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Case for Non-Enforcement of Anti-Recording Laws against Citizen Recorders

Mark Brncik

A CASE FOR NON-ENFORCEMENT OF ANTI-RECORDING LAWS AGAINST CITIZEN RECORDERS

"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws."[1]

INTRODUCTION

In September of 2010, police officers in Roy, Utah shot and killed Todd Blair while executing a no-knock warrant to search his home for drugs.[2] Roy Police Chief Greg Whinham claimed that Blair was holding a golf club above his head and that he approached the officer "in an attacking motion."[3] The Roy police recorded the incident.[4] The Salt Lake Tribune posted the video on its website,[5] and later the video was also uploaded to YouTube.[6] The video of the Blair shooting sparked a debate over whether the tactics the police used to raid Blair's home went too far.[7] Police investigators analyzed the video and cleared the officer of wrongdoing because he "had less than a second" to determine

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[1] THOMAS PAINE, *Dissertations on First Principles of Government*, *in* LIFE AND WRITINGS OF THOMAS PAINE 242, 278 (Daniel Edwin Wheeler ed., 1908).

[2] Lana Groves & Pat Reavy, *Roy Man Shot and Killed During Police Drug Raid*, DESERET MORNING NEWS, Sept. 18, 2010, at B8.

[3] *Id.*

[4] Erin Alberty, *Police Video Shows How Drug Raid Turned Deadly*, SALT LAKE TRIB. (Dec. 24, 2010, 6:54 AM), http://www.sltrib.com/sltrib/home/50932722-76/blair-burnett-officers-police.html.csp?page=1 (updated March 29, 2011, 12:38 AM).

[5] *Id.*

[6] *Blair Shooting.m4v*, YOUTUBE (Dec. 23, 2010), http://www.youtube.com/watch?v=WV6Bq8xeQrU&feature=player_embedded.

[7] *See* Ron Barnett & Paul Alongi, *Critics Knock No-Knock Police Raids: The Increasing Use of Surprise Tactics Raises Privacy, Risk Questions*, USA TODAY, Feb. 14, 2011, at 3A (criticizing no-knock warrants for giving residents "seconds to decide if they face a police raid or a home invasion"); Ryan Grim, *Police Kill Man in Drug Raid Gone Wrong*, HUFFINGTON POST (Jan. 18, 2011, 1:05 PM), http://www.huffingtonpost.com/2011/01/18/utah-video-police-kill-man-drug-raid_n_810420.html (updated May 25, 2011, 7:25 PM) (noting that "Blair's death raises the question of why multiple heavily-armed [sic] officers were sent to raid a drug addict").

whether Blair was holding a golf club or a sword.[8] The Roy police department's video recording of the Blair shooting was key in the debate over police tactics that followed the shooting, as well as the exoneration of the officer involved.[9]

When citizens record the police, however, some police officers become camera-shy.[10] In March 2010, Anthony Graber was pulled over for "popping a wheelie" on a Maryland highway while driving eighty miles per hour in a sixty-five mile-per-hour zone.[11] Graber had a small camera mounted on his bike helmet.[12] The plain-clothes officer who pulled Graber over was "wielding a gun" while he approached Graber, but later holstered the weapon and gave Graber a speeding ticket.[13] On March 10, Graber posted the video of his encounter with the officer on YouTube.[14] Prosecutors responded by obtaining a grand jury indictment alleging that Graber violated a Maryland wiretap law.[15] Maryland's wiretapping statute prohibits a person from recording another person's oral communications unless all parties consent to the recording.[16] This statute and other so-called "all-party consent" wiretapping statutes apply where a citizen secretly records an oral communication.[17]

The charges filed against Graber led to widespread criticism. Opponents cite the 1991 Rodney King video, which showed Los Angeles police officers unjustifiably beating King, as evidence that public recording of police can expose problems in police forces—racism and brutality in King's case—and set the stage for

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[8] Alberty, *supra* note 4.

[9] *See supra* notes 7–8 and accompanying text.

[10] Although the topic of this Note is the use of all-party consent statutes to prevent citizen recordings of police activities, police have not limited themselves to this method. *See, e.g.*, Randy Ludlow, *Deputy Confiscates Woman's Cell Phone*, COLUMBUS DISPATCH, July 30, 2010, at B1 (reporting that the police confiscated a woman's cell phone she was using to record them because they feared it was a "cell phone gun"); *see also* Radley Balko, *The War on Cameras*, REASON.COM, Jan. 2011, at 22, 31, *available at* http://reason.com/archives/2010/12/07/the-war-on-cameras ("In addition to arresting citizens with cameras for wiretapping, police can use vaguer catch-all charges, such as interfering with a police officer, refusing to obey a lawful order, or obstructing an arrest or police action.").

[11] Annys Shin, *From YouTube to Your Local Court*, WASH. POST, June 16, 2010, at A1.

[12] *Id.*

[13] *Id.*

[14] *Id.* For a video of the incident, see *Cop Pulls Out Gun on Motorcyclist*, YOUTUBE (June 5, 2010), http://www.youtube.com/watch?v=RK5bMSyJCsg.

[15] Shin, *supra* note 11, at A1.

[16] *See* MD. CODE ANN., CTS. & JUD. PROC. § 10–402(a)(1), (c)(3) (LexisNexis 2011) (prohibiting secret recording of oral conversations unless all parties consent).

[17] *See, e.g.*, Adams v. State, 424 A.2d 344, 347 (Md. 1981) (noting that the Maryland statute prohibits the "aural acquisition of the contents of a communication by use of" an electronic device).

positive change.[18] Some recent examples of newsworthy police recordings are the Oakland Bay Area Rapid Transit (BART) shooting video, in which several private citizens used their cell phone cameras and various pocket-sized recording devices to capture a police officer shooting a suspect,[19] and recordings of police interactions with Occupy Wall Street protestors, which show police using pepper spray against protestors.[20] After the BART shooting videos were passed around on the Internet, a case "normally . . . played out in a courtroom" became "one in which anyone with an Internet connection [could] serve as virtual judge and jury."[21] The same can be said for the newscasts of the King video. These videos put police conduct on stark display and led to widespread debate.[22]

Police recordings allow the public to view and debate police tactics. While the trooper's conduct in the Graber incident was not as disturbing as the conduct of the police in the King, BART, Blair, or Occupy Wall Street incidents, some aspects of Graber's traffic stop were troubling. The trooper in the Graber video "cut Graber off in an unmarked vehicle, approached Graber in plain clothes and yelled while brandishing a gun before identifying himself as a trooper."[23] If the public was barred from recording videos of on-duty police, it is unlikely that these instances of police abuse would have received the degree of attention and debate that they deserved. Prosecuting citizen recorders "discourages people from filming . . . even when they have a right to film."[24] The potential of receiving a substantial punishment[25] for recording police has a chilling effect on citizens who wish to record police misconduct. This Note argues that all-party consent

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[18] *See* Adam Cohen, *Should Videotaping the Police Really Be a Crime?*, TIME (Aug. 4, 2010), http://www.time.com/time/nation/article/0,8599,2008566,00.html (noting that "it's not hard to see why police are wary of being filmed" due to the reaction to the King video).

[19] *See* Madison Gray, *Bay Area Transit Cop Gets 2 Years in Passenger Shooting Death*, TIME (Nov. 5, 2010), http://newsfeed.time.com/2010/11/05/bay-area-closely-watches-bart-police-shooting-trial/.

[20] For an example of a prominent recording associated with Occupy Wall Street, see *UC Davis Protestors Pepper Sprayed*, YOUTUBE (Nov. 18, 2011), http://www.youtube.com/watch?v=6AdDLhPwpp4. *See also* Maria L. La Ganga et al., *Occupy Protests Put Police Tactics in Spotlight*, LOS ANGELES TIMES, Nov. 24, 2011, at 1 (reporting on the response to police tactics used to break up several Occupy Wall Street affiliated protests).

[21] Elinor Mills, *Web Videos of Oakland Shooting Fuel Protests*, CNET NEWS (Jan. 9, 2009, 1:23 PM), http://news.cnet.com/web-videos-of-oakland-shooting-fuel-protests/.

[22] *See supra* note 18 and accompanying text (noting the debate surrounding public video recording of the police).

[23] Cohen, *supra* note 18.

[24] *Id.*

[25] For an overview of punishments for violations of all-party consent statutes, see *infra* Part I.C.

wiretapping laws are privacy laws that can only be properly construed to protect the privacy rights of private citizens and are not applicable to the recording of police while they are performing their public duties. Since many of these prosecutions rest on a faulty interpretation of all-party consent statutes, this Note recommends that law enforcement agents not bring charges based on the these statutes against citizen recorders.

Part I of this Note presents a general background of federal and state wiretapping laws, focusing on different varieties of all-party consent statutes. Part II analyzes the privacy rights of on-duty police. Part III then examines the importance of public video recordings of on-duty police. Part IV discusses the problems raised by enforcing all-party consent statutes against citizen recorders, and looks at problems with current proposals to amend all-party consent statutes to allow police recording. Finally, Part V argues that, given the reduced expectation of privacy of police officers and the unlikelihood that citizen recorders will be convicted under an all-party consent wiretapping statute for recording police activities, police departments and prosecutors should adopt a voluntary policy of non-enforcement of all-party consent statutes against citizen recorders.

I. ONE-PARTY AND ALL-PARTY WIRETAPPING STATUTES: A BRIEF OVERVIEW

Wiretapping statutes come in two forms: all-party consent statutes and one-party consent statutes. This Part clarifies the difference between the two and provides a general background of these laws, and discusses state variations of all-party consent wiretapping statutes. Then, this Part briefly details different punishments under all-party consent statutes. Lastly, this Part analyzes the legislative intent behind all-party consent statutes.

A. The Federal Wiretapping Statute and State One-Party Consent Statutes

Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[26] also known as the "Wiretap Act,"[27] sets out the requirements for obtaining a legal wiretap and defines what

[26] Pub. L. No. 90–351 §§ 801–802, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. §§ 2510–2522 (2006)).

[27] *See Privacy & Civil Liberties: Federal Statutes*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, http://it.ojp.gov/default.aspx?area=privacy&page=1284 (last updated Apr. 7, 2010) (discussing the background, amendments, and provisions of the Wiretap Act).

constitutes a legal wiretap.[28] The Wiretap Act prohibits a private person from using a recording device to intercept an oral communication.[29] The Act, however, permits a person to record his or her *own* conversations, or to intercept a conversation between two or more people where one of the parties to the conversation consents to the recording.[30] Thus, the Act and other state statutes that track its language[31] are referred to as "one-party consent" wiretapping laws. The Wiretap Act has two goals: (1) to "forbid[] the interception of wire, oral or electronic communications by private persons" unless one party consents to the interception and (2) to give law enforcement the ability to secure judicial approval of a wiretap in an effort to curb organized crime.[32] While private citizens are not permitted to record a conversation unless one of the parties consents, police may secretly record conversations without consent provided that the recording is authorized by a judicial order.[33] Finally, The Wiretap Act and state statutes following the one-party consent approach do not allow citizens to make recordings for a criminal or tortious purpose, regardless of whether one party consented to the recording.[34]

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[28] *See generally* 18 U.S.C. §§ 2510–2522 (2006).

[29] 18 U.S.C. § 2511(1)(b).

[30] 18 U.S.C. § 2511(2)(d) (allowing a person "not acting under color of law" to record a conversation if that person is a party to the conversation or if "one of the parties to the communication has given prior consent to such interception"); *see also* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING & EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE § 5:102, at 5–151 (3d ed. 2007) (noting that under the federal statute "it is legally permissible . . . [for a] private citizen not acting in cooperation with any government agent or agency . . . to intercept his or her own conversations, or to intercept communications between other people so long as one of the participants to the conversation gives prior consent").

[31] *See, e.g.*, ALASKA STAT. § 42.20.310 (2011) (prohibiting a person from "us[ing] an eavesdropping device to hear or record . . . an oral conversation without the consent of a party to the conversation"); ARIZ. REV. STAT. ANN. § 13–3005(A)(1)–(2) (2011) (prohibiting a private citizen from recording a conversation "at which he is not present"); OHIO REV. CODE ANN. § 2933.52(B)(4) (West 2006) (prohibiting using a recording device to intercept a communication unless a person is a member of law enforcement or "if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act").

[32] FISHMAN & MCKENNA, *supra* note 30, § 1:10, at 1–16–1–17.

[33] *Id.* at 1–17.

[34] *See, e.g.*, 18 U.S.C. § 2511(2)(d) (permitting a person to record with the consent of one party, except where the recording is "for the purpose of committing any criminal or tortious act"); IDAHO CODE ANN. § 18–6702(2)(e) (West 2011) (allowing interceptions of communications if one party consents but providing that "[i]t is unlawful to intercept any communication for the purpose of committing any criminal act"). For an overview of what constitutes a "criminal or tortious purpose," see FISHMAN & MCKENNA, *supra* note 30, § 5:104.

B. All-Party Consent Anti-Wiretapping Statutes

The Wiretap Act authorized states to enact their own wiretapping statutes,[35] and most states have done so.[36] The federal statute permits states to adopt statutory schemes that are more restrictive than the federal statute, but does not permit states to enact more permissive statutes.[37] States were thus able to enact the more restrictive all-party consent wiretapping statutes that are at issue in this Note.

Anthony Graber's prosecution involved the application of an all-party consent wiretapping statute.[38] All-party consent wiretapping statutes prohibit recording a conversation unless all the parties to that conversation consent to the recording. Thirteen states currently have all-party consent laws.[39] Maryland, for example, makes it a crime to "[w]illfully intercept . . . any wire, oral, or electronic communication"[40] but allows a person to intercept a "wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception."[41] The Maryland statute, like eleven of the thirteen all-party consent statutes, specifies that only the secret recording of a *private* conversation is prohibited.[42] The prosecution in the Graber case argued that Graber violated the Maryland all-party

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[35] FISHMAN & MCKENNA, *supra* note 30, § 1:22, at 1–34 (citing 18 U.S.C.A. § 2516(2)); *see also* J. Peter Bodri, Comment, *Tapping into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1327, 1334 (2011) (pointing out that a state wiretapping law must be at least as restrictive as the Wiretap Act, and may be more restrictive).

[36] *See* FISHMAN & MCKENNA, *supra* note 30, § 1:22 (listing references to state wiretapping statutes).

[37] *Id.* at 1–34.

[38] *See* Shin, *supra* note 11, at A1 (noting that the Maryland law under which Graber was convicted requires all recorded parties to consent).

[39] *See* Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1549 n.2, n.6 (2008) (citing the thirteen state statutes that require all parties to consent before recording a conversation).

[40] MD. CODE ANN., CTS. & JUD. PROC. § 10–402(a)(1) (LexisNexis 2011).

[41] CTS. & JUD. PROC. § 10–402(c)(3).

[42] *See* CTS. & JUD. PROC. § 10–401(2)(i) (defining "oral communication" for the purposes of the Maryland all-party consent statute as "any conversation or words spoken to or by any person in private conversation"). For other state statutes with similar provisions, see, e.g., CAL. PENAL CODE § 632(a) (West 2010) (prohibiting the secret recording of a "confidential communication" without the consent of all parties to that communication); DEL. CODE ANN. tit. 11, § 1335(a)(4) (2007) (providing that a person is guilty of a "violation of privacy" if that person records a communication by any "means of communicating privately, including private conversation"); WASH REV. CODE ANN. § 9.73.030(1)(b) (West 2011) (prohibiting recording a "[p]rivate communication, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all persons engaged in the conversation.").

consent wiretapping law by videotaping his conversation with the trooper who pulled him over without first obtaining that trooper's consent to be recorded.[43]

Two states' wiretapping statutes can plausibly be construed to apply to all communications, whether private or not. The Illinois wiretapping statute forbids a person from recording a conversation "unless [that person] does so . . . with the consent of all of the parties to such conversation . . . ."[44] Illinois defines a conversation as "any oral communication between [two] 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."[45] The Massachusetts wiretapping statute prohibits the "interception . . . of any . . . oral communication," and provides that "'interception' means to . . . secretly record the contents of *any* . . . oral communication."[46] Because these two statutes specifically apply to all oral communications, they could prohibit citizen recordings of police.[47]

C. Punishments Under Wiretapping Statutes

All-party consent wiretapping laws have a wide variety of potential punishments. The federal wiretapping statute imposes a maximum sentence of five years' imprisonment for private citizens who violate the statute.[48] State all-party consent statutes have a variety of punishments, ranging anywhere from a $2,500 fine[49] to a misdemeanor charge and the destruction of the recording[50] to a five-year prison sentence and a $10,000 fine.[51]

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[43] *See* Shin, *supra* note 11, at A1 ("[P]rosecutors . . . obtained a grand jury indictment alleging [Graber] had violated state wiretap laws by recording the trooper without his consent.").

[44] 720 ILL. COMP. STAT. ANN. 5/14–2(a)(1)(A) (West 2003).

[45] 720 ILL. COMP. STAT. ANN. 5/14–1(d).

[46] MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4), (C)(1) (West 2000) (emphasis added).

[47] For state court cases involving the applicability of similar statutes to police recordings, see *infra* Part II.B.

[48] 18 U.S.C. § 2511(4)(a) (2006) (providing that whoever intentionally intercepts a communication without the consent of one party will be fined, imprisoned for up to 5 years, or both).

[49] *See* CAL. PENAL CODE § 632(a) (West 2010) (creating a punishment for violation of eavesdropping laws not to exceed $2,500, one year in prison, or both).

[50] *See* HAW. REV. STAT. § 711–1111(4) (West 2011) (punishing violators of the statute with a second degree misdemeanor and allowing the court to order "the destruction of any recording made in violation of this section").

[51] *See* MD. CODE ANN., CTS. & JUD. PROC. § 10–402(b) (LexisNexis 2011) (punishing violators of the statute with a felony charge, and "imprisonment for not more than 5 years or a fine of not more than $10,000, or both").

Some all-party consent statutes create different levels of punishment depending on what the offender recorded;[52] others impose lighter sentences for first-time violators and impose harsher sentences for repeat violators.[53]

D. Legislative Intent of All-Party Consent Statutes

The legislative history for all-party consent statutes is sparse, but what is available indicates that they were enacted to protect the privacy rights of citizens. Broadly speaking, the legislative history refers to two goals: (1) to protect the privacy of communications; and (2) to give police the ability to conduct lawful wiretaps.[54] The Florida and Massachusetts all-party statutes contain legislative findings, which illuminate the purpose of the wiretapping statutes. The Florida statute provides that its goal is to "safeguard the privacy of innocent persons" by permitting interception without the consent of all parties "only when authorized by a court."[55] The preamble to the Massachusetts statute states that it was enacted with two general purposes: (1) to restrict the right of legal secret recording to the police and (2) to protect all other citizens from clandestine recording without their prior consent.[56] After first declaring that law enforcement officials must be allowed to use secret recording methods because "[n]ormal investigative procedures are not effective in the investigation of illegal acts committed by organized crime," the preamble goes on to state that "the secret use of [electronic recording] devices by private individuals must be prohibited."[57] The Massachusetts legislature's concern was that "the uncontrolled development of and unrestricted use of modern electronic surveillance devices pose grave dangers to the *privacy* of all *citizens* of [Massachusetts]."[58]

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[52] *See* DEL. CODE ANN. tit. 11, § 1335(c) (2007) (making it a misdemeanor to intercept a party's communication without all the consent of all parties, and making it a felony to surreptitiously record someone who is getting undressed).

[53] *See* MONT. CODE ANN. § 45–8–213(3)(a) (2011) (penalizing first-time violators with a fine of up to $500, a six-month jail sentence in county jail, or both); § 45–8–213(3)(b) (penalizing second-time violators with a one-year county jail sentence, a fine of up to $1000, or both); § 45–8–213(3)(c) (penalizing third-time violators with up to a 5-year sentence in prison, a fine of up to $10,000, or both).

[54] *See, e.g.*, FLA. STAT. ANN. § 934.01(4) (West 2001) (stating that, to protect privacy, wiretapping should be permitted only by court authorization and limited to the investigation of a select number of crimes); MASS. GEN. LAWS ANN. ch. 272, § 99(A) (West 2000) (same).

[55] FLA. STAT. ANN. § 934.01(4).

[56] MASS. GEN. LAWS ANN. ch. 272, § 99(A).

[57] *Id.*

[58] *Id.* (emphasis added).

The legislative history for these statutes, then, contains two separate goals: one for citizens and one for police. They unquestionably reflect a concern for the privacy of citizens.[59] But at the same time, these statutes are also meant to enable the police to conduct lawful wiretaps. There is no indication in any of the available legislative history that all-party consent statutes were intended to protect the privacy of anyone other than private citizens.

II. PRIVACY RIGHTS, PUBLIC EMPLOYEES, AND PUBLIC PLACES: A REDUCED EXPECTATION OF PRIVACY FOR ON-DUTY POLICE OFFICERS

The Graber case received a great deal of coverage, likely due to the apparent incongruity of applying a statute designed to protect the privacy rights of citizens to shield police officers from public scrutiny. Graber's case is another example in a recent trend of applying old privacy laws in novel ways that appear to run counter to the proper scope of those laws.[60] First, this Part asks whether police privacy expectations can be viewed as being objectively reasonable, given that police officers are public officials and given the proliferation and general acceptance of recording devices. Then, this Part reviews various courts' analysis of police privacy rights when determining whether to apply all-party consent statutes to citizen recordings.

A. Privacy Rights of On-Duty Police Officers

The proliferation of recording devices has had a strong impact on the public perception of what may and may not properly be considered "private." The reduced expectation of privacy that results from the proliferation of new technology has been litigated frequently since *Katz v. United States*.[61] Justice Harlan's concurring opinion in *Katz* laid out a two-pronged requirement for determining whether a privacy interest exists: A person must have

[59] *See* Commonwealth v. Hyde, 750 N.E.2d 963, 972–73 (Mass. 2001) (Marshall, C.J., dissenting) (noting that the Massachusetts statute was amended to set guidelines for judicially approved wiretaps, to prevent the "newly discovered practice of private telephone companies' eavesdropping on the conversations of [their] private customers," and to prevent private investigators and private persons from bugging telephones).

[60] *See, e.g.*, L.L. Brasier, *Is Reading Wife's E-Mail a Crime?*, DETROIT FREE PRESS, Dec. 26, 2010, at 7A (reporting that a Michigan statute "typically used to prosecute such crimes as identity theft or stealing trade secrets" was being used to prosecute a man for logging on to his wife's computer and reading an e-mail correspondence which revealed she was having an affair).

[61] 389 U.S. 347 (1967).

"an actual (subjective) expectation of privacy, and . . . the expectation must be one that society is prepared to recognize as 'reasonable.'"[62]

Cases analyzing the *Katz* test are useful in demonstrating how the proliferation of "intrusive" technology can chip away at privacy expectations. These decisions demonstrate that as intrusive technology becomes more commonly used, people have less of a reasonable expectation that the new technology will not intrude their privacy.[63] *Kyllo v. United States*[64] demonstrates how the Supreme Court has treated intrusions by new technology. In *Kyllo*, the police argued that using a thermal-imaging device to view heat waves coming off of a suspect's house did not invade the suspect's privacy because the imaging device did not expose the private details of the suspect's home.[65] But the Court held that in cases involving new technology "[w]here . . . the Government uses a device that is *not* in general public use," people have an objectively reasonable expectation of privacy from the use of that technology to reveal the contents of their private spaces.[66] And since the thermal-imaging device the government used was not in general public use, the Court held that the government violated the suspect's subjective and objective expectations of privacy by using the new technology to view heat waves coming off of his home.[67] *Kyllo* singled out technology that is "not in general public use" when it held that the government's use of thermal imaging was an unreasonable search.[68] This suggests that there is a reduced expectation of privacy from technology that *is* in general public use.

Under the Court's reasoning in *Kyllo*, people likely have a decreased expectation of privacy in being recorded—at least when they are in public. From the King beating to the BART shooting, video recording technology has proliferated to the point that it is now in general use. While possessing a video recorder in 1991 was a "then-rare fortuity," today video recordings of police-citizen encounters are "the norm, more frequent and more widely

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[62] *Id.* at 361 (Harlan, J., concurring).

[63] *See, e.g.*, United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007) (finding that "the Supreme Court has insisted, ever since [*Katz*], that the meaning of a Fourth Amendment search must change to keep pace with the march of science").

[64] 533 U.S. 27 (2001).

[65] *Id.* at 35.

[66] *Id.* at 40 (emphasis added).

[67] *Id.*

[68] *Id.*

disseminated, within and without the news media."[69] A private citizen recorded the King beating from the terrace of his home using a Sony Handycam.[70] Contrast this with the BART shooting, in which multiple onlookers recorded the shooting using cell phone cameras and posted their videos to the Internet.[71] Recording devices are ubiquitous in today's society. As recording devices become more prevalent (or even commonplace), it becomes increasingly unreasonable for police to expect the performance of their duties to go unrecorded.

The Supreme Court has also attached a lessened expectation of privacy in public places. In *Katz*, the Court recognized 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."[72] Subsequent cases have followed this approach. For example, in *United States v. Knotts*,[73] police officers placed a beeper in a five-gallon container of chloroform.[74] The police then arranged for that container to be sold to a suspected drug dealer, and after he purchased it, used the beeper inside of the container to track the suspect's movements.[75] The Court held that this was not an invasion of privacy and that no search took place because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[76] The clear trend from the time that *Katz* was decided seems to point toward a very limited expectation of

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[69] Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 617–18 (2009).

[70] Michael Goldstein, *The Other Beating*, L.A. TIMES, Feb. 19, 2006, at A2.

[71] *See* Mills, *supra* note 21 (discussing the recordings and providing multiple links to different recordings of the BART shooting).

[72] Katz v. United States, 389 U.S. 347, 351 (1967).

[73] 460 U.S. 276 (1983).

[74] *Id.* at 278.

[75] *Id*. at 278–79.

[76] *Id.* at 281. The Supreme Court has recently decided another GPS tracking case, and clarified that "the *Katz* reasonable expectation-of-privacy test has *added to*, not *substituted for*, the common-law trespassatory test." United States v. Jones, 132 S. Ct. 945, 952 (2012). In *Jones*, the challenged search was one in which police attached a GPS tracking device "on the undercarriage of [a] Jeep while it was parked in a public parking lot." *Id.* at 947. The Court distinguished this search from the search in *Knotts*, reasoning that the "common law trespassatory test" for a search was not at issue in *Knotts* becase "[t]he beeper had been placed in [a] container before it came into Knotts' possession, with the consent of the then-owner." *Id.* at 952. The Court noted that it was irrelevant to its analysis that the exterior of the car was exposed to the public, holding that "[b]y attaching the device to the Jeep, officers encroached on a protected area" under the trespassatory test. *Id.* The Court, however, clarified that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." *Id.* at 953. Because recording police performing public duties is more akin to the transmission of data than to the common-law trespass at issue in *Jones*, this Note analyzes the issue under *Katz* and its progeny.

privacy in public places. When police officers perform functions in public, under the reasoning of the *Katz* line of cases, they have a reduced expectation of privacy.

Police also have less privacy expectations due to their status as public figures and public employees. Joseph Cassilly, the Maryland prosecutor who pursued charges against Anthony Graber, however, argued that "not everything a police officer does on the job should be for public consumption."[77] Cassilly drew a line between large gatherings, where police arguably have little expectation of privacy, and situations where there are fewer people around, where police have a heightened expectation of privacy.[78] But, in the defamation context, the Supreme Court has concluded that public officials have a decreased expectation of privacy by virtue of their status as public officials.[79] The reasoning behind this position is relatively straightforward: "It is inconsistent with democracy and democratic political accountability for government officials to have protectable privacy interests when performing official functions, especially in the context of adversarial encounters with members of the public."[80]

Similarly, commentators have unanimously concluded that police officers have a decreased expectation of privacy when taking into consideration the proliferation of recording devices, the fact that police are public employees, and the fact that many (if not most) police-citizen interactions take place on public streets and in public places.[81] But even though all-party consent

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[77] Radley Balko, *Police Officers Don't Check Their Civil Rights at the Station House Door*, REASON.COM (Aug. 9, 2010), http://reason.com/archives/2010/08/09/police-officers-dont-check-the.

[78] *See id.* ("Generally, Cassilly says, police actions in front of large crowds of people can probably be recorded. But citizen recorders put themselves in legal jeopardy when there are fewer people around, and an officer is more likely to think his conversations are private.").

[79] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) ("[P]ublic men, are, as it were, public property . . . ." (quoting Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952))).

[80] Wasserman, *supra* note 69, at 650.

[81] *See* Jesse Harlan Alderman, *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*, 9 FIRST AMENDMENT L. REV. 487, 514–15 (2011) (concluding that "police officers in the public performance of their duties do not own an objective expectation of privacy"); Bodri, *supra* note 35, at 1343 (finding that "there is no expectation of privacy in an on-duty police officer's interactions with citizens because all statements that on-duty police officers make to private citizens in public spaces are knowingly exposed to the public"); N. Stewart Hanley, Note, *A Dangerous Trend: Arresting Citizens for Recording Law Enforcement*, 34 AM. J. TRIAL ADVOC. 645, 653–54 (2011) (concluding that "[t]he right of the public to know how police are conducting their duties simply outweighs the individual privacy concerns" of police officers); Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 300 (2011)

wiretapping statutes are, at their core, privacy statutes, courts have come to contradictory conclusions regarding the applicability of these statutes to citizen recordings of on-duty police performing public duties.

B. State Courts and Police Privacy Rights

Recent charges against citizen recorders have produced mixed results. Maryland Circuit Court Judge Emory A. Plitt dismissed the charges against Anthony Graber for secretly recording an officer during a traffic stop.[82] Judge Plitt dismissed these charges in part because public officials who exercise their "power in a public forum . . . should not expect [their] activity to be shielded from public scrutiny."[83] This decision also recognized the increased availability of recording devices and the resulting loss of privacy. Judge Plitt noted that recording technology has "changed rapidly as to cost, size, weight, quality and storage systems," and that "stationary and portable cameras and other recording devices are everywhere."[84]

In Florida, another state that has an all-party consent wiretapping statute, a woman who was charged for recording her son's arrest had all charges against her dropped.[85] Other states, however, have pressed ahead with prosecutions for recording police. For instance, in Illinois, Christopher Drew was charged under that state's eavesdropping statute for recording a police encounter that took place on the streets in Chicago.[86] The judge in

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(finding that police officers have "a legitimate expectation of privacy that derives from the penumbras of the Bill of Rights," but recognizing that this right "is seriously diminished while on duty due to the public nature of their office"); Mishra, *supra* note 39, at 1552 (arguing that enforcing all-party consent statutes against citizens recorders "overprotect[s] police officers' privacy while in the line of duty" and "is inconsistent with most sources of privacy values in our legal culture"); 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, 1006 (2009) (concluding that "[t]he privacy concerns at the forefront of anti-wiretapping laws were to protect private citizens from law enforcement officers, not the reverse").

[82] Pete Hermann, *Judge Says Man Within Rights to Record Police Traffic Stop*, BALT. SUN, Sept. 27, 2010, at 1A.

[83] *Id.*

[84] *Id.*

[85] Allison Bybee, *Lawsuit Filed: Mom Arrested for Recording Son's Arrest*, FOX 29 WFLX.COM (Aug. 4, 2010, 1:08 PM), http://www.wflx.com/Global/story.asp?S=12924814 (reporting that a mother charged under Florida's eavesdropping statute for recording her son's arrest was filing a lawsuit against the department).

[86] Radley Balko, *Illinois: Where Recording On-Duty Cops is Treated Like Sexual Assault*, REASON.COM (May 20, 2010), http://reason.com/blog/2010/05/20/illinois-where-videotaping-on.

this case rejected Drew's motion to dismiss,[87] and Drew is currently awaiting trial.[88]

Several courts considered the applicability of all-party consent statutes to citizen recordings of police prior to the proliferation of handheld recording devices in the 2000s, arriving at contradictory conclusions. Massachusetts took the most restrictive approach in upholding the application of all-party consent laws to police encounters. In *Commonwealth v. Hyde*,[89] the Supreme Judicial Court of Massachusetts upheld the conviction of a citizen for recording the police in contravention of the Massachusetts all-party consent statute.[90] The current Massachusetts statute, which is identical to the statute at issue in *Hyde*,[91] prohibits a private person from "secretly record[ing] the contents of any . . . oral communication" unless all parties consent.[92] In *Hyde*, a citizen was prosecuted for secretly recording the police during a traffic stop.[93] The defendant filed a motion to dismiss, arguing that "because the police officers were performing official police duties during the stop of his car, they had no privacy expectations in their words."[94] The majority, however, upheld the defendant's conviction, engaging in what it characterized as a "straightforward matter of statutory interpretation" to come to the conclusion that "[s]ecret tape recording by private individuals has been unequivocally banned."[95] To support this conclusion, the majority relied on a portion of the wiretapping statute's preamble, which stated that Massachusetts enacted a stricter anti-wiretapping statute due to concern over the increased availability of electronic recording devices and "the recognition that there was no way effectively to prohibit the sale or manufacture of these devices."[96]

The *Hyde* dissent analyzed the Massachusetts statute's legislative history to conclude that the statute does not apply to citizen recordings of police.[97] The dissent argued that "[t]here is

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[87] *Id.*

[88] Paris Schutz, *Eavesdropping Law*, WTTW CHICAGO TONIGHT (Dec. 15, 2011, 12:00 PM), http://chicagotonight.wttw.com/comment/3732.

[89] 750 N.E.2d 963 (Mass. 2001).

[90] *Id.* at 971.

[91] *See id.* at 966 (discussing the Massachusetts all-party statute at issue in the case).

[92] MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2000).

[93] *Hyde*, 750 N.E.2d at 964–65. The defendant in *Hyde* recorded a police altercation using a hidden hand-held tape recorder. *Id.* at 965.

[94] *Id.* at 965.

[95] *Id.* at 970–71.

[96] *Id.* at 966.

[97] *Id.*at 971–77 (Marshall, C.J., dissenting).

no hint in the legislative history that the Legislature contemplated the circumstances at issue in this criminal case: the tape recording of an encounter on a public way between a citizen and a police officer engaged in his official duties."[98] Rather, the dissent argued that the Massachusetts legislature intended the all-party statute to allow "police to engage in secret electronic surveillance of citizens suspected of organized crime" and "to protect the privacy of citizens."[99] The dissent concluded that Massachusetts's all-party consent statute was never intended to apply to citizen recordings of police.[100]

A Washington case, *State v. Flora*,[101] dealt with an all-party consent statute but reached a different conclusion than the *Hyde* majority opinion.[102] In *Flora*, the defendant secretly placed a tape recorder in a stack of papers to record the police during an encounter; the police noticed and confiscated the tape recorder after the defendant was arrested.[103] The court held that a conversation incidental to an arrest is "not entitled to be private."[104] Instead of broadly holding that no conversation between a citizen and a police officer is private, the court held that whether a conversation is private is a "fact-specific inquiry."[105] The court—emphasizing that this arrest involved "public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby"—determined that the police could not assert a privacy interest under the Washington statute.[106] Unlike the *Hyde* decision, *Flora* took into account whether a police-citizen conversation should be considered private. This was similar to the court's line of reasoning in the dismissal of the charges against Anthony Graber.[107]

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[98] *Id.* at 973.

[99] *Id.*

[100] *See id.* at 972 (noting that intent of the statute was to regulate the government's use of wiretaps and protect the privacy of citizens from nongovernment surveillance).

[101] 845 P.2d 1355 (Wash. Ct. App. 1992).

[102] Washington's electronic surveillance statute prohibits recording private conversations without the prior consent of all parties to that communication. *See* WASH. REV. CODE ANN. § 9.73.030(1)(a) (West 2011) (prohibiting the recording of any "[p]rivate conversation, by any device electronic or otherwise designed to record and/or transmit said communication").

[103] *Flora*, 845 P.2d at 1356.

[104] *Id.* at 1358.

[105] *Id.* at 1357.

[106] *Id.*

[107] *See* Hermann, *supra* note 82, at 1A (reasoning that the police, in exercising their "power in a public forum . . . should not expect [their] activity to be shielded from public scrutiny").

An Illinois case analyzing a similar statute came to the same conclusion as *Flora*. In *People v. Beardsley*,[108] a case involving the application of a previous version of the Illinois all-party consent statute,[109] a driver tape recorded an officer during a traffic stop despite that officer's refusal to consent to the recording.[110] Later, the driver recorded a conversation between the officer who pulled him over and another officer who arrived later at the scene without the knowledge of either officer.[111] The driver argued that the officers impliedly consented to this recording because they were both aware that he had recording equipment and was using that equipment.[112] The court, however, sidestepped this argument and instead held that this recording did not violate the wiretapping statute:

> "The primary factor in determining whether the defendant . . . committed the offense of eavesdropping is not . . . whether all of the parties consented to the recording of the conversation. Rather, it is whether the [officers] intended their conversation to be of a private nature under circumstances justifying such expectation."[113]

Because the officers had this discussion in the squad car while the driver sat in the back seat of that car, the court found that there was no expectation that this would be a private conversation. If the officers intended it to be a private conversation, they would have left the car and held their conversation elsewhere.[114]

After the *Beardsley* decision, it should be noted that the Illinois legislature amended the eavesdropping statute. Under the amended statute, a "conversation" is defined as any oral communication between parties "regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."[115]

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[108] 503 N.E.2d 346 (Ill. 1986).

[109] The current version of the statute prohibits surreptitious recording of a conversation or electronic communication unless a party does so "with the consent of all of the parties to such conversation or electronic communication." *See* 720 ILL. COMP. STAT. ANN. 5/14–2(a)(1) (West 2003).

[110] *Beardsley*, 503 N.E.2d at 347.

[111] *Id.* at 348.

[112] *Id.* ("The defendant . . . argues that [the police officers] impliedly consented to the recording of their conversation. The defendant maintains that the officers knew the defendant had the tape recorder with him in the back seat of the squad car and, yet, they neither physically removed it from his possession nor verbally stopped the defendant by warning him not to record their conversation.").

[113] *Id.* at 350.

[114] *Id.*

[115] 720 ILL. COMP. STAT. ANN. 5/14–1(d) (West 2003); *see also* Commonwealth v. Hyde,

Courts that have considered this amended text have concluded that "it was not the legislature's intent to provide a definition of 'conversation' so broad as to encompass any audible expression whatsoever."[116] But courts have generally interpreted the statute to "prohibit the recording of any conversation without the consent of all parties regardless of any party's expectation of privacy."[117] *Beardsley* may well have reached a different result if it was tried under the amended Illinois all-party statute.

Since *Hyde*, *Flora*, and *Beardsley* were decided, portable recording devices have proliferated to the point that they are generally available. *Hyde*, decided in 2001, is the most recent of the three decisions. The *Hyde* court expressed concern over the proliferation of recording devices,[118] and this concern has only been confirmed since that 2001 decision. Most cell phones today are capable of recording both audio and video, and there are ample channels available on the Internet for people to display their recordings.[119] And people now more commonly *use* the recording devices on their cell phones.[120] This results in a situation where "Big Brother is watching the people, but the people are watching him" due to "a balance of power in which all sides can record most police-public encounters occurring on the street and in the stationhouse."[121] As recording devices have become increasingly commonplace, all people (including police officers) have lost some sense of privacy from being recorded in public places. The *Katz* line of cases suggests that the more recording devices are used in society, the less objectively

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750 N.E.2d 963, 970 n.10 (Mass. 2001) (justifying its holding that the Massachusetts wiretapping statute applies to conversations between citizens and police by describing the *Beasley* holding and its legislative aftermath in Illinois).

[116] DeBoer v. Vill. of Oak Park, 90 F. Supp. 2d 922, 924 (N.D. Ill. 1999) (quoting *In re* Marriage of Almquist, 704 N.E.2d 68, 71 (Ill. App. Ct. 1998)) (quotation and alterations omitted).

[117] People v. Nunez, 756 N.E.2d 941, 952 (Ill. App. Ct. 2001) (quoting In re *Marriage of Almquist*, 704 N.E.2d at 71) (quotations and alterations omitted).

[118] *See Hyde*, 750 N.E.2d at 966 (finding that the legislature, in amending the Massachusetts anti-wiretapping act to require the consent of all parties to a recording, was in part concerned with the increased availability of recording devices).

[119] *See* Wasserman, *supra* note 69, at 600 ("New portable technology . . . enables people to produce their own personal records of their lives and environment, including their confrontations with police . . . [a]nd an ever-expanding bevy of internet sites . . . enable them to disseminate those recordings directly to the world . . . .").

[120] *See* Aaron Smith, *Mobile Access 2010*, PEW INTERNET & AMERICAN LIFE PROJECT (July 7, 2010), http://pewinternet.org/Reports/2010/Mobile-Access-2010/Summary-of-Findings.aspx (finding that the percentage of cell phone owners who have used their phone to record a video has increased from 19 percent in April 2009 to 34 percent in May 2010).

[121] Wasserman, *supra* note 69, at 601.

reasonable an expectation of privacy from them becomes.[122] This increased availability of recording devices and decreased expectation of privacy, coupled with police officers' status as public officials and the fact that most of their interactions with citizens take place in public, suggests that courts should be more willing to dismiss charges for recording police than they were at the time *Hyde* was decided.

III. THE IMPACT OF POLICE RECORDINGS ON PUBLIC DISCOURSE AND IN THE COURTROOM

Video recordings of police have become increasingly commonplace in recent years.[123] These recordings help to inform the public and to enrich the public debate over what is or is not abusive behavior. Video evidence is particularly valuable because videos provide the viewer a direct look at a particular interaction between police and citizens, and thus the viewer is more likely to view the video as a credible account of the interaction.[124] Laws that impose a penalty on citizens for recording police, however, may deter citizens from making these recordings. This Part analyzes the importance of recording police officers, both in terms of these recordings' value to the public at large, and their value as evidence in civil and criminal actions involving the police.

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[122] *See supra* notes 64–72 and accompanying text (arguing that as technology becomes more widely available that people have a decreased expectation of privacy related to that technology). It should be noted that the Supreme Court's recent opinion in *United States v. Jones*, 132 S. Ct. 945 (2012), clarified that the common-law trespass test for determining whether a search has occurred still has bearing on the *Katz* analysis. In *Jones*, the Court noted that its "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century," and specifically noted that later cases, including *Katz*, "have deviated from that exclusively property-based approach." *Id.* at 950–51. The *Jones* Court made it clear that it was not "mak[ing] trespass the exclusive test," and clarified that "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis." *Id.* at 953. The act that is the subject of this Note—the videotaping of police performing their public duties—is more similar to the transmission of electronic signals than it is to the sort of trespass at issue in *Jones*. Therefore, the implications of the *Jones* opinion on the rights of citizens to record police are not discussed at length in this Note.

[123] *See* Michael Newsom, *House OKs Citizens Taping Law Officers: Author Expects Senate to Kill Measure*, SUN HERALD (Feb. 14, 2011), http://www.sunherald.com/2011/02/14/2862780/house-oks-citizens-taping-law.html (describing the practice of "cop watching," where citizen activists routinely tape on-duty police officers). *See also* Cohen, *supra* note 18 (reporting that the NAACP has recently started to encourage its members to videotape their interactions with police officers).

[124] *See* Wasserman, *supra* note 69, at 619 (noting that video evidence offers fact finders—either a jury or the public at large—an eyewitness with which they are unlikely to disagree).

A. The Role of Police Recordings in Exposing Police Conduct to the Public

Videotapes of police conduct have helped to shape and change police policy. The most notable example of this is the investigation following the Rodney King beating. Los Angeles Mayor Tom Bradley established a commission to investigate the King beating in the wake of the incident.[125] The commission's report stated that it "owe[d] its existence to the [King beating] videotape."[126] Because "the report of the involved officers was falsified," which thwarted an attempt by King's brother to file a complaint, the commission concluded that the videotape was the key factor that led to the investigation.[127] The commission found that there were "a significant number of LAPD officers who repetitively misuse force and persistently ignore the written policies and guidelines of the Department regarding force."[128]

The importance of the King video cannot be overstated. If this recording was never made, there likely would have been no investigation into the LAPD's abusive tactics. Even if there was an investigation, "without the [King beating] videotape the complaint might have been adjudged to be 'not sustained,' because the officers' version conflicted with the account by King and his two passengers."[129] As the *Hyde* dissent notes, however, if the person who taped King lived in a state that penalized citizens for recording police, he "would have been exposed to criminal indictment rather than lauded for exposing an injustice."[130] The King video ultimately put the LAPD's abusive tactics under public scrutiny. Citizen recordings such as the King video may negatively impact the public's perception of police. But allowing citizen recording will ultimately strengthen public confidence in the police, as police departments change and improve procedures as new incidents are brought to light.

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[125] INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT ii (1991) [hereinafter LAPD REPORT], *available at* http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf.

[126] *Id.*

[127] *Id.*

[128] *Id.* at ix.

[129] *Id.* at ii.

[130] Commonwealth v. Hyde, 750 N.E.2d 963, 972 (Mass. 2001) (Marshall, C.J., dissenting). California is an all-party consent state, but there have been no reported prosecutions for recording police using California's all-party statute. *See* CAL. PENAL CODE § 632(a) (West 2010) (prohibiting private citizens from "intentionally and without consent of all parties to a confidential communication" from recording that communication).

B. The Impact of Police Recordings as Evidence

The Supreme Court has long recognized a right, rooted in the Fourteenth Amendment's Due Process Clause[131] and the Sixth Amendment's Compulsory Process and Confrontation Clauses,[132] which "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[133] The use of video recordings in cases involving citizens making assertions against police can be a crucial aid in the truth-seeking function of courts. The use of video recordings is particularly important in situations such as the BART shooting, in which the police use deadly force and therefore the victim cannot testify.[134] Police may also use citizen recordings to defend themselves in civil suits.[135] If a state prevents citizens from recording their interactions with police, it arguably deprives citizens of due process and their right to present a defense at trial by preventing this evidence from being created at the outset.

Citizen recordings are particularly important when considering that modern police often observe the so-called "Blue Code of Silence," a norm against reporting other officers' misconduct.[136] One commentator theorizes that the officers charged in the Rodney King beating were willing to use abusive tactics because they "must have believed that they could count on their colleagues to lie in a case of investigation."[137] In addition, the possibility that

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[131] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

[132] U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.").

[133] Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

[134] *See* Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 416–17 (2008) ("[W]hen deadly force is employed . . . there will necessarily be a dramatic asymmetry in the information and perspective available to the fact finder that favors the police.").

[135] *See* 42 U.S.C. § 1983 (2006) (providing that police who deprive a citizen of his or her rights may be held liable to that person "in an action at law, suit in equity, or other proper proceeding for redress"); *see also* Wasserman, *supra* note 69, at 618 ("Video evidence is uniquely important in civil rights actions arising from police-public confrontations.").

[136] Lacks, *supra* note 134, at 420 (quoting Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RES. 7, 7 (2002)) ("[C]ontemporary police culture often *demands* that officers lie or conceal the truth to protect their own. . . . [T]he police 'Blue Code of Silence' is an 'embedded feature of police culture' that commands loyalty and brotherhood among officers . . . .").

[137] *Id.* at 421 (quoting Jerome H. Skolnick, *It's Not Just a Few Rotten Apples: The Beating of Rodney King Reignites Los Angeles' Debate on Police Conduct*, L.A. TIMES, Mar. 7, 1991, at B7) (quotation marks omitted).

a court will suppress evidence obtained from an unlawful search or seizure has led to the practice of "testilying" among police.[138] Indeed, the commission that investigated the King beating noted that the King video was crucial to the investigation of the LAPD because "the report of the involved officers was falsified."[139] Without the video, King's account and the officers' falsified reports would have been the only evidence of police misconduct. Without the videotape to visually demonstrate to the public the true circumstances of the King beating, the general public would likely have ignored the incident.

Several recent Supreme Court decisions highlight the importance of video recordings as evidence. In *Scott v. Harris*,[140] the majority's opinion included a link to a video of a high-speed chase to bolster its conclusion that an officer did not use excessive force to terminate the chase.[141] *Scott* reached the Supreme Court on appeal from a summary judgment,[142] and "[the driver's] version of events . . . differ[ed] substantially from [the officer's] version."[143] The Court looked to a videotape of the incident and determined that the videotape contradicted the driver's story.[144] The Court recognized that at the summary judgment stage the facts must be viewed "in the light most favorable to the nonmoving party."[145] But it added the wrinkle that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record . . . a court should not adopt that version of the facts . . . ."[146] The majority responded to the dissent's claim that it was misrepresenting the events depicted in the video by posting the video to the Internet and inviting anyone to view its contents.[147]

A more recent case from the United States Court of Appeals for the Ninth Circuit, *Norse v. City of Santa Cruz*,[148] also employed this approach. In *Norse*, the plaintiff sued the City of

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[138] WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 39 (1999).

[139] LAPD REPORT, *supra* note 125, at ii.

[140] 550 U.S. 372 (2007).

[141] *Id.* at 378 n.5.

[142] *Id.* at 378.

[143] *Id.*

[144] *See id.* at 378–79 (finding that the videotape contradicted the respondent's claim that during the chase there was little threat to pedestrians).

[145] *Id.* at 380.

[146] *Id.*

[147] *Id.* at 378 n.5 (responding to Justice Stevens' claim that the majority was "misrepresenting [the video's] contents" by "allow[ing] the video to speak for itself" and providing a link).

[148] 629 F.3d 966 (9th Cir. 2010).

Santa Cruz after he was ejected from a city council meeting for making a "Nazi salute."[149] In a concurring opinion, Judge Kozinski stated that it was "clear that the council members [were not] entitled to qualified immunity" because the plaintiff's "sieg heil was momentary and casual, causing no disruption whatsoever."[150] To support his claim, Judge Kozinski included a link to a YouTube video of the incident.[151] *Norse*'s use of the *Scott v. Harris* "see for yourself" approach[152] suggests that the approach has gained acceptance among lower courts.

Some comments accompanying a recent Supreme Court denial of certiorari highlight the impact that video recordings can have on the fact finder. In *Kelly v. California*,[153] the Court denied certiorari in two cases challenging the admissibility in the penalty phase of death penalty trials of videotapes describing the impact of the loss of the victim on their loved ones.[154] The California Supreme Court upheld the use of these videos since the videos merely "implied sadness" and did not contain a "clarion call for vengeance."[155] In a statement respecting the denial of certiorari, Justice Stevens expressed concern that these videos may be unduly prejudicial, cautioning that that they may "put[] a heavy thumb on the prosecutor's side of the scale in death cases," and that "the Court has a duty to consider what reasonable limits should be placed on its use."[156] Justice Stevens's concern demonstrates the importance of video evidence relative to oral testimony. Stevens was concerned that these videos could be prejudicial because they were more forceful than written statements and brief oral testimony that had been upheld in previous decisions.[157] If the government prohibits citizens from recording police conduct, it potentially prohibits citizens and police from presenting forceful evidence in their defense at trial.

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[149] *Id.* at 969.

[150] *Id.* at 979 (Kozinski, J., concurring).

[151] *Id.* ("In the Age of YouTube, there's no need to take my word for it: There is a video of the incident that I'm 'happy to allow . . . to speak for itself.'" (quoting Scott v. Harris, 550 U.S. 372, 378 n.5 (2007))).

[152] *See Scott*, 550 U.S. at 378 n.5 (providing a link to the video at issue and allowing the video to "speak for itself").

[153] 129 S. Ct. 564 (2008).

[154] *Id.* (Stevens, J., respecting denial of certiorari).

[155] *Id.* at 565 (quoting People v. Kelly, 171 P.3d 548, 558 (Cal. 2007), *cert. denied* 129 S. Ct. 564 (2008)) (internal quotation marks omitted).

[156] *Id.* at 567.

[157] *Id.*

IV. NEGATIVE CONSEQUENCES OF ENFORCEMENT OF ALL-PARTY CONSENT STATUTES AGAINST CITIZEN RECORDERS

The current trend of enforcing all-party consent statutes against citizen recorders has several negative consequences. First, given that all-party statutes are properly construed to protect the privacy rights of citizens[158] and that police have at best a limited expectation of privacy,[159] enforcing all-party statutes against citizen recorders criminalizes innocent conduct and contributes to the so-called "overcriminalization phenomenon."[160] Second, enforcement of all-party statutes may in some circumstances violate the First Amendment. And third, even though a legislative solution appears to be in order, an amendment to permit police recording has proven to be difficult to achieve, and absent a non-legislative response these problems will remain.

A. Overcriminalization

Applying all-party consent wiretapping statutes to citizen recordings of police seems to fall within what one commentator calls "the overcriminalization phenomenon," which refers to "the implementation of crimes" that are "deficient in harmful wrongdoing and beyond any legitimate rationale for state action . . . ."[161] Due to an "enlargement in governmental authority and the breadth of law enforcement prerogatives," the amount of criminalized conduct has expanded, at times producing absurd results.[162] The main problem with overcriminalization is that it leads to "sentences that cannot contribute to the traditional goals of punishment in any meaningful sense."[163] Overcriminalization is a particular concern today, as prison overcrowding has become a major issue that state legislatures and courts have struggled to address.[164]

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[158] *See supra* Part I.D (analyzing the legislative history of two all-party consent statutes and concluding that they were intended to protect the privacy of citizens, rather than the privacy of public officials).

[159] *See supra* Part II.A (arguing that police have a limited expectation of privacy).

[160] Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

[161] *Id.* at 716–17.

[162] *Id.* at 704. Among the absurd criminal statutes detailed in this piece are an Alabama statute making it a felony to "train a bear to wrestle," a Tennessee statute which prohibits "hunt[ing] wildlife from an aircraft," and a federal statute prohibiting placing advertisements on the American flag in the District of Columbia. *Id.*

[163] *Id.* at 716.

[164] *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1923 (2011) (upholding an order which required the State of California to release an estimated 46,000 prisoners to remedy constitutional violations associated with overcrowding).

As previous sections of this Note have discussed, all-party consent statutes are privacy statutes and cannot be properly construed to apply to recordings of on-duty police.[165] And recording police officers while they perform their public duties is beneficial both to the public and the police.[166] If recording police is beneficial to society and does not intrude on police officers' legitimate privacy rights, it does not follow that this is conduct that ought to carry with it a criminal penalty. In the Graber incident, for instance, the trooper whom Graber recorded arguably "suffered no real harm," whereas Graber was "incarcerated overnight" and "had to endure the stress and expense of felony charges . . . ."[167] Another important factor is that police regularly record citizens through dashboard-mounted cameras during traffic stops.[168] Considering that recording on-duty police is not overly harmful to police and that police often record their own interactions with citizens, preventing citizens from recording police seems to serve no legitimate purpose of punishment.

B. First Amendment Issues

Another argument against applying all-party consent laws to police recordings is that the application might violate the First Amendment's guarantee that no law shall be made "abridging the freedom of speech, or of the press."[169] Some commentators argue that creating a video recording is a form of speech.[170] But even if

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[165] *See supra* Part II (arguing that the proliferation of recording devices and the nature of police work suggest that all-party consent statutes do not apply to police officers).

[166] For a discussion of the benefits of citizen recording, see *supra* Part III.

[167] Radley Balko, *Maryland Judge Tosses the Felony Wiretapping Charges Against Anthony Graber*, REASON.COM (Sept. 27, 2010), http://reason.com/blog/2010/09/27/maryland-judge-tosses-the-felo.

[168] *See* Skehill, *supra* note 81, at 997 ("Police departments have . . . taken advantage of recording technology by documenting public rallies and traffic stops.").

[169] U.S. CONST. amend. I.

[170] *See, e.g.*, Alderman, *supra* note 81, at 519 (finding that "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"); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339 (2011) (arguing that "[i]n today's world, personal image capture is part of a medium of expression entitled to First Amendment cognizance"); Skehill, *supra* note 81, at 1002–03 (finding that courts have found a First Amendment right to record police misconduct); Wasserman, *supra* note 69, at 658–60 (finding a First Amendment right to record police deriving from the freedom to petition to the government). *But see* Kies, *supra* note 81, at 296–97 (finding that, while the "First Amendment's Free Press Clause protects civilians' right to record the police," limitations on that right may be constitutionally permissible only after a "thorough assessment of the countervailing interest at stake and the state's proffered interest in protecting it").

a video recording is a form of speech, all-party consent statutes might not unconstitutionally abridge that speech.

First, all-party consent statutes appear to be content neutral,[171] since they are a flat prohibition on recording conversations without the consent of all parties and make no reference to the content of those communications.[172] Second, these statutes do not appear to be impermissibly overbroad. A court can strike down a statute as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[173] Arguing that all-party statutes are overbroad presents two seemingly insurmountable problems. First, there are few reported prosecutions for recording police. Second, the Supreme Court has repeatedly recognized that the overbreadth doctrine is "strong medicine" and that it should be "employed . . . sparingly and only as a last resort."[174] Finally, all-party consent statutes do not appear to be impermissibly vague. There are two grounds for invalidation based on vagueness: (1) a statute does not provide notice that enables a reasonable person to know what it prohibits; or (2) a statute "authorizes or encourages seriously discriminatory enforcement."[175] In either case, all-party consent statutes are fairly clear in that they prohibit recording without the consent of all parties. A court would have to stretch to strike down an all-party consent statute for being impermissibly vague.

Nevertheless, a recent decision from the United States Court of Appeals for the First Circuit found that the right to record police was implicit in the First Amendment's protection of freedom of

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[171] It is generally acceptable to regulate the time, place, and manner of speech as long as that regulation is reasonable, content neutral, "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quotations and citations omitted). The government could assert a myriad of "significant" interests in justifying this speech restriction, most obviously the interest of promoting effective law enforcement.

[172] The "principal inquiry" in determining whether a regulation is a regulation of content is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*

[173] United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)) (quotations omitted).

[174] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

[175] United States v. Williams, 128 S. Ct. 1830, 1845 (2008) (citation omitted). The Court recently changed this standard, without explanation, from voiding a statute for vagueness "[i]f it authorizes or even encourages arbitrary and discriminatory enforcement" to voiding a law if it "authorizes or encourages *seriously* discriminatory enforcement." Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 258 (2010) (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000), for the former standard and *Williams*, 128 S. Ct. at 1845, for the latter) (internal quotation marks omitted).

speech and freedom of the press.[176] In *Glik v. Cunniffe*,[177] Simon Glik brought a suit under 42 U.S.C. § 1983 claiming that his arrest for filming several police officers arresting a man on the Boston Common violated his rights under the First and Fourth Amendments.[178] The court framed the question as a narrow one: "is there a constitutionally protected right to videotape police carrying out their duties in public?"[179] "Basic First Amendment principles, along with case law from this and other circuits," the court held, "answer that question unambiguously in the affirmative."[180]

The *Glik* court reasoned that the freedom of the press guaranteed by the First Amendment protected a citizen's right to record police.[181] The court acknowledged that "the right to film is not without limitations" and "may be subject to reasonable time, place, and manner restrictions."[182] But the court found that Glik's recording was protected by the First Amendment because he recorded the police in a public place and because he peacefully recorded the officers from a reasonable distance.[183] Because the First Amendment restrains police from disciplining individuals for *verbally* opposing police action,[184] the court concluded that the same restraint "must be expected when [the police] are merely the subject of videotaping that memorializes, without impairing, their work in public spaces."[185]

The *Glik* court went beyond merely finding a First Amendment right to record police; in its view, the First Amendment "unambiguously"[186] protects the rights of citizens to record police, and that that right is "firmly established."[187] The *Glik* court had to analyze whether this right was firmly established because the

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[176] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."); *see also* Kies, *supra* note 81, at 295 (concluding that "[b]ecause civilian recorders of police activity gather news of public concern . . . they should constitute members of the press protected by the First Amendment").

[177] 655 F.3d 78 (1st Cir. 2011).

[178] *Id.* at 79.

[179] *Id.* at 82.

[180] *Id.*

[181] *See id.* ("It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press,' and encompasses a range of conduct related to the gathering and dissemination of information." (quoting U.S. CONST. amend. I)).

[182] *Id.* at 84.

[183] *Id.*

[184] *Id.* (citing City of Houston v. Hill, 482 U.S. 451, 461 (1987)).

[185] *Id.*

[186] *Id.* at 82.

[187] *Id.*

defendant police officers in *Glik* raised the defense of qualified immunity due to their status as public officials.[188] In the First Circuit, courts apply a two-pronged analysis when a public official raises a claim of qualified immunity: "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation."[189] The *Glik* court relied primarily on *Iacobucci v. Boulter*,[190] a First Circuit case upholding a journalist's 42 U.S.C. § 1983 lawsuit against police officers who arrested him for refusing to stop filming public officials in a hallway outside of a public meeting room.[191] The *Glik* court noted that, although the lawsuit was "largely grounded in the Fourth Amendment and did not include a First Amendment claim," the *Iacobucci* court rejected the officer's qualified immunity defense because "the plaintiff's journalistic activities 'were peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights*, [and, therefore, the officer] lacked the authority to stop them.'"[192] Relying on the cursory nature of *Iacobucci*'s First Amendment analysis to find the right to record police is firmly established, the *Glik* court observed that the "brevity of the First Amendment discussion" in *Iacobucci* was "a characteristic found in other circuit opinions that have recognized a right to film government officials or matters of public interest in public space."[193]

There are several limitations to the *Glik* holding that make it problematic as a solution to the enforcement of all-party consent statutes against citizen recorders. First, the case law relied on by the *Glik* court contains a somewhat perfunctory analysis of the First Amendment issue, which may not be sufficient to convince other courts. The *Glik* court found the sparseness of the analysis in other cases addressing citizen recording to be persuasive, reasoning that the "terseness" of this analysis "implicitly speaks

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[188] *Id.* at 81.

[189] *Id.* (citation and quotations omitted).

[190] 193 F.3d 14 (1st Cir. 1999).

[191] *Id.* at 17–18, 25.

[192] *Glik*, 655 F.3d at 83 (quoting *Iacobucci*, 193 F.3d at 25).

[193] *Id.* at 85 (citing Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (acknowledging that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest" and finding that the plaintiff had "a right to videotape police activities," but holding that the plaintiff failed to show that those rights were violated)); *see also* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (finding, without further analysis, that there is a "First Amendment right to film matters of public interest").

to the fundamental and virtually self-evident nature of the First Amendment's protections" of citizen recordings of police.[194] Other courts, however, have refrained from relying on arguments whose analysis or discussion is perfunctory.[195] Second, even if one accepts that the *Glik* court's holding was legally sound, "it is inconsistent with the realistic application of the law; ironically, the case itself proves that citizens are still being arrested for what the court describes as a 'well-established' and 'fundamental' principle of law."[196] Given these limitations, the extent to which courts outside of the First Circuit would follow the holding in *Glik* is unclear.

C. Difficulties with Re-Drafting All-Party Consent Statutes

Following the *Hyde* opinion and the Graber incident, several commentators proposed legislative solutions that would allow citizens to record police.[197] Re-drafting all-party consent statutes to allow citizens to record police officers, however, can be problematic. For example, one commentator proposed that the Massachusetts wiretapping statute could be brought "in line with the majority of states that allow for the surreptitious recordings of on-duty police officers" if the legislature added an exception for situations where "a party has no reasonable expectation of privacy" to the statute.[198] This commentator argued that this exception would apply to almost all on-duty activities of police officers because "it is commonsensical that police privacy rights

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[194] *Glik*, 655 F.3d at 85.

[195] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 223–24 (1997) (declining to decide a First Amendment argument because the district court answered the question in only a "perfunctory discussion" and because the parties devoted little attention to it in their briefs).

[196] Caycee Hampton, Case Comment, *Confirmation of a Catch-22:* Glik v. Cunniffe *and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549, 1556 (2011) (quoting *Glik*, 655 F.3d at 85).

[197] *See* Alderman, *supra* note 81, at 531 (concluding that because "[t]here is a fundamental democratic and practical evidentiary value in any recording of public police conduct" that "[s]tate legislatures should move quickly to adopt statutory exceptions to the criminalization of civilian recordation of police in the fulfillment of their public obligations"); Bodri, *supra* note 35, at 1349 (arguing that because the use of all-party consent statutes to prosecute citizens for recording police "unconstitutionally burdens the First Amendment right to gather information of public importance," is "bad public policy," and "incorrect judicial practice," that "[t]he scope of the right to gather information of public importance must be legislatively clarified to include recording on-duty officers"); Kies, *supra* note 81, at 307–10 (proposing an amendment to the Federal Wiretap Act that would allow citizens to record police, with certain exceptions); Mishra, *supra* note 39, at 1555 (urging that states "explicitly permit citizens to record police communications other than those uttered with the reasonable expectation that they would not be recorded"); Skehill, *supra* note 81, at 1011 (proposing an amendment to the Massachusetts all-party statute).

[198] Skehill, *supra* note 81, at 1011.

[are] diminished while on-duty."[199] Another commentator argued that Massachusetts and other all-party consent states should amend their wiretapping statutes to "explicitly permit citizens to record police communications other than those uttered with the reasonable expectation that they would not be recorded."[200] The theory behind this exception is that police cannot reasonably expect to have privacy rights while communicating with citizens, whereas they could reasonably expect to have some right to privacy in their "private spaces."[201]

Each of these standards would likely allow the video recording of most interactions between police and citizens. But there are several instances where police officers' activities could fall outside of the reach of these revised all-party statutes where recording the conversation may nevertheless be beneficial to citizens. The Graber arrest presents an example of a case on this margin, in which a court may find it difficult to determine whether the officer involved had a legitimate expectation of privacy. Graber was pulled over and given a traffic citation by a plain-clothes officer.[202] Although the judge in the Graber case determined that this officer had no legitimate expectation of privacy since the interaction took place during a traffic stop,[203] the judge may have concluded differently if a citizen recorded an on-duty police officer in a private place, such as the citizen's home.

The *Flora* court, while rejecting the state's claim that the police had a legitimate expectation of privacy, emphasized that whether a police-citizen encounter is "private" must be a fact-specific inquiry.[204] A "fact-specific inquiry" of the Graber case could lead to a different conclusion, depending on the amount of weight a judge gives to the fact that the arresting officer was a plain-clothes officer.

These amendments may also make it difficult to determine whether on-duty police officers have a reasonable expectation of privacy when they are in public, but not interacting with citizens. *Flora* rejected the state's claim that a public arrest was a private conversation,[205] but nothing in the *Flora* decision suggests that the holding was meant to apply beyond the sort of conversation that

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[199] *Id.*

[200] Mishra, *supra* note 39, at 1555.

[201] *Id.* at 1556.

[202] *See* Shin, *supra* note 11, at A1.

[203] *See* Hermann, *supra* note 82, at 1A.

[204] *See* State v. Flora, 845 P.2d 1355, 1357 (Wash. Ct. App. 1992) ("Determining whether a given matter is private requires a fact-specific inquiry.").

[205] *Id.* at 1358.

took place in *Flora*—"statements [the police] make as public officers effectuating an arrest."[206] To avoid these difficulties, a clear policy of non-enforcement of all-party consent statutes in police-citizen encounters would benefit both citizens and police.

Perhaps the most serious problem lawmakers who might be susceptible to amending state all-party statutes face is the sure opposition from the police, an unquestionably powerful lobby.[207] Legislators who support a statute that explicitly grants citizens the right to record police may jeopardize their reelection bids. For example, Mississippi's legislature recently proposed an amendment that "would allow cameras, film, and other recording devices to be used while uniformed officers . . . are performing duties related to their office, as long as the person filming doesn't interfere [with those duties]."[208] The bill died in committee,[209] due in part to opposition from law enforcement groups.[210]

A recent Congressional effort reached a similar fate. In 2010, Representative Edolphus Towns introduced a concurrent resolution to the House of Representatives which resolved that "members of the public have a right to . . . make video or sound recordings of the police during the discharge of their public duties . . . ."[211] This bill also died in committee.[212] While there is no indication that this bill faced opposition from law enforcement officials, law enforcement officers may not have felt a need to oppose this resolution, since concurrent resolutions do not have the force of law.[213] That this resolution had no legal impact and

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[206] *Id.* at 1357.

[207] Balko, *supra* note 77 (finding that there has been "little activity in state legislatures to prevent [arrests of citizen recorders]. . . . because any policy that makes recording cops an explicitly legal endeavor is likely to encounter strong opposition from law enforcement organizations").

[208] Newsom, *supra* note 123.

[209] *HR 168 – History of Actions / Background*, MISS. ST. LEGISLATURE, http://billstatus.ls.state.ms.us/2011/pdf/history/HB/HB0168.xml (last updated Mar. 1,. 2011). As an aside, this amendment was unnecessary. Mississippi is a one-party consent state, and therefore it was already legal for citizens to record police officers. *See* MISS. CODE ANN. § 41–29–531(e) (West 2011) (providing that the statute does not apply to a person "not acting under color of law who intercepts" an oral communication "if the person is a party to the communication, or if one (1) of the parties to the communication has given prior consent to the interception").

[210] *See* Newsom, *supra* note 123 (reporting that the author of the bill recognized there were "law enforcement groups [who] oppose[d] the measure" and that the bill would likely die in committee).

[211] H.R. Con. Res. 298, 111th Cong. (2010); *see also* Kies, *supra* note 81, at 309 (discussing the resolution).

[212] *Legislation: H. Con. Res. 298*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=hc111-298 (last visited Feb. 11, 2012).

[213] *See* BLACK'S LAW DICTIONARY 1426 (9th ed. 2009) (defining a "concurrent resolution" as one that "expresses the legislature's opinion on a subject, but does not have the force of

still died in committee, however, is telling of the difficulty legislators would face in passing an amendment specifically allowing citizens to record police.

An explicit proposal may lead to a debate divided along party lines and may be particularly difficult to pass given that "[m]embers of Congress increasingly put the strategic interests of their party, and its hopes of doing better in the next election, above all else and vote accordingly."[214] Given the current polarized political climate, legislators may be reluctant to introduce legislation that would paint them as being "anti-police." Since these efforts carry a great degree of political risk and stand little chance of success, this Note proposes that it would be better to look outside of the legislative process for a solution. Rather than amending all-party statutes, police and prosecutors should employ a scheme of voluntary non-enforcement of all-party consent statutes against citizen recorders.

V. POLICE AND PROSECUTORIAL NON-ENFORCEMENT AS A SOLUTION

The constitutionality of applying all-party statutes to police recordings remains an open question in all but the First Circuit,[215] and efforts to re-draft these statutes have proven fruitless. The question, then, becomes how to fix the problems with all-party consent statutes without striking them down as a whole. Police departments and prosecutors should adopt a policy of non-enforcement of all-party consent statutes against citizen recorders. In eleven of the thirteen all-party consent states, in which all-party consent statutes specifically apply only to "private" communications, these statutes do not seem to apply to citizen recordings of police.[216] Even the Massachusetts and Illinois

law"); *see also* Kies, *supra* note 81, at 309 n.263 (noting that this resolution is an "admirable step toward protecting civilian recordings of police activity" but that its "primary weakness" is that "even if adopted, it will lack the force of law").

[214] David Wessel, Editorial, *An Untested Model of Democratic Governance*, WALL ST. J., Jan. 5, 2012, at A2. Wessel finds that the present polarization in Congress is caused by a multitude of factors, including an increased political homogeneity in neighborhoods and congressional districts and the proliferation of cable TV and websites which "mak[e] it easier for voters to find information that confirms their views." *Id.*

[215] *See* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (answering the question whether "there [is] a constitutionally protected right to videotape police carrying out their duties" in the affirmative).

[216] For the argument that eleven of these statutes specifically reference "private" or "confidential" communications and therefore do not apply to recordings of police officers, see *supra* Part I.B.

statutes, which apply to the secret recording of any conversation whether private or not,[217] are privacy statutes and do not seem to properly apply to recording police officers.[218] Prosecuting citizen recorders for innocent conduct under an erroneous or overly strict interpretation of these statutes raises questions about the legitimacy of law enforcement. Law enforcement agents must lead by example, because when "the Government becomes a lawbreaker, it breeds contempt for the law."[219]

A. Advantages of Non-Enforcement to Police Departments

As noted earlier, law enforcement groups have resisted amendments to all-party statutes that would permit citizens to record police.[220] Despite this resistance, the idea that police departments would voluntarily agree not to enforce all-party consent statutes may not be as far-fetched as it sounds. Police in two Pennsylvania townships have adopted a written policy which allows citizens to record on-duty policemen.[221] The townships established the policies as part of an agreement reached with ACLU attorneys in a case involving the prosecution of a citizen recorder.[222] The agreement provides not only that the townships will not enforce all-party consent statutes against citizens recording on-duty policemen, but also requires the townships to train police officers pursuant to this new policy.[223]

There may also be a financial incentive for police departments not to pursue these charges. In July 2010, the city of Beaverton, Oregon had to pay a $19,000 settlement to a man who was arrested for recording police officers.[224] In August 2010, a Florida woman charged with violating Florida's all-party statute for recording her son's arrest filed a lawsuit against the police

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[217] For a discussion of these statutes, see *supra* notes 44–47 and accompanying text.

[218] *See supra* Part II (arguing that under *United States v. Katz* and other privacy cases that police officers have a lessened expectation of privacy while on duty, and therefore that applying all-party statutes do their actions is an improper application of the statutes).

[219] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[220] *See supra* Part IV.C (concluding that efforts to amend all-party consent statutes to specifically allow recording of police would face such political opposition that a non-legislative solution would be preferable).

[221] *See* Wendy McElroy, *Are Cameras the New Guns?*, GIZMODO (June 2, 2010, 5:00 PM), http://gizmodo.com/5553765/are-cameras-the-new-guns (describing the policies of two Pennsylvania municipalities, Spring City and East Vincent Township).

[222] *See ACLU of PA Announces Settlement for Man Arrested for Videotaping Police Officers in Public*, AM. CIVIL LIBERTIES UNION OF PA. (Dec. 18, 2008), http://www.aclupa.org/pressroom/acluofpaannouncessettlemen.htm (describing the case and the terms of the settlement).

[223] *Id.*

[224] Balko, *supra* note 10, at 28.

department after charges against her were dropped.[225] Police departments that charge citizen recorders under all-party consent statutes may wind up saddled with expensive penalties and court costs. And the end result of the prosecution, on top of the damage award or settlement, might be a judicial order or settlement that forces the police to allow citizens to record their actions.

But if police departments instead adopt a policy of non-enforcement, it may help to improve the public's confidence in the police as an institution. Tom Wiseman, an attorney for the State of Illinois, justified bringing charges against a citizen for recording police by arguing that there were no problems with "bad police officers" in Crawford County.[226] And according to Wiseman, "[t]here's just no reason for anyone to feel they need to record police officers in Crawford County."[227] The person who made this recording, however, felt that "he was being unjustly targeted by local authorities" and would probably disagree that there is "no reason" to record police officers in Crawford County.[228]

The notion that there is "no reason"[229] to record police officers contravenes basic notions of government transparency. To quote Justice Brandeis, "[s]unlight is . . . the best of disinfectants; electric light the most efficient policeman."[230] And if police officers are behaving properly, there is no reason to forbid people from recording them. For instance, in the shooting death of Todd Blair described in the Introduction,[231] the video enabled the public to see for itself that the suspect approached the police in an attacking motion[232] and arguably demonstrated that shooting Blair in self-defense was justified. Charging citizens with felonies for recording police suppresses these recordings and creates the impression that the police do not want to expose their actions to public scrutiny. Police could improve the appearance of

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[225] *See* Bybee, *supra* note 85 (reporting that Jim Green, an ACLU attorney, filed a civil suit against the Boynton Beach Police Department alleging that Tasha Ford, the woman who made the recording, was "wrongfully arrested" and "had the right to record the interaction").

[226] *See* Balko, *supra* note 77 (reporting that Wiseman was pursuing charges against Michael Allison, a "construction worker who recorded police officers and other public officials he thought were harassing him").

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

[231] *See* Alberty, *supra* note 4 (reporting that a police officer shot and killed Todd Blair in self-defense after Blair approached the officer holding a golf club above his head).

[232] *Id.*

legitimacy of law enforcement if they adopt voluntary policies of non-enforcement of all-party statutes against citizen recorders, and open their actions up to public scrutiny.

B. Advantages of Non-Enforcement to Prosecutors

Prosecutors who are asked to prosecute citizen recorders can and should exercise their discretion not to pursue such charges. Prosecutors have discretion to "decline to charge entirely."[233] Generally, the legislature's role is to decide what should and should not be considered a crime.[234] But legislators often draft criminal statutes that "cover either too much or too little" criminal conduct.[235] When a statute produces unforeseen results, and particularly when it leads to criminal charges for non-blameworthy behavior, a prosecutor may use his or her discretion not to prosecute the offense.[236] Further, if legislatures feel that citizens *should* be prohibited from recording police, then non-enforcement would impel state legislatures to confirm that there is a public consensus that videotaping police should be criminalized.[237] As a practical matter, "[c]riminal statutes are a grant of power to police and prosecutors, who can choose how aggressively and in what cases to exercise that power."[238]

The result of the Anthony Graber incident makes a good case for prosecutorial discretion. On July 7, 2010, prior to the outset of the Graber case, the Office of the Attorney General of Maryland issued an advisory opinion on the applicability of Maryland's wiretapping statute to police recordings.[239] This opinion

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[233] Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 369 (2010).

[234] *Id.* at 371 ("Police and prosecutors should not have free rein to decide what conduct to criminalize and how severely to punish it. Democratically elected legislatures can better . . . sort[] the most blameworthy and harmful acts from those that do not deserve punishment.").

[235] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 (2001).

[236] Bibas, *supra* note 233, at 372 ("[N]o criminal code can spell out crimes and punishments to fit every conceivable scenario. . . . [W]hatever the legislature does not address, it implicitly delegates to prosecutors and other criminal justice actors.").

[237] *See* Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLIAMETTE L. REV. 1, 4 (1999) (arguing that courts and prosecutors who opt to dismiss charges against unmarried, pregnant teenage women for fornication can "avoid creating a broad right of sexual privacy for teenagers" while at the same time ensuring "that if the legislature wishes to continue criminalizing fornication, the legislature must confirm that a public consensus remains to retain fornication as a crime").

[238] Stuntz, *supra* note 235, at 549.

[239] Advisory Op. from the State of Md. Office of the Attorney Gen. to the Honorable Samuel I. Rosenberg (July 7, 2010) [hereinafter Md. Advisory Op.], *available at* http://www.oag.state.md.us/Topics/WIRETAP_ACT_ROSENBERG.pdf.

concluded that, because the Maryland wiretap act specifically applied to "private communications,"[240] it did not apply to citizen recordings of police officers.[241] The opinion based this conclusion on "the holdings of the courts in most other states construing state eavesdropping statutes."[242] This opinion put the prosecutor in the Graber case, Joseph Cassilly,[243] in the awkward position of prosecuting a citizen using an interpretation of the Maryland wiretap statute that had been repudiated by the Attorney General of Maryland. Unsurprisingly, the charges against Graber were dismissed.[244] In other all-party consent states, there are only a handful of prosecutions against citizen recorders that have been upheld.[245] Most of these prosecutions have either been overturned or thrown out of court.[246] Prosecutors who proceed with charges against citizen recorders may face an uphill battle, and in all likelihood face a potentially embarrassing legal defeat. Simply refusing to proceed with these charges may be to the benefit of prosecutors.

C. Public Awareness Campaigns Regarding Permissible Citizen Recording

If individual police departments and prosecutors are unwilling to adopt a policy of non-enforcement, at a minimum they could help citizens to avoid being ensnared by all-party consent statutes.

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[240] MD. CODE ANN., CTS. & JUD. PROC. § 10–401(2)(i) (LexisNexis 2011).

[241] Md. Advisory Op., *supra* note 239, at 10.

[242] *Id.* at 10–11.

[243] *See* Balko, *supra* note 77 (discussing the charges Cassilly filed against Graber).

[244] *See* Hermann, *supra* note 82, at 1A (reporting that the charges against Graber were dismissed because the judge found that a conversation between a police officer and a citizen on a public road is not a private conversation).

[245] *See* Commonwealth v. Hyde, 750 N.E.2d 963, 971 (Mass. 2001) (upholding charges against a citizen for secretly recording police officers during a traffic stop). There are two citizen recording cases currently pending in Illinois, whose all-party statute is the strictest in the country. *See* Don Terry, *Eavesdropping Laws Mean That Turning On an Audio Recorder Could Send You to Prison*, CHI. NEWS COOPERATIVE (Jan. 22, 2011), http://www.chicagonewscoop.org/eavesdropping-laws-mean-that-turning-on-an-audio-recorder-could-send-you-to-prison/ (reporting that a Chicago man and woman were separately charged with Class 1 felonies carrying a potential 15-year prison sentence for recording police). The Illinois all-party consent statute flatly prohibits recording someone without his or her consent, "regardless of whether one or more of the parties intended their communication to be of a private nature." 720 ILL. COMP. STAT. ANN. 5/14–1(d) (West 2003).

[246] *See* People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986) (applying a previous version of the Illinois all-party consent statute and holding that a man who recorded police officers during a traffic stop did not violate that version of the statute); *see also* State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (holding that a conversation pursuant to a citizen's arrest is "not entitled to be private" and therefore that the Washington all-party consent statute did not forbid the recording at issue); Bybee, *supra* note 85 (reporting that charges were dropped against a Florida woman who recorded police officers during her son's arrest).

Criminal statutes should not be a "trap for the unwary innocent."[247] There are steps that police, prosecutors, and citizens' groups should take to inform citizens about how to avoid unwittingly falling within the snare of all-party consent statutes. For example, citizens who *openly* record police do not violate all-party consent statutes. All-party consent statutes generally refer to "secret" or "surreptitious" recordings of police officers.[248] The *Hyde* decision points out that if a citizen recorder "inform[s] the police of his intention to tape record [an] encounter" or holds the recording device "in plain sight," the recording does not violate an all-party consent statute because the recording is no longer secret.[249] Police departments in all-party consent states should engage in public awareness campaigns that inform citizens of permissible methods of recording police encounters. Similar to non-enforcement, this would save resources needlessly wasted in prosecuting citizen recorders, and could also bolster public confidence in the police. Citizen groups in all-party consent states should also engage in public awareness campaigns, especially if police departments choose not to. If citizens in all-party consent states are informed of their rights, they may be less likely to fall victim to a prosecution under an all-party statute.

CONCLUSION

All-party consent wiretapping statutes were enacted with the worthy goal of protecting citizens from being recorded without their knowledge or permission.[250] But the proliferation of recording devices and people's increased tendency to use those devices, it has become increasingly easy for citizens to make surreptitious recordings. Police officers are public employees and many of their interactions with citizens take place in public areas. Privacy laws such as all-party consent statutes should not apply to citizen recordings of their public, on-duty activities. The policy of non-enforcement proposed by this Note is in line with current

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[247] Sherman v. United States, 356 U.S. 369, 372 (1958).

[248] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2000) (prohibiting the "secret" recording of a conversation unless all parties to the conversation consent).

[249] *Hyde*, 750 N.E.2d at 971; *see also* WASH. REV. CODE ANN. § 9.73.030(3) (West 2011) ("[C]onsent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation . . . that such communication or conversation is about to be recorded.").

[250] *See Hyde*, 750 N.E.2d at 966–67 (alteration in original) (citation and quotations omitted) (looking to the legislative history of the Massachusetts all-party consent statute to determine that the legislature's goal was to "strictly prohibit [the public from] electronic eavesdropping and wiretapping of other persons' conversations without permission").

technological and societal developments, and would be beneficial to police officers, prosecutors, and citizens.

Rather than leaving it to citizens to mount a difficult and potentially futile constitutional attack, it would be for the best if police officers and prosecutors adopted a voluntary policy of non-enforcement of all-party consent statutes against citizen recorders. A non-enforcement policy would alleviate concerns that recording police could lead to a lengthy prison sentence. There are also several benefits to non-enforcement, when compared to the amendments already proposed to all-party consent statutes.[251] An explicit non-enforcement policy avoids the confusion in determining whether a conversation is "private." And it would ensure that all citizens would have the opportunity to record officers and to preserve any incidents for trials. Non-enforcement could also bolster public perception of the police. By allowing citizens to record their public actions, the police would signal a new willingness to correct abusive tactics and change police procedure.

The video of the King beating helped to visualize police abuse to the public, and although the aftermath of the King trial was devastating, it served to teach the lesson that the sort of abusive tactics employed by the police were unacceptable. Cell phone recordings of police abuse can help to serve the same function, and this proposal ensures that citizens' rights to make those recordings are fully protected. From the King video in 1991 to the cell phone videos taken in the Oakland BART shooting, recordings have been an important part of informing the public of potential police abuse. Rather than risking that the next video to spark a national debate on police abuse goes un-filmed due to the filmmaker's concern about being prosecuted for filming police, prosecutors and law enforcement officials in all-party consent states should adopt a clear policy of non-enforcement of all-party statutes against citizen recorders.

MARK BRNCIK[†]

[251] *See, e.g.*, Mishra, *supra* note 39, at 1555 (proposing an exception to all-party consent statutes that would "explicitly permit citizens to record police communications other than those uttered with the reasonable expectation that they would not be recorded"); Skehill, *supra* note 81, at 1011 (proposing an exception to the Massachusetts all-party consent statute for situations where "a party has no reasonable expectation of privacy").

[†] J.D. Candidate, 2012, Case Western Reserve University School of Law.