is so infused with elements of political discourse that the First Amendment safeguards the practice.<sup>189</sup>

### 1. The Right to Publish Public Police Communications

In *Bartnicki*, an “unidentified” third party “intercepted” a phone call between a central Pennsylvania teachers’ union negotiator and the president of the local chapter.<sup>190</sup> On the call, the union president threatens “[t]o ‘blow off . . . [the] front porches’” of school board members.<sup>191</sup> A local anti-tax activist found an unmarked copy of this recording in his mailbox and delivered it to Frederick Vopper, a radio disc jockey.<sup>192</sup> Vopper played the tape, and union officials filed an action for damages pursuant to the civil remedies provided by the Pennsylvania wiretapping statute and Title III.<sup>193</sup> Both statutes criminalize third party interception, where the recorded parties enjoy a reasonable expectation of privacy, and publication of any illegally intercepted communication.<sup>194</sup> However, Vopper filed for summary judgment, asserting a positive First Amendment right to publicly disseminate the tape recordings.<sup>195</sup>

Writing for a six-to-three majority, Justice Stevens framed the issue narrowly: If a publisher of information has lawfully acquired the information from a source that obtained it unlawfully, may the government punish the ensuing publication?<sup>196</sup> The Court first determined that the wiretapping statutes’ proscriptions on publication of illegally intercepted communications were content-neutral regulations, and thus, not violative of the First Amendment on their face.<sup>197</sup> Next, the

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188. *Bartnicki v. Vopper*, 532 U.S. 514, 534-35 (2001).

189. *See infra* notes 190-233 and accompanying text.

190. *Bartnicki*, 532 U.S. at 518-19.

191. *Id.*

192. *Id.* at 519.

193. *Id.* at 519-20.

194. *See id.* at 520 n.3.

195. *Id.* at 520.

196. *See id.* at 525.

197. *Id.* at 526.

Court agreed with the defendant that statutory prohibitions on publication regulated “pure speech” as opposed to mere conduct.<sup>198</sup>

Finally, the Court balanced the government’s objectives for prohibition of that speech against the broad interest in public reception of “truthful information of public concern.”<sup>199</sup> The Court stated two cognizable interests served by the statute: (1) “removing an incentive for parties to intercept private conversations” and (2) “minimizing the harm to persons whose conversations have been illegally intercepted.”<sup>200</sup> The Court focused almost exclusively on the second interest, stating that “the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself.”<sup>201</sup> Noting the heavy presumption against prior restraint of truthful information, Justice Stevens wrote that constitutional balances tipped in favor of publication of matters of “public importance” when weighted against individual privacy.<sup>202</sup> In a pronouncement all the more fitting when applied to police officers rather than union negotiators, the Court wrote: “One of the costs associated with participation in public affairs is an attendant loss of privacy.”<sup>203</sup>

Other courts have engaged in a similar balancing of the right of publication against the inchoate privacy desires of public officials, in the specific context of public police actions.<sup>204</sup> At least one court has flatly stated that public exposure of police activity is of even greater public significance than the hyperbolic, and decidedly private, telephone conversation between labor organizers in *Bartnicki*.<sup>205</sup> In *Jean v. Massachusetts State Police*, the U.S. Court of Appeals for the First Circuit held that *Bartnicki* controlled where a “citizen journalist” published a surreptitious recording caught on a “nanny-cam” of state

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198. *Id.* at 526-27. The Court analogized the delivery of a tape recording to “the delivery of a handbill or a pamphlet, and as such, it is the kind of ‘speech’ that the First Amendment protects.” *Id.* at 527.

199. *Id.* at 529, 534.

200. *Id.* at 529.

201. *See id.* at 533.

202. *Id.* at 534-35.

203. *Id.* at 534.

204. *See, e.g., Jean v. Mass. State Police*, 492 F.3d 24, 29-30 (1st Cir. 2007).

205. *Id.*

troopers conducting a warrantless and illegal search of a home.<sup>206</sup> Even though the recording amounted to an illegal interception under the flawed interpretation of the Massachusetts wiretapping statute in *Hyde*, the court concluded that the government interest in police privacy during a home search is “less compelling in this case than in *Bartnicki*.”<sup>207</sup> In fact, the First Circuit emphatically wrote that the privacy interest of police officers in public is “virtually irrelevant,” when, as in *Jean*, they conduct searches in front of numerous witnesses including other officers, and a home’s occupants.<sup>208</sup> Therefore, the sound reasoning of *Bartnicki* and *Jean* provides more ammunition for the proposition that any privacy right asserted by police in the public fulfillment of their duties evaporates beneath the paramount constitutional importance of responsible scrutiny of public officers, and the valuable information it contributes to political debate and the ordering of society.<sup>209</sup>

## 2. The Right to Receive Information about Public Police Conduct

The *Bartnicki* decision was clear that the First Amendment only immunizes publishers with clean hands and not the original and illegal recorder.<sup>210</sup> However, *Bartnicki* will be instructive should the Court ever visit the issue of whether the First Amendment also creates a right to record public police activity.<sup>211</sup> For one, the Court once again invigorates the underlying constitutional value of public access to information of democratic relevance.<sup>212</sup> The Court stressed that personal privacy rights are of a lesser constitutional pedigree than the right of the public to

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206. *Id.*

207. *Id.* at 33. It is also critical to note that the exceptions to state wiretapping laws proposed in this Article would not likely shield from prosecution the recorder of a *Bartnicki*-like conversation between police officers. There, union officials were on the telephone, outside the earshot of others. See *Bartnicki*, 532 U.S. at 518. Similarly, police officers off duty, or in relative seclusion, should maintain a privacy interest in their communications and could invoke the protection of a state wiretapping law, notwithstanding this Article’s proposed exception.

208. *Jean*, 492 F.3d at 30.

209. See *Bartnicki*, 532 U.S. at 534-35; *Jean*, 492 F.3d at 29-30.

210. See *Bartnicki*, 532 U.S. at 524-25.

211. See *id.*

212. See *id.* at 534-35.

receive information, particularly when public officials are the purportedly aggrieved parties.<sup>213</sup> Moreover, the public concern attached to monitoring the activity of police through recordation, would seem far greater than the concern attendant to the insular labor dispute classified as a public matter in *Bartnicki*.<sup>214</sup> While the public relevance in *Bartnicki* centered on the pecuniary, namely the allocation of public resources, the dominant public issue involved in the recordation of police is liberty, that is, the government's exercise of its most solemn authority — the power of arrest and deprivation of freedom.<sup>215</sup>

The publication protected by *Bartnicki* might also be distinguished from the interception of public police communications because the act of interception could be construed as mere conduct not of constitutional dimension rather than expressive activity insulated by the First Amendment.<sup>216</sup> However, a diverse range of courts seem to suggest that recordation of police is sufficiently tinged with elements of speech, if not a wholly protected class of pure speech, that it deserves robust First Amendment protection.<sup>217</sup>

It is a well-established constitutional principle from *Stanley* that the right to free speech guaranteed by the First Amendment also protects “the right to receive information and ideas.”<sup>218</sup> The Supreme Court has called this right “fundamental to our free society.”<sup>219</sup> At least one federal court has held that the speech principles safeguarded by *Stanley* create a positive constitutional liberty to videotape police officers on a public highway, and thus receive information and speak out on issues of public concern.<sup>220</sup> In *Robinson v. Fetterman*, the U.S. District Court for the Eastern District of Pennsylvania awarded damages pursuant to § 1983 to

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213. *See id.* (“[P]rivacy concerns give way when balanced against the interests in publishing matters of public importance.”).

214. *See id.* at 534; *Jean*, 492 F.3d at 30.

215. *Bartnicki*, 532 U.S. at 534. *Jean*, 492 F.3d at 30.

216. *See Bartnicki*, 532 U.S. at 524–25.

217. *See, e.g., Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).

218. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *See also Robinson*, 378 F. Supp. 2d at 541 (finding First Amendment protection to receive and gather information).

219. *Stanley*, 394 U.S. at 564.

220. *Robinson*, 378 F. Supp. 2d at 541.

a truck driver twice arrested for criminal harassment after videotaping police at a truck inspection point on a state highway.<sup>221</sup> First, the court cited favorably the Supreme Court's statement in *City of Houston v. Hill* that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."<sup>222</sup> Just like the police in *Hyde* or *Glik*, the Court pulled back the curtain and determined that the officers decided to "unreasonably apply a valid law in order to arrest someone who annoys or offends them."<sup>223</sup> The court further held that the First Amendment preserved Robinson's right to express his concern about the safety of truck inspections through videotaping officers.<sup>224</sup> The court wrote: "Videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case."<sup>225</sup> Finally, the court held that the officers' confiscation of the tape upon Robinson's arrest was tantamount to a prior restraint in further contravention of the First Amendment.<sup>226</sup> Other courts have applied similar reasoning in allowing recordation of police and public officials.<sup>227</sup> The U.S. Court of Appeals for the Eleventh Circuit wrote that, subject to valid time, place, and manner restrictions, the First Amendment protects the right to photograph or videotape police conduct.<sup>228</sup> The right stems from the positive liberty of the citizens to gather information about matters of public interest.<sup>229</sup>

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221. *Id.* at 538-40. Section 1983 creates a civil cause of action for compensatory and punitive damages when any person acting under color of law "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2006).

222. *Robinson*, 378 F. Supp. 2d at 541 (quoting *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)).

223. *Id.* at 542; see also *Commonwealth v. Hyde*, 750 N.E.2d 963, 970-71 (Mass. 2001).

224. *Robinson*, 378 F. Supp. 2d at 541.

225. *Id.*

226. *Id.*

227. See, e.g., *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

228. *Id.*

229. *Id.* (citation omitted).

Since the right to record public police activity falls within the scope of First Amendment protection, nothing short of a compelling government interest should justify criminalization of the act under the strict judicial scrutiny it deserves.<sup>230</sup> As the First Circuit said in *Jean*, as oxymoronic the argument sounds, the purported privacy interest in public police conduct is “virtually irrelevant.”<sup>231</sup> Surely passive recording of police activity, surreptitiously or openly, does not imperil public safety or the efficacy of the police function.<sup>232</sup> That officers may interpret the act of recording as expressive of opprobrium or insult is immaterial. Even if one can conjure highly particularized scenarios where recording amounts to an interference of the police function, an absolute ban is hardly sufficiently narrowly tailored. Outright bans are overinclusive because they equally punish innocuous acts of recording, such as the witness standing at a distance who records an arrest on a cellular phone or the driver at a traffic stop who records the exchange on a mobile device from inside her pocket. In short, the public enjoys a positive liberty to receive information about how police wield their awesome power, and this free speech right is unconstitutionally extinguished by undemocratic bans on recordation of public police conduct.<sup>233</sup>

#### *D. Public Policy Arguments*

In addition to the constitutional principles supporting a broad exception in state wiretapping statutes for recordation of public police activity, numerous public policy arguments further bolster the proposal. This Part discusses three primary public policy purposes advanced by such an exception: (1) promotion of the availability of probative evidence in criminal cases; (2) greater evidentiary support for the vindication of civil rights in § 1983 cases; and (3) a need for symmetry with best police practices, which favor recordation of custodial

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230. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

231. *Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007).

232. *See, e.g., Commonwealth v. Hyde*, 750 N.E.2d 963, 970-71 (2001) (facts in common scenario show surreptitious recording of police in no way interferes with investigation or arrest).

233. *See Smith*, 212 F.3d at 1333 (11th Cir. 2000); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).



interrogations, confessions, and even in many jurisdictions, field stops from cameras mounted on patrol cars.<sup>234</sup>

### 1. Promotion of Probative Evidence in Criminal Trials

In the age of the iPhone, it is increasingly common for dispositive evidence in criminal trials to come in the form of audio or video captured by ordinary cellular phones or mobile devices.<sup>235</sup> However, wiretapping statutes pose a dangerous problem in states that prohibit surreptitious or one-party recording.<sup>236</sup> Perversely, video or audio evidence, instead of exonerating the innocent or assuring the conviction of the guilty, could be suppressed under the applicable wiretapping statutes.<sup>237</sup>

In the context of police actions, state laws like those in Illinois or Massachusetts that bar all surreptitious recordings would forestall the prosecution of police officers, even when the misconduct is captured on tape.<sup>238</sup> As the dissent in *Hyde* astutely points out, had police beaten Rodney King in Massachusetts, it might have been George Holliday,

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234. See *infra* notes 235–74 and accompanying text.

235. See e.g., Erica Pearson & John Lauinger, *Hofstra Gang Rape Story Was All a Lie*, N.Y. DAILY NEWS, Sept. 17, 2009, available at 2009 WLNR 18305500; Ann Givens, *Hofstra false gang-rape accuser won't be charged*, NEWSDAY, Sept. 25, 2009, available at 2009 WLNR 18956516; Timothy Williams, *Recorded on a Suspect's Hidden MP3 Player, a Bronx Detective Faces 12 Perjury Charges*, N.Y. TIMES, Dec. 7, 2007, at B7.

236. See 720 ILL. COMP. STAT. §§ 5/14-1 (2010) (containing no surreptitious-only requirement, all party consent, and statutory language expressly disclaiming a reasonable expectation of privacy requirement); MASS. GEN. LAWS ch. 272, § 99 (2010).

237. See 720 ILL. COMP. STAT. §§ 5/14-1; MASS. GEN. LAWS ch. 272, § 99. The problem is equally troubling in criminal trials not involving police. See Pearson & Lauinger, *supra* note 235, at A2. Four men charged in a brutal rape of a Hofstra University freshman, who claimed to be bound in a dormitory bathroom, were quickly released from jail when a recording made on an unknown cell phone revealed the sex was consensual and without bondage. Givens, *supra* note 235. Yet, it is entirely conceivable that, at trial, a judge would have been forced to suppress the exculpatory video in a state like Illinois or Massachusetts, where third party surreptitious recordings are outlawed and barred from admission at trial. See 720 ILL. COMP. STAT. §§ 5/14-1 to -2; MASS. GEN. LAWS ch. 272, § 99.

238. See 720 ILL. COMP. STAT. §§ 5/14-2; MASS. GEN. LAWS ch. 272, § 99.

rather than the four abusive officers, charged in the aftermath of the incident.<sup>239</sup> Holliday's crime: "secretly" recording police without consent.<sup>240</sup> The scenario continues to repeat itself. When a Bay Area Rapid Transit police officer shot and killed Oscar Grant, an unarmed passenger laying face down on the platform, passengers on a nearby train did what has become commonplace in the mobile era – they took out their cell phones and pressed record.<sup>241</sup> Within days the videos hit the news and outrage grew.<sup>242</sup> Protests swelled in Oakland, and the officer eventually was charged.<sup>243</sup> In a few of the most restrictive states, like Illinois, where even non-surreptitious one-party recordings are barred, or Massachusetts, where recording is illegal if "secret," irrefutable evidence of police misconduct might never see the courtroom.<sup>244</sup>

Even worse, there is reason to believe exculpatory evidence collected in violation of wiretapping statutes might never be admitted in criminal trials in places such as Massachusetts or Illinois.<sup>245</sup> For instance, in the attempted murder prosecution of Erick Crespo, police perjury that exonerated Crespo only came to light because he surreptitiously recorded a custodial interrogation on an mp3 player concealed in his pocket.<sup>246</sup> In

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239. *Commonwealth v. Hyde*, 750 N.E.2d 963, 971-72 (2001) (Marshall, C.J., dissenting).

240. *See id.*

241. Demian Bulwa, *BART Urges Patience over Video of Shooting*, S.F. CHRON., Jan. 5, 2009, at A1.

242. *See* Henry K. Lee, *3 Charged in Shooting Protest*, S.F. CHRON., Jan. 10, 2009, at A4.

243. *Id.*; Demian Bulwa, Leslie Fulbright, & Henry K. Lee, *BART Officer Arrested*, S.F. CHRON., Jan. 14, 2009, at A1. The officer, Johannes Mehserle, was convicted by a jury of involuntary manslaughter, but found not guilty on charges of second-degree murder and voluntary manslaughter. Demian Bulwa, *Verdict: Jury Finds Former BART Officer Guilty on Involuntary Manslaughter Charge*, S.F. CHRON., July 9, 2010, at A1. Mehserle was sentenced to two years in prison. Demian Bulwa, *2 Years for Mehserle - Protests in Streets*, S.F. CHRON., Nov. 6, 2010, at A1.

244. *See* 720 ILL. COMP. STAT. §§ 5/14-1 to -2 (2010); MASS. GEN. LAWS ch. 272, § 99 (2010).

245. *See* 720 ILL. COMP. STAT. §§ 5/14-2; MASS. GEN. LAWS ch. 272, § 99. *See also* Williams, *supra* note 235, at B7.

246. Williams, *supra* note 235, at B7. New York is a one-party consent state, so the recording was not illicit under the controlling wiretapping laws. N.Y. PENAL LAW §§ 250.00, 250.05 (McKinney 2008).

sworn testimony at Crespo's trial for attempted murder, Detective Christopher Perino repeatedly stated that he never interrogated Crespo, but heard the suspect tell his mother, "[t]hey want to know why I shot this guy."<sup>247</sup> In fact, in the one-hour-and-fifteen-minute interrogation captured on tape, Detective Perino not only asked a battery of questions but also told Crespo he would never be allowed to tell his version of the events at trial if he didn't sign a confession and dissuaded Crespo from consulting a lawyer.<sup>248</sup> On cross-examination, Detective Perino testified: "I never interrogated your client, sir."<sup>249</sup> Given the overwhelming prejudicial effect of police testimony on jurors, Crespo would likely have been convicted without the recording. The attempted murder charges were swiftly dropped (Crespo pled guilty to lesser weapons charges), and in subsequently charging Officer Perino, the Bronx District Attorney said he hoped the charges would send "a strong message" about police accountability.<sup>250</sup> The message plainly failed to reach states like Massachusetts and Illinois.<sup>251</sup>

## 2. Vindication of Constitutional Rights in § 1983 Actions

States that shield police officers from public recordation also shield themselves from liability – doubling the injustices created by these statutes. Congress passed § 1983 precisely for citizens like Erick Crespo and Simon Glik, and the family of Oscar Grant, who suffer deprivation of basic constitutional liberties at the hands of law enforcement officers.<sup>252</sup> Yet, § 1983 creates a civil cause of action, and, as such, plaintiffs carry the burden of proving a denial of the alleged constitutional violation by a preponderance of the evidence.<sup>253</sup> Video and

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247. Williams, *supra* note 235, at B7 (alteration added).

248. *Id.*

249. *Id.*

250. *Id.*

251. *See* Commonwealth v. Hyde, 750 N.E.2d 963, 968 (2001).

252. *See* 42 U.S.C. § 1983 (2006) (creating a private right of action for persons whose constitutional liberties are violated by persons acting under color of state law).

253. *See id.*

audio evidence are uniquely probative and must be admissible in § 1983 actions.<sup>254</sup>

In fact, the Supreme Court has hailed the merits of such evidence, holding that videos in particular create a practically unimpeachable evidentiary record, even at the summary judgment phase of trial.<sup>255</sup> In *Scott v. Harris*, the Court dismissed a § 1983 action alleging that Georgia county deputies rammed a suspect's fleeing car in an 85-mile-per-hour car chase.<sup>256</sup> At issue was whether the purposeful, potentially lethal, high speed collision represented excessive force violative of Harris's Fourth Amendment right of freedom from "unreasonable seizure."<sup>257</sup> Harris contended that his driving was not so dangerous to justify deadly force by the officers in terminating the chase.<sup>258</sup> He argued that the Court was bound to accept this version of events for the purposes of reviewing the officer's motion for summary judgment.<sup>259</sup> Justice Scalia wrote that although a court is obligated to review the facts in a light most favorable to the non-moving party, there was "an added wrinkle in this case: existence in the record of a videotape capturing the events in question."<sup>260</sup> The Court echoed the familiar summary judgment standard of review, and ruled that when, as here, the videotape represented dispositive proof of the frivolity of Harris's § 1983 claim, judgment must be granted because the evidence unmasked no "genuine issue for trial."<sup>261</sup> Praising the probative value of video evidence, Justice Scalia wrote that rather than relying on the plaintiff's "visible fiction," the court "should have viewed the facts in the light depicted by the videotape."<sup>262</sup>

State wiretapping laws must allow for the admissibility of exculpatory or inculpatory documentary evidence in the criminal or civil

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254. See generally *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

255. See *id.*

256. *Id.* at 374–76.

257. *Id.* at 376.

258. See *id.* at 378–79.

259. See *id.*

260. *Id.* at 378.

261. *Id.* at 380–81 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)).

262. *Id.*

trials of police officers, whether or not the evidence amounts to an unlawful recording under the applicable wiretapping statute. A bystander who watches a police officer in the fulfillment of his public duties should not need to request “consent” before documenting breaches of the public trust and acts of heroism alike. To cloak public police action behind the veil of privacy is to give license to officers to abuse their authority because the risk of getting caught evaporates beneath the aura of impunity. Statutes that render the nonconsensual recordation of police inadmissible in § 1983 actions are blockading access to uniquely probative evidence. Recordings of police encounters, as the Supreme Court stated in *Scott*, save valuable judicial resources since in many cases they can dispositively vindicate the constitutional rights of victims, or validate the propriety of the challenged actions of law enforcement officers.<sup>263</sup> There are no justifiable reasons to blindfold judges and juries from access to consummately public and probative evidence simply because the recorder did not ask police permission.

### 3. Symmetry with Best Police Practices

Lastly, a broad exception to state wiretapping laws allowing civilian recording of public police actions is consonant with the growing consensus among police, judges, and researchers about the need for recording of major evidentiary events in the criminal process.<sup>264</sup> Across the nation, growing numbers of police departments, voluntarily or by law, are mandating recordation of confessions, custodial interrogations

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263. *Id.* at 378-81.

264. See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 93 J. CRIM. L. & CRIMINOLOGY 1127, 1127-44 (2005); N.J. SUP. CT. SPECIAL COMM. ON RECORDATION OF CUSTODIAL INTERROGATION, REPORT OF SUPREME COURT SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS (Apr. 15, 2005); N.Y. COUNTRY LAWYERS' ASSOC. & A.B.A SECTION OF CRIM. JUSTICE, RESOLUTION ENDORSING VIDEOTAPED INTERROGATIONS & ACCOMPANYING REPORT (Feb. 9, 2004); NAT'L DIST. ATT'YS ASSOC., POLICY ON ELECTRONIC RECORDING OF STATEMENTS (Oct. 23, 2004) (“America’s prosecutors encourage police agencies to record statements by suspects and witnesses but recognize that there are circumstances in which the statements are not or could not be recorded.”); AM. LAW INST., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §130.4 (May 20, 1975).

and corporeal identifications.<sup>265</sup> Many jurisdictions also mandate recordation of a broader range of police encounters with the public – like field stops taped from cameras mounted on patrol cars.<sup>266</sup> Recordation of confessions and interrogations ensures the integrity of the criminal justice process and forestalls coerced or ambiguous confessions, which are a primary cause of wrongful convictions in the United States.<sup>267</sup> Likewise, recordation is a powerful deterrent against not only police misconduct but also defendant perjury at trial.<sup>268</sup> Where a powerful and growing chorus of police, prosecutors, judges, and scholars endorse recordation of police encounters with suspects, state laws that prohibit civilians from engaging in the same conduct are oddly asymmetric.<sup>269</sup> These dissonant state laws detract from the widely acknowledged utility of recorded evidence for subsequent use in criminal trials.<sup>270</sup> Symmetry with this growing body of favorable research is manifestly desirable as a check on the fulfillment of the duty to record by individual officers, verification of the accuracy of the recordings, and the general integrity of the judicial process.<sup>271</sup>

#### CONCLUSION

There is fundamental democratic and practical evidentiary value in any recording of public police conduct. Any place where the government is vested with a positive statutory right to suppress potent memorials of its own misconduct or the evidence of a citizen's innocence is not a democracy; it's a police state. Moreover, civilian recordings of encounters between citizens and police often produce reliable inculpatory evidence that promotes our collective faith in the integrity of the justice system. State legislatures should move quickly to adopt statutory exceptions to the criminalization of civilian recordation of police in the fulfillment of their public obligations. Constitutional principles,

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265. See Sullivan, *supra* note 264, at 1127-45.

266. See Scott, 550 U.S. at 378.

267. See Sullivan, *supra* note 264, at 1127-45.

268. See *id.*

269. See *id.*

270. See *id.*

271. See *id.*

grounded in the First and Fourth Amendments, and sound public policy demand no less.

**Appendix One – Table of State Authorities**  
**All-Party Consent States**

<b>State</b>	<b>Expectation of Privacy Requirement</b>	<b>Surreptitious Only</b>	<b>Surreptitious and Open</b>
<b>California</b> (CAL. PENAL CODE §§ 631–632 (West 2010))	No (for wiretapping); Yes (for other recordings)		X
<b>Connecticut</b> (CONN. GEN. STAT. §§ 53a-187 to -190 (2010))	No (for third-party non-consensual audio recording); Yes (for video or photography)		X
<b>Florida</b> (FLA. STAT. §§ 934.02–.03 (2010))	Yes		X
<b>Illinois</b> (720 ILL. COMP. STAT. §§ 5/14-1 to -3 (2010))	No		X
<b>Maryland</b> (MD. CODE. ANN., CTS. & JUD. PROC. §§ 10-401 to -402 (West 2010))	Yes		X
<b>Massachusetts</b> (MASS. GEN. LAWS ch. 272, § 99 (2010))	No	X	



State	Expectation of Privacy Requirement	Surreptitious Only	Surreptitious and Open
<b>Montana</b> (MONT. CODE. ANN. § 45-8-213 (2009))	No	X	
<b>Nevada</b> (NEV. REV. STAT. §§ 200.610–.690 (2010))	No (for telephonic recording); Yes (for surreptitious recording of non-telephonic private conversations)	X	
<b>New Hampshire</b> (N.H. REV. STAT. ANN. §§ 570-A:1–:2 (2010))	Yes		X
<b>Oregon</b> (OR. REV. STAT. §§ 133.721, 165.535–.543 (2010))	Yes	X (at public meetings, universities, and police interviews conducted at law enforcement facilities)	X (all-party consent for recording of conversations )
<b>Pennsylvania</b> (18 PA. CONS. STAT. §§ 5701–5704 (2010))	Yes		X
<b>Washington</b> (WASH. REV. CODE § 9.73.030 (2010))	Yes		X

One-Party Consent States

State	Expectation of Privacy Requirement	Surreptitious Only	Surreptitious and Open
<b>Federal Statute</b> (18 U.S.C. §§ 2510–2511 (2008))	Yes		X
<b>Alabama</b> (ALA. CODE §§ 13A-11-30 to -32 (2010))	Yes		X
<b>Alaska</b> (ALASKA STAT. § 42.20.310 (2010))	No		X
<b>Arizona (ARIZ.)</b> REV. STAT. ANN. §§ 13-3001, 3005 (2010))	Yes		X
<b>Arkansas</b> (ARK. CODE ANN. §§ 5-16-101, 5-60-120 (2010))	No (for audio interception); Yes (for visual interception)		X
<b>Colorado</b> (COLO. REV. STAT. §§ 18-9-301 to -305 (2010))	Yes		X
<b>Delaware</b> (DEL. CODE ANN. tit. 11, §§ 1335, 2401–2402 (2010))	Yes		X

State	Expectation of Privacy Requirement	Surreptitious Only	Surreptitious and Open
<b>Georgia</b> (GA. CODE ANN. §§ 16-11-60, -62 (2010))	Yes	X	
<b>Hawaii</b> (HAW. REV. STAT. §§ 803-41 to -42 (2010))	Yes		X
<b>Idaho</b> (IDAHO CODE ANN. §§ 18-6701 to -6702 (2010))	Yes		X
<b>Indiana</b> (IND. CODE ANN. §§ 35-33.5-1-3.5, -1-5, -5-5 (2010))	No	N/A	N/A
<b>Iowa</b> (IOWA CODE §§ 727.8, 808B.1-2 (2010))	Yes	X	
<b>Kansas</b> (KAN. STAT. ANN. §§ 21 - 4001 to - 4002 (2010))	Yes	X	
<b>Kentucky</b> (KY. REV. STAT. ANN. §§ 526.010 - . 030 (West 2010))	No		X
<b>Louisiana</b> (LA. REV. STAT. ANN. §§ 14:322, 15:1302-:1303	Yes		X

State	Expectation of Privacy Requirement	Surreptitious Only	Surreptitious and Open
<b>Minnesota</b> (MINN. STAT. §§ 626A.01-.02 (2010))	Yes		X
<b>Mississippi</b> (MISS. CODE ANN. §§ 41-29-501, -531, -533 (2010))	Yes		X
<b>Missouri (MO.)</b> REV. STAT. §§ 542.400-.402 (2010))	Yes		X
<b>Nebraska (NEB.)</b> REV. STAT. §§ 86-271 to -290 (2010))	Yes		X
<b>New Jersey (N.J.)</b> STAT. ANN. §§ 2A:156A-2 to -4 (West 2011))	Yes		X
<b>New Mexico</b> (N.M. STAT. § 30-12-1 (2010))	No	N/A	N/A
<b>New York</b> (N.Y. PENAL LAW §§ 250.00, .05 (McKinney 2010))	No		X
<b>North Carolina</b> (N.C. GEN. STAT. §§ 15A-286 to -287 (2010))	Yes		X

State	Expectation of Privacy Requirement	Surreptitious Only	Surreptitious and Open
<b>Ohio</b> (OHIO REV. CODE ANN. §§ 2933.51-.52 (West 2011))	Yes		X
<b>Oklahoma</b> (OKLA. STAT. tit. 13, §§ 176.2-3 (2010))	Yes		X
<b>Rhode Island</b> (R.I. GEN. LAWS §§ 11-35-21, 12-5.1-1 (2010))	Yes		X
<b>South Carolina</b> (S.C. CODE ANN. §§ 16-17-470, 17-30-15 to -35 (2010))	Yes		X
<b>South Dakota</b> (S.D. CODIFIED LAWS §§ 23A-35A-1, -20 (2010))	Yes		X
<b>Tennessee</b> (TENN. CODE ANN. §§ 39-13-601 to -602, 40-6-303 (2010))	Yes		X
<b>Texas</b> (TEXAS PENAL CODE ANN. § 16.02 (Vernon 2009))	Yes		X

State	Expectation of Privacy Requirement	Surreptitious Only	Surreptitious and Open
<b>Vermont</b> (VT. STAT. ANN. tit. 13, § 2605 )			
<b>Virginia</b> (VA. CODE ANN. §§ 19.2-61 to -62 (2011))	Yes		X
<b>West Virginia</b> (W. VA. CODE §§ 62-1D-2 to -3 (2011))	Yes		X
<b>Wisconsin</b> (WIS. STAT. §§ 968.27, .31 (2010))	Yes		X
<b>Wyoming</b> (WYO. STAT. ANN. § 7-3-701 to -702 (2010))	Yes		X

#### All-Party Consent States

State	Notes
<b>California</b> (CAL. PENAL CODE §§ 631-632 (West 2010))	Only prohibits non-wiretap recording of “confidential communications,” which excludes public gatherings, legislative, judicial, or executive proceedings, and communications where a party does not have an expectation of privacy.
<b>Connecticut</b> (CONN. GEN. STAT. §§ 53a-187	Any mechanical recording of non-telephonic or wire conversations only requires one-party consent; visually recording a person prohibited if person is “not in plain

- to -190 (2010)) view” and has “reasonable expectation of privacy.”
- Maryland**  
(MD. CODE. ANN.,  
CTS. & JUD.  
PROC. §§ 10-401  
to -402 (West  
2010)) Interception of any conversation, defined as “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,” is punishable, §§ 5/14-1(d), -2(a)(1); “open meetings” exception, § 5/14-3(e).
- Massachusetts**  
(MASS. GEN.  
LAWS ch. 272, §  
99 (2010)) Interception is only prohibited for private conversations, which Maryland courts have interpreted to require a “reasonable expectation of privacy,” § 10-401. *See, e.g.,* Malpas v. Maryland, 695 A.2d 588 (Md. Ct. Spec. App. 1997).
- Michigan**  
(MICH. COMP.  
LAWS §§  
750.539–.539d  
(2010)) Illegal interception only applies to secret recording or eavesdropping .
- Montana**  
(MONT. CODE.  
ANN. § 45-8-213  
(2009)) Only illegal to audio intercept “private conversations,” § 750.539d, or to visually intercept in a “private place,” which is defined as any place where “one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access,” § 750.539a(1).
- Nevada**  
(NEV. REV. STAT.  
§§ 200.610–.690  
(2010)) The law does not apply to: “(i) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty;  
(ii) persons speaking at public meetings;  
(iii) persons given warning of the transcription or recording, and if one person provides the warning, either

party may record;” and only applies to “hidden” recording.

**New Hampshire** One-party consent required for conversations (N.H. REV. STAT. ANN. §§ 570-A:1–:2 (2010)) surreptitiously recorded; all-party consent for telephonic or wiretapping; statute only applies to a “private conversation,” and persons “surreptitiously listening to, monitoring or recording” the private conversations of others, § 200.650.

**Pennsylvania** The statute criminalizes (1) wiretapping by any third party without consent of at least one party to a telephonic or electronic communication; and (2) recording any non-wire conversation without specifically informing *all participants* in the conversation; it is not illegal to record any communication from inside one’s home; the prohibitions on recording do not apply at “[p]ublic or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies, and sporting or other events,” § 165.540(6)(a); “regularly scheduled classes or similar educational activities in public or private institutions,” § 165.540(6)(b); or during an “interview conducted by a peace officer in a law enforcement facility” provided that the recording device is not concealed, § 165.540(5).

**Washington** Statute only protects “private” conversations; party (WASH. REV. CODE § 9.73.030 (2010)) gains consent by announcing an intent to record in a “reasonably effective manner,” and also recording the announcement.



**One-Party Consent States**

<b>State</b>	<b>Notes</b>
<p><b>Alabama</b> (ALA. CODE §§ 13A-11-30 to -32 (2010))</p>	<p>Criminal penalties only extend to recording of “private communication;” surreptitious visual observation or photography is illegal only if the recorder is trespassing on private property.</p>
<p><b>Arkansas</b> (ARK. CODE ANN. §§ 5-16-101, 5-60- 120 (2010))</p>	<p>Persons acting under color of law are exempt from the statute; telecommunications workers are directed to cooperate with law enforcement officers seeking to intercept wire or oral communications; criminal penalties only extend to visual recording where person taped:</p> <ol style="list-style-type: none"> <li>(1) Is in a private area out of public view;</li> <li>(2) Has a reasonable expectation of privacy; and</li> <li>(3) Has not consented to the observation.</li> </ol>
<p><b>Colorado</b> (COLO. REV. STAT. §§ 18-9-301 to - 305 (2010))</p>	<p>The statute may not be interpreted to “prevent a news agency, or an employee thereof, from using the accepted tools and equipment of that news medium in the course of reporting or investigating a public and newsworthy event,” § 18-9-305(1).</p>
<p><b>Delaware</b> (DEL. CODE ANN. tit. 11, §§ 1335, 2401–2402 (2010))</p>	<p>Delaware’s wiretap statute permits one-party consent (allowing interception of “wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act,” § 2402(c)(4)), but the state’s privacy law contains an all-party provision (illegal to intercept “without the consent of all parties thereto a message by telephone, telegraph, letter or other means of communicating</p>

privately, including private conversation, “ § 1335(a)(4)).

**Georgia**

(GA. CODE ANN. §§  
16-11-60, -62  
(2010))

It is only illegal to *clandestinely* record a “*private conversation*” in a “*private place*,” § 16-11-62(1); private place is defined as “a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance,” § 16-11-60(3); it is also illegal to record with a hidden camera “without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view,” § 16-11-62(2).

**Hawaii**

(HAW. REV. STAT.  
§§ 803-41 to -42  
(2010))

It is illegal to visually record any party in a “private place.”

**Indiana**

(IND. CODE ANN.  
§§ 35-33.5-1-3.5, -  
1-5, -5-5 (2010))

Act only criminalizes wiretapping (“telephonic” or “telegraphic” interception) where the recorder is neither the “sender” or the “receiver” of the communication, § 35-33.5-1-5.

**Iowa**

(IOWA CODE §§  
727.8, 808B.1-.2  
(2010))

The laws allow one-party consent; but a recorder “who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication,” § 727.8.

**Kansas**

(KAN. STAT. ANN.  
§§ 21-4001 to -  
4002 (2010))

Intercepting any private communication is illegal; criminal eavesdropping is defined as “[e]ntering into a private place with intent to listen surreptitiously” or to observe or record a private communication, § 21-4001; installing a recording device in a private place where sounds would not normally be audible to outsiders; and visually recording any party in a state of undress when the recorded party has a reasonable expectation of

privacy.

- Maine** (ME. REV. STAT. ANN. tit. 15, §§ 709–711, tit. 17-A, § 511 (2009)) The statute prohibits prosecution if the recorder is “within the range of normal unaided hearing,” tit. 15, § 709(4)(B); it is a criminal violation of privacy to visually record any person in a “private place,” tit. 17, § 511(1)(B).
- New Jersey** (N.J. STAT. ANN. §§ 2A:156A-2 to -4 (West 2011)) The statute does not apply to the recording of communications that have “become common knowledge or public information,” § 2A:156A-3.
- New Mexico** (N.M. STAT. § 30-12-1 (2010)) The statute only applies to wiretapping (“tapping or making any connection with any telegraph or telephone line, wire, cable or instrument belonging to or in the lawful possession or control of another, without the consent” of the owner of the line).
- New York** (N.Y. PENAL LAW §§ 250.00, .05 (McKinney 2010)) Wiretapping is only illegal when a non-party to a conversation taps the line of any party in the communication; the statute also criminalizes “mechanical overhearing of a conversation,” § 250.05, defined as “the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat,” § 250.00(2).
- South Carolina** (S.C. CODE ANN. §§ 16-17-470, 17-30-15 to -35 (2010)) There are no penalties for recording “any public oral communication uttered at a public meeting,” § 17-30-15(2); the state’s “peeping tom” statute forbids the use of audio or video equipment for peeping “through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon,” § 16-17-470(A); the “peeping tom” law does not apply to

police, private detectives and “bona fide news gathering activities,” § 16-17-470(E)(5).

**South Dakota**  
(S.D. CODIFIED  
LAWS §§ 23A-35A-  
1, -20 (2010))

Third parties to conversations may not use an “eavesdropping device” to record, however eavesdropping devices do not include “[a]ny telephone or telegraph instrument, equipment, or facility, or any component thereof,... furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business,” § 23A-35A-1(6)(a); use of hidden cameras is banned to record activity in “private places,” defined as places “where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access,” § 22-1-2(33).

**Vermont**  
(VT. STAT. ANN.  
tit. 13, § 2605 )

It is illegal to use a hidden video or audio recorder in a “private place,” which is defined as “a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance,” § 76-9-401(1).

The Vermont Supreme Court has held that nonconsensual surreptitious recording inside a home violated the privacy provision of the state’s constitution. The court also stated that the constitution cannot be invoked to protect areas or activities that have been willingly exposed to the public. VT. CONST. ch. 1, art. 11; *Vermont v. Geraw*, 795 A.2d 1219, 1221–22 (Vt. 2002).