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Tapping Into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police

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TAPPING INTO POLICE CONDUCT: THE IMPROPER USE OF WIRETAPPING LAWS TO PROSECUTE CITIZENS WHO RECORD ON-DUTY POLICE

J. PETER BODRI*

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I. INTRODUCTION

In October 1998, Massachusetts police pulled over Michael Hyde for seemingly no reason.¹ During the stop, Hyde secretly recorded his dialogue with the officers, and later offered the recording as evidence to bolster a formal complaint with the department based on the conduct of the stopping officers.² The recording *was* evidence of a crime, but the crime was Hyde's violation of the Massachusetts wiretapping statute.³ Initially, a clerk-magistrate refused the police's request for a criminal complaint against Hyde, but after a show cause hearing a state district court issued the criminal complaint.⁴

In another 2005 incident, Massachusetts police conducted a warrantless search of Paul Pechonis's home after arresting him on a misdemeanor charge.⁵ Unbeknownst to the officers, a hidden "nanny cam" captured audio and video of the entire arrest and search.⁶ Pechonis turned over the surreptitiously recorded video to Mary Jean, who proceeded to post the video on her website.⁷ Although the First Amendment ultimately protected

1. *See* Commonwealth v. Hyde, 750 N.E.2d 963, 964-65 (Mass. 2001) (recounting how officers ordered Hyde and his passenger out of the car, searched them and the vehicle, had a heated conversation with Hyde involving an exchange of profanities, and eventually let Hyde go with only a verbal warning for noisy exhaust and an unlit license plate).

2. *See id.* at 965 (reporting that Hyde went to the police six days after the stop, formally complained about his treatment and about not knowing any potential implications for wiretapping laws, and turned over the tape recording "to substantiate his allegations").

3. *See id.* (reporting that an internal investigation of the officers ultimately exonerated them of any misconduct, while the Abington police sought a criminal complaint against the defendant for four counts of wiretapping).

4. *See id.* (recounting that the same judge that ordered that the criminal complaint issue also denied Hyde's motion to dismiss).

5. *See* Jean v. Mass. State Police, 492 F.3d 24, 25 (1st Cir. 2007) (recounting that on September 29, 2005, eight state police troopers met Pechonis at his front door and handcuffed him with his consent before the warrantless search occurred).

6. *See id.* (noting that, although disputed, it was immaterial to the decision as to whether the motion sensors activated the nanny cam or it was intentionally switched on).

7. *See id.* (explaining that Jean was a local political activist who maintained a

Jean's publication, Pechonis's recording had broken Massachusetts law.⁸

In Maryland, motorcycle aficionado Anthony Graber was speeding when a gun-waving undercover police officer pulled him over.⁹ Graber happened to be wearing a helmet-mounted camera that captured video of the officer's initial reaction to Graber's speeding and of the officer issuing a speeding citation.¹⁰ Graber subsequently posted the video on YouTube, which days later resulted in armed police at his door for his arrest.¹¹ Hyde, Pechonis, and Graber all have one thing in common: by taping their experiences of law enforcement misconduct, they all inadvertently ran afoul of state wiretapping laws.¹² The trend of criminally charging citizens who have recorded police officers is not unique to Massachusetts and Maryland; any state where wiretapping laws require unanimous consent could feasibly charge its citizens for similar actions.¹³

Criminalizing wiretapping is not a new legal concept, but rather a natural evolution of the common law prohibition on eavesdropping, as well as a governmental recognition that electronic surveillance requires regulation.¹⁴ Legislatures generally enact wiretapping statutes with the dual intent of protecting citizens' privacy and enabling police to combat organized crime efficiently.¹⁵ However, using wiretapping laws to send a message that the state does not want citizens documenting officers' on-duty activities is becoming more frequent.¹⁶

website criticizing the former District Attorney for Worshester County, Massachusetts).

8. *See id.* (recounting that Massachusetts State Police sent Jean a cease and desist letter after she posted the video, claiming that she had violated the wiretapping statute and was therefore subject to felony prosecution).

9. *See* David Rittgers, *Maryland Wiretapping Law Needs an Update*, BALTIMORE SUN (June 1, 2010), http://articles.baltimoresun.com/2010-06-01/news/bs-ed-maryland-wiretapping-20100601_1_wiretapping-search-warrant-mr-graber (detailing the story of Anthony Graber and arguing that this particular use of wiretapping laws is strongly contrary to the public good).

10. *See id.* (noting that Graber never contested his citation for speeding).

11. *See id.* (recalling how armed police officers came to Graber's house in the early morning hours, seized Graber's computer equipment, and detained his mother and sister for over an hour, preventing them from going to work and school).

12. *See generally* Jean, 492 F.3d at 25 (stating that Jean's posting of the recording was protected speech despite the fact that the recording was likely obtained illegally); *Commonwealth v. Hyde*, 750 N.E.2d 963, 965 (Mass. 2001) (charging Hyde with violation of MASS. GEN. LAWS. ANN. ch. 272, § 99 (West 2010)); Rittgers, *supra* note 9 (detailing how Graber faces up to five years in prison and, potentially, a \$10,000 fine).

13. *See* Rittgers, *supra* note 9 (discussing how Maryland is among a dozen states with this stricter requirement written into their wiretapping laws).

14. *See* Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1266 (2004) (explaining that, although surveillance can help solve and prevent crimes, surveillance has dangerous implications for freedom and democracy and therefore warrants control).

15. S. REP. NO. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157 (1967) (stating that combating organized crime is the major purpose of Title III).

16. *See* Dina Mishra, Comment, *Undermining Excessive Privacy for Police:*

This Comment argues that citizens should not have to fear reprisal for recording a police officer in public and that legislation is necessary to correct the practice of using wiretapping statutes to arrest and prosecute citizens engaged in such activity.¹⁷ Part II of this Comment explores the development of the modern right to privacy.¹⁸ Part II also gives a brief review of current wiretapping statutes.¹⁹ Part III argues that all wiretapping statutes should have an expectation of privacy requirement, and that on-duty police officers have a diminished expectation of privacy because they are acting in their capacity as public officials.²⁰ Part III also argues that unanimous consent laws burden First Amendment rights in various forms.²¹ Part IV suggests possible solutions to these policy problems.²² Finally, Part V concludes that citizens' First Amendment rights outweigh police officers' expectations of privacy and that change is wholly necessary.²³

II. BACKGROUND

A. *The Right to Privacy*

Although Americans enjoy a fundamental right to privacy, the word

Citizen Tape Recording to Check Police Officers' Power, 117 YALE L.J. 1549, 1558 n.9 (2008) (listing recent arrests for police taping in Pennsylvania, Florida, and New Hampshire).

17. See generally Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 806-13 (2005) (arguing that video recording's role in the administration of justice is becoming more important as technology advances); Mishra, *supra* note 16, at 1550 (agreeing that the current ability of states to prosecute citizens for recording police misconduct is untenable and requires constructive change).

18. See *infra* Part II (exploring how the modern right of privacy has arisen from the Fourth Amendment to the United States Constitution).

19. See *infra* Part II (explaining how federal law currently handles the prohibition on wiretapping, as well as how different states approach the issue with their own legislation).

20. See *infra* Part III (establishing that legislators did not intend to have wiretapping laws used to prosecute citizens for recording officers, and combining court decisions recognizing that a police officer is a public official and other decisions expounding on how public officials acting in their public capacity typically have a diminished expectation of privacy to show a lessened expectation of privacy for on-duty police officers).

21. See *infra* Part III (showing that wiretapping laws can burden the First Amendment right to gather information on matters of public importance and potentially burden the right to petition for redress of grievances).

22. See *infra* Part IV (arguing that permitting surreptitious recording of on-duty police officers is the most effective solution to the untenable practice of prosecuting citizens for recording police and offering several less intrusive measures that aim to protect a police officer's privacy expectation).

23. See *infra* Part V (concluding that federal legislation explicitly permitting secret recording of police officers acting in their official capacities is necessary considering the direction in which unanimous consent states are heading).

“privacy” cannot be found anywhere in the Constitution.²⁴ The Constitution does not facially describe the right to privacy, but the right has emerged from between the lines of the Fourth Amendment, and it has taken years of judicial rhetoric and more than a few violations of citizens’ privacy expectations to find the right in its modern state.²⁵

I. The Katz Test

The modern right to privacy first emerged in the landmark decision *Katz v. United States*.²⁶ In a highly quoted passage, the Supreme Court held that the Fourth Amendment “protects people not places” and overturned *Olmstead v. United States*.²⁷ *Olmstead* had previously interpreted the Fourth Amendment as requiring a physical search or seizure for privacy to be violated.²⁸ Shortly after *Katz*, the Supreme Court struck down a New York surveillance statute; the wiretapping statute gave police free reign to record an individual up to six days and did not require specifics as to what police were looking for.²⁹ Articulated in *Katz*, the modern test for whether a right to privacy has been violated is twofold.³⁰ First, the person alleging the violation must have a subjective expectation of privacy.³¹ Second, the expectation of privacy must be one that society is willing to consider

24. *Accord* U.S. CONST. amend. IV; see DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1, 2 (2008) (asserting that not only does the word “privacy” not appear anywhere in the Fourth Amendment, from which the right to privacy largely derives, but it also does not appear anywhere in the entirety of the Constitution).

25. See generally *Berger v. New York*, 388 U.S. 41, 44 (1967) (holding unconstitutional a New York electronic surveillance statute because of the broad power it afforded police in invading privacy rights); *Katz v. United States*, 389 U.S. 347, 353 (1967) (reversing *Olmstead* and ruling that a warrantless wiretapping violates the Fourth Amendment); *Olmstead v. United States*, 277 U.S. 438, 455-70 (1928) (finding no violation of the Fourth Amendment in warrantless wiretapping of a phone call).

26. See *Katz*, 389 U.S. at 353 (holding that a person has a reasonable expectation of privacy in phone booth conversations).

27. See *id.* at 351. *Contra Olmstead*, 277 U.S. at 466 (holding that, based on the plain language of the Fourth Amendment, police tapping of telephone wires was not a type of search or seizure contemplated by the Fourth Amendment).

28. See *Katz*, 389 U.S. at 351 (pointing to language in *Olmstead* that concluded wiretapping telephones to gather conversations was not a physical search or seizure and therefore did not violate the Fourth Amendment).

29. See *Berger*, 388 U.S. at 44 (characterizing New York’s statute as “too broad” and deeming the conduct it permits as a “trespassory intrusion” into an area the Constitution protects).

30. See *Katz*, 389 U.S. at 360-63 (1967) (Harlan, J., concurring) (articulating the now adopted two-pronged test, which requires that a person have a subjective expectation of privacy and that the expectation be one that society considers reasonable). See generally *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (adopting the currently recognized two-pronged test for expectation of privacy).

31. See *Smith*, 442 U.S. at 745-46 (finding no expectation of privacy where police used a pen register to capture numbers dialed into a telephone).

objectively reasonable.³²

2. *Public Officials Acting in Official Capacity*

The test the Court articulated in *Katz* does not definitively set the boundaries for expectations of privacy, and other courts have unexpectedly found diminished or nonexistent expectations of privacy.³³ For example, state courts have found that there is a diminished expectation of privacy for public officials acting in their official capacities.³⁴ Certain state courts have determined that police officers are public officials for the purposes of expectations of privacy, and thus the lowered expectation applies.³⁵

Another vehicle through which courts have found lessened expectations of privacy is the “open field” doctrine, which holds that a person has no reasonable expectation of privacy in something left in view of the public or, in other words, what someone “knowingly exposes” to the public.³⁶ Applying the open field doctrine, certain courts have ruled that comments police officers make in the course of their public duties are comments that have been knowingly exposed to the public.³⁷

B. *A History of Wiretapping Law*

1. *The Federal Wiretapping Statute*

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act to govern the interception of wire communications and

32. *See id.* at 742 (holding that it would be unreasonable to recognize an expectation of privacy here because the dialed numbers are openly transmitted to the phone company when the call is connected).

33. *See O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976) (holding that mandatory disclosure of financial records did not violate the police officers' privacy rights because police are held to a higher standard of accountability, which includes a lessened privacy expectation).

34. *See State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (holding that a police officer had no expectation of privacy in a conversation that took place during an arrest because the conversation occurred in public where passersby could easily overhear).

35. *See Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 (Mass. 2000) (concluding that a police officer is a “public official” because of the broad powers invested in officers, the high potential for abuse of these powers, and their high impact and visibility within the community).

36. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (noting that the Fourth Amendment does not protect from a search what a person “knowingly exposes to the public,” even if this exposure occurs in a person's own home or office); *see also Florida v. Riley*, 488 U.S. 445, 445 (1989) (holding that the defendant had no reasonable expectation of privacy in a trailer, the contents of which were visible via naked-eye aerial observation).

37. *See Flora*, 845 P.2d at 1358 (finding that comments made during a routine traffic stop are exposed to the public).

other enumerated communications.³⁸ In the wake of *Katz*, Congress drafted Title III carefully so that it would comply with the Supreme Court's prior holdings on the issue of electronic surveillance.³⁹ According to the Supreme Court, Title III aims "to prohibit, on the pain of criminal and civil penalties, all interception of oral and wire communications, except those specifically provided for in the Act."⁴⁰ Before Title III, the Federal Communications Act of 1934 was the law governing all forms of wiretapping, but Congress felt that a law with more thorough privacy protection was necessary.⁴¹ Concerned that Title III could not adequately provide for advances in the technology of wiretapping and eavesdropping, Congress amended Title III in 1986.⁴²

Today, Title III generally prohibits, with some exceptions, both private and state electronic surveillance.⁴³ For law enforcement to legally record a conversation under Title III, there must either be a warrant obtained in good faith for the recording and either at least one party must consent to the recording or one party must lack a reasonable expectation of privacy in the conversation.⁴⁴

38. Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2006); see S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153 (arguing the need for electronic surveillance legislation and regulation to protect citizen's privacy and allow police to fight organized crime).

39. See also *Dalia v. United States*, 441 U.S. 238, 250 n. 9 (1979) (recognizing Congress's approval of the Court's finding that electronic surveillance can pose a large threat to privacy).

40. See *United States v. Giordano*, 416 U.S. 505, 514 (1974) (noting that the act provides exceptions for interceptions that law enforcement officers make based on a court order and in furtherance of an investigation of one of an enumerated list of serious crimes).

41. See *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (suggesting that protection of privacy was a large concern in the enactment of Title III); see also S. REP. NO. 90-1097, reprinted in 1968 U.S.C.C.A.N. 2112, 2153 (stating that Title III was written to comport with the constitutional standards articulated in *Berger* and *Katz*); Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversation When They Believe the Child is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 958 (2005) (positing that concerns surrounding the Federal Communications Act's failure to properly protect citizens' privacy rights were a motivating factor in Title III's enactment).

42. See Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-22 (2006) (expounding the modern version of the federal wiretapping statute).

43. See generally §§ 2511, 2516 (listing the foundational requirements for an interception to be unlawful and giving specific excepted circumstances).

44. See § 2511(2)(a)(ii)(A) (detailing the warrant exception); § 2511(2)(d) (setting forth the one party consent exception); § 2510(2) (providing that the statute protects oral communications if a person has a reasonable expectation that a communication is not subject to interception and circumstances justify that expectation); *United States v. Leon*, 468 U.S. 897, 926 (1984) (explaining that when law enforcement obtains a warrant in good faith, suppression of evidence found pursuant to the warrant is inappropriate even if the warrant is subsequently deemed invalid).

2. *State Wiretapping Statutes*

If a state chooses to enact a wiretapping law, the law must be at least as restrictive as the federal law, but may be more restrictive.⁴⁵ Forty-nine states have anti-wiretapping laws.⁴⁶ Like the federal wiretapping statute, the majority of these statutes permit recordings when only one party has consented.⁴⁷ Thirteen state wiretapping laws have a unanimous consent or knowledge requirement.⁴⁸ Those requirements mean that, to record any conversation, both parties being recorded must either give their express consent to the recording or know about the recording.⁴⁹

Massachusetts's law is arguably the strictest because police and prosecutors can (and do) use the wiretapping laws to arrest and prosecute citizens for making an audio recording of police officers.⁵⁰ Courts have consistently interpreted Massachusetts's statute as prohibiting the creation of all forms of secret records by the public.⁵¹ The statute does not provide an explicit exception for circumstances in which there is no reasonable expectation of privacy.⁵²

In most jurisdictions, video recording alone will not trigger the application of these wiretapping statutes, as it is the audio recording that is

45. See *Commonwealth v. Vitello*, 327 N.E.2d 819, 833 (Mass. 1975) (explaining that Title III sets a minimum standard of restrictiveness in wiretapping statutes that no state can lower).

46. See *Dinger*, *supra* note 41, at 965 n.58 (noting that Vermont is the only state without a wiretapping statute).

47. *Id.* at 965 n.59.

48. See, e.g., CAL. PENAL CODE § 632 (West 2009); DEL. CODE ANN. tit. 11, § 1335(a) (West 2010); FLA. STAT. ANN. § 934.03 (West 2010); HAW. REV. STAT. ANN. § 711-1111 (LexisNexis 2010); 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2010); KAN. STAT. ANN. § 21-4001 (West 2010); MASS GEN. LAWS ANN. ch. 272, § 99 (West 2010); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2010); MICH. COMP. LAWS ANN. § 750.539c-d (West 2010); MONT. CODE ANN. § 45-8-213(1)(c) (West 2009); N.H. REV. STAT. ANN. § 570-A:2 (West 2010); 18 PA. CONS. STAT. ANN. § 5704(4) (West 2010); WASH. REV. CODE ANN. § 9.73.030 (West 2010).

49. See *Commonwealth v. Hyde*, 750 N.E.2d 963, 966 (Mass. 2001) (recognizing that one functional difference between the Massachusetts wiretapping statute and Title III is that Title III's definition of an "oral communication" requires an expectation of privacy, while the Massachusetts statute seems clear in its definition of "oral communication" in that it does not require a privacy expectation).

50. See, e.g., *Jean v. Mass. State Police*, 492 F.3d 24, 25 (1st Cir. 2007) (mentioning that Pechonis's recording of his encounter with police misconduct was illegal, although the case deals with charges against Jean for dissemination of the recording); *Hyde*, 750 N.E.2d at 967 (opining that the Massachusetts legislature designed the wiretapping statute to be stricter than comparable statutes in other states).

51. See *Hyde*, 750 N.E.2d at 966-67 (holding that all recordings violate the statute because the legislature intended to "strictly prohibit all secret recordings by members of the public" and Hyde's surreptitious recording of the police officers who pulled him over fits into this category).

52. See *id.* at 971 (noting that the statute does not contemplate privacy expectations).

illegal.⁵³ However, with the progression of technology, nearly every video recording device (from cell phones to point-and-shoot digital cameras) has an audio component.⁵⁴ Police in some jurisdictions simply ask amateur videographers if the videographers' recording device captures audio and then immediately arrest the videographer when he or she affirmatively responds.⁵⁵ Yet, courts in other jurisdictions have held that their respective wiretapping statutes do not criminalize this amateur videography.⁵⁶ Courts sometimes do this by finding an implicit expectation of privacy requirement for police officers.⁵⁷

C. *The First Amendment Rights of Public Officials*

Aside from granting the commonly known rights to freedom of speech and assembly, the First Amendment also protects the right to gather information about public officials' activities on public property.⁵⁸ In *Garcetti v. Ceballos*, the Supreme Court held that, when public employees make statements pursuant to their official duties, those statements do not receive the same First Amendment protections as they would if made by private citizens.⁵⁹ Furthermore, the Court has determined that the right to gather information of public importance outweighs potential wiretapping

53. See *Commonwealth v. Wright*, 814 N.E.2d 741, 742 n.1 (Mass. App. Ct. 2004) (observing that although sound recordings are prohibited, there is "no express statutory prohibition" against visual recordings).

54. See Ric Simmons, *Why 2007 is Not Like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531, 532 (2007) (explaining that, as in Orwell's chilling dystopia, video cameras are everywhere, but unlike Orwell's vision the citizen masses wield them in cell phones).

55. See David Rowinski, *Police Fight Cellphone Recordings*, BOSTON GLOBE (Jan. 12, 2010) (recounting the story of a lawyer who recorded police brutality on his cell phone, only to be arrested for wiretapping violation after he informed an officer he recorded that his phone recorded audio).

56. See, e.g., *Smith v. City of Cummings*, 212 F.3d 1332, 1332 (11th Cir. 2000) (holding that plaintiffs had First Amendment right to photograph or videotape police conduct, subject to reasonable time, manner, and place restrictions); *People v. Beardsley*, 503 N.E.2d 346, 348 (Ill. 1986) (ruling that a wiretapping statute violation was not meant to apply in a situation where officers conversed in the presence of a suspect in custody and therefore had no expectation of privacy).

57. See generally *Malpas v. State*, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997) (holding that wiretap violation requires jury determination on reasonable expectation of privacy).

58. See *Smith*, 212 F.3d at 1333 (holding that the right to record matters of public interest granted by the First Amendment does allow for recording of police conduct); *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995) (finding that a genuine issue of material fact existed as to whether plaintiff's arrest on wiretapping charges interfered with his First Amendment right to gather news).

59. See *Garcetti v. Ceballos*, 547 U.S. 410, 411-12 (2006) (finding a district attorney was not speaking as a citizen and therefore had a lessened First Amendment right when he was reprimanded for a memorandum written pursuant to his official duties).

violations when lawfully accessing and disseminating illegally intercepted information.⁶⁰

III. ANALYSIS

A. Courts Should Find an Implicit Privacy Requirement in Unanimous Consent Wiretapping Statutes When Used to Charge Citizens for Recording On-Duty Police Officers.

Although the Fourth Amendment only limits the actions of state and federal actors against private citizens, Fourth Amendment jurisprudence is instructive in defining expectations of privacy in cases in which citizens tape police officers, and deciding when these expectations have been violated.⁶¹ Thus, to address the issue of a police officer's privacy in the context of Massachusetts and other states' wiretapping statutes, the statutes must first require an expectation of privacy.⁶² Federal courts have interpreted the use of the term "oral communication" in Title III to require that a speaker have a justifiable expectation of privacy in a communication for the statute to cover it.⁶³

Two issues arise when determining whether applicable state wiretapping laws cover communications with police officers in routine interactions with the public. The first is whether the statute only applies when the police officers have a reasonable expectation of privacy in words they utter during a traffic stop or any other interaction with the public in their official capacity.⁶⁴ Even Massachusetts courts assert that public officials' status lessens the expectations of privacy of public officials.⁶⁵ The second issue

60. See *Bartnicki v. Vopper*, 532 U.S. 514, 515 (2001) (holding no violation of relevant wiretapping law because the information was obtained lawfully and was a matter of public concern, even though respondents had reason to know the communication was intercepted illegally).

61. See Howard A. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 609-10 (2009) (discussing the Fourth Amendment's protection of individual privacy rights and relating it to examples of states bringing actions for some violation of police officers' privacy).

62. See *Commonwealth v. Hyde*, 750 N.E.2d 963, 968 n.6 (Mass. 2001) (explaining that since the statute broadly prohibits the interception of speech in general, the officer's expectation of privacy was irrelevant).

63. See *id.* at 965 (stating that Hyde argued that the court should look to the federal statute by analogy in interpreting the Massachusetts statute).

64. See *id.* at 975 (Marshall, C.J., dissenting) (arguing that because police are held to higher standards of conduct, they have lower expectations of privacy); *O'Connor v. Police Comm'r of Boston*, 557 N.E.2d 1146, 1150 (Mass. App. Ct. 1990) (indicating that police officers are generally held to higher standards than citizens); *People v. Beardsley*, 503 N.E.2d 346, 350 (Ill. 1986) (holding that the important factors of the Illinois eavesdropping statute are whether the officers intended their conversation to be private and if that intent was reasonable).

65. See *O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976) (balancing the police officers' privacy expectations and the public interest, and finding that the public

concerns the circumstances that are required to give rise to this expectation of privacy, assuming police are even required to have a privacy expectation.⁶⁶ Without a loss of generality, the focus can narrow to only the states in which wiretapping laws require unanimous consent, with a specific focus on Massachusetts and Maryland, as no issue arises when the consent of the recorder satisfies a single party consent requirement.⁶⁷

B. Courts Should Analogize to the Federal Wiretapping Statute When Interpreting State Wiretapping Laws.

The phrase “private conversation” is not used in the federal wiretapping statute.⁶⁸ According to the Maryland wiretapping law, an “oral communication” is “any conversation or words spoken to or by a person in a private conversation.”⁶⁹ Conversely, the federal law defines “oral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”⁷⁰ The federal law has been construed as only applying to situations where the individual uttering the oral communication has a reasonable expectation of privacy in that communication.⁷¹

Maryland courts have properly determined that, because of the Maryland

interest outweighed the officers’ expectations of privacy); *Hyde*, 750 N.E.2d at 972-77 (Marshall, C.J., dissenting) (arguing that reduced privacy for public officials holds them more accountable, which is necessary to protect the public against illegitimate exercises of power); *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 285 (Mass. 2000) (defining a police officer as a public official for purposes of interpreting statutory language).

66. *See generally* *Katz v. United States*, 389 U.S. 347, 360-64 (1967) (Harlan, J., concurring) (articulating the modern standard of subjective reasonableness, and society’s acceptance as reasonable, for when a person has an expectation of privacy); *State v. Flora*, 845 P.2d 1355 (Wash. Ct. App. 1992) (articulating one of the situations lacking an expectation of privacy, namely, in conversations that take place in public places where they can be easily overheard).

67. *See Hyde*, 750 N.E.2d at 967 (detailing how Massachusetts’s wiretapping law was revised from a one-party consent law to be more strict because of a concern for the increasing commercial availability of devices that could secretly intercept oral and wire communications).

68. *See* Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2006); Letter from Robert N. MacDonald, Chief Counsel Ops. & Advice, Md. Office of the Attorney Gen., to Samuel I. Rosenberg, Md. State Delegate (July 7, 2010) at 5 (on file with author) (explaining, by comparison to the Maryland statute, how privacy is found in the federal statute despite the absence of any specific reference to a private conversation).

69. MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (West 2010).

70. 18 U.S.C. § 2510(2).

71. *See United States v. Duncan*, 598 F.2d 839, 849-55 (4th Cir. 1979) (determining, for the purposes of the federal wiretapping statute, that I.R.S. agents had a reasonable expectation of privacy when surreptitiously recorded in the defendant’s bank, which they had been occupying to conduct an audit).

and federal statutes' similarities, the language of the Maryland statute incorporates the reasonable expectation of privacy standard derived from the federal law.⁷² This reasonable expectation of privacy standard should be incorporated into all state wiretapping laws because not doing so creates a great potential for misuse of the law against citizens, as happened in *Hyde*.⁷³

C. Courts That Have Not Found Privacy Requirements in Wiretapping Statutes are Wrong Because They Have Incorrectly Construed Statutory Language and Misinterpreted Legislative Intent.

The majority in *Hyde* misapplies the Massachusetts wiretapping statute in holding Michael Hyde criminally liable because it ignores judicial precedent and misinterprets legislative intent.⁷⁴ There is no doubt that the Massachusetts wiretapping statute is stricter than the wiretapping statutes of most states, as the Supreme Judicial Court of Massachusetts points out.⁷⁵ However, the Court inaccurately explained the reasons for the disparity between Massachusetts' wiretapping statutes and other states' wiretapping statutes.⁷⁶ Decisions by other Massachusetts courts show that the statute's intent was not to prosecute private citizens for surreptitiously recording police officers, but instead, the statute was meant to protect private citizens from state actors and other private citizens.⁷⁷

The Massachusetts statute makes it illegal to record people without their

72. See *Malpas v. State*, 695 A.2d 588, 595-96 (Md. Ct. Spec. App. 1997) (determining whether a violation of the wiretapping statute occurred requires a jury determination that some involved party had a reasonable expectation of privacy). See generally Letter from Robert N. MacDonald to Samuel I. Rosenberg, *supra* note 68, at 5 (explaining how courts have characterized the difference between the federal and Maryland statutes' definition of "oral communication" as "slight," and requiring the same privacy standard under Maryland law as federal law requires).

73. See *Commonwealth v. Hyde*, 750 N.E.2d 963, 972 (Mass. 2001) (Marshall, C.J., dissenting) (arguing that the legislature enacted the statute with the intention of protecting the privacy rights of citizens, not as a weapon to prosecute citizens in similar situations).

74. See *id.* at 972 (discussing legislative history and determining that using the statute to criminally prosecute citizens in these situations directly contradicts the legislators' intention to protect citizens from police abuse of wiretapping).

75. See *id.* at 967 (relating that when it amended the statute in 1968, the commission intended to create an electronic surveillance statute that was more restrictive than those in other states).

76. See *id.* at 972-74 (Marshall, C.J., dissenting) (expounding that the two-fold intention of the statute was to authorize and regulate the government's use of electronic surveillance and to protect the privacy of citizens by regulating nongovernmental surveillance).

77. See *Commonwealth v. Thorpe*, 424 N.E.2d 250, 255 (Mass. 1981), *cert. denied*, 454 U.S. 1147 (1982) (acknowledging that the legislature had great concern for the privacy rights of citizens and was hesitant to add an exception enabling police to use wiretapping to combat organized crime).

consent regardless of the location of the recording.⁷⁸ The statute defines “interception” as “to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such a communication.”⁷⁹ Any person who commits, attempts to commit, or even “procures any other person to commit an interception” may be punished with a fine of up to ten thousand dollars, imprisonment for up to five years, or both.⁸⁰ It also states that any individual who “willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception . . . shall be guilty of a misdemeanor.”⁸¹ Additionally, the statute prohibits “permit[ting] . . . participat[ing] in a conspiracy to commit,” or serving as an “accessory” to any other violations of section 99.⁸² The majority in *Hyde* wrongly concludes that the statute lacks privacy language, and therefore, does not provide an expectation of privacy requirement, as the statute specifically provides a civil remedy for “aggrieved” persons who have “standing to complain that . . . his privacy was invaded in the course of an interception.”⁸³

Similarly, in Maryland, the wiretapping law does not regulate video recording alone and must include an audio communication for a violation to occur.⁸⁴ The Maryland wiretapping law specifically regulates interception of oral, wire, or electronic communication, and, since a typical encounter between a private citizen and a police officer does not implicate wire or electronic communication, the relevant analysis hinges on whether an “oral communication” between an officer and citizen is protected by the act.⁸⁵ Like the Massachusetts statute, the Maryland statute governing wiretapping is more stringent than federal wiretapping law because it

78. *See Jean v. Mass. State Police*, 492 F.3d 24, 25 (1st Cir. 2007) (suggesting that the wiretapping law applied to Pechonis, who recorded police officers conducting an illegal search in his own home).

79. MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2010).

80. § 99(C)(1).

81. § 99(C)(3).

82. § 99(C)(6).

83. §§ 99(B)(6), 99(Q).

84. *See Ricks v. State*, 537 A.2d 612, 614, 617 (Md. App. Ct. 1988) (holding that although the Maryland wiretapping act is more restrictive than its federal counterpart, there is nothing in either act that affects the legality of visual recording). *See generally Jean v. Mass. State Police*, 492 F.3d 24, 26 (1st Cir. 2007) (explaining that due to the Massachusetts statute’s limitation to “wire and oral communications,” Jean’s video of police officers would not violate the statute were she to remove the audio portion).

85. Letter from Robert N. MacDonald to Samuel I. Rosenberg, *supra* note 68, at 4.

requires all-party consent.⁸⁶

As with any legal issue, there are several ways to analyze the Massachusetts wiretapping law's application to *Hyde* and other similar circumstances, and all of them inevitably lead to the conclusion that the law was not meant to apply to private citizens who record on-duty police officers.⁸⁷ The majority opinion bases its argument on a plain text reading of the statutory language, commenting several times that the statute makes no mention of exceptions for citizens secretly recording on-duty police officers or for when there is no expectation of privacy.⁸⁸ Since the statute does contain enumerated exceptions, the implication is that the legislature anticipated every possible applicable circumstance for the statute and intended only the exceptions appearing therein.⁸⁹ While the majority refuses to read implicit language into the statute, it engages in just such a reading when it assumes the legislature meant to conflate consent with knowledge, and interprets the unanimous consent requirement of the statute to mean that if Hyde had simply held the recorder in plain view then he would have been free of criminal culpability.⁹⁰

D. Courts That Have Used Wiretapping Statutes to Prosecute Citizens Who Record On-Duty Police Officers Have Failed to Follow Persuasive Precedent.

The Washington Court of Appeals addressed circumstances similar to those in *Hyde* and came to the opposite conclusion.⁹¹ The Washington appellate court rejected the idea that the wiretapping law was “a sword available for use against individuals by public officers acting in their

86. Richard P. Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law*, 8 U. BALT. L. REV. 183, 192 (1979) (suggesting that the Maryland statute is “considerably more inclusive” than its federal counterpart because of Maryland requires consent of all parties and the federal statute only requires single party consent).

87. See also *Commonwealth v. Voight*, 556 N.E.2d 115 (Mass. App. Ct. 1990) (suggesting that a public official acting in public capacity may not be a “person” for the purpose of statutory grievances). See generally *Commonwealth v. Hyde*, 750 N.E.2d 963, 972 (Mass. 2001) (Marshall, C.J., dissenting) (arguing for an exception where participants have no reasonable expectation of privacy).

88. See *Hyde*, 750 N.E.2d at 966 (agreeing with the Commonwealth that Hyde's assertion that the officer had no expectation of privacy in the conversation Hyde recorded was irrelevant since the statute lacks any exceptions for situations involving privacy expectations).

89. See MASS. GEN. LAWS ANN. ch. 272, § 99(D) (West 2010) (listing several exceptions to the prohibition, including interceptions made pursuant to a warrant and for institutions that record telephone conversations in the ordinary course of business).

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

91. See generally *State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (overturning a conviction under a Washington statute that prohibits the recording of private conversations because Flora recorded his arrest on the side of a public thoroughfare, with a third party present, and in sight and hearing of passersby).

official capacity,” despite the fact that Washington also has a unanimous consent wiretapping statute very similar to Massachusetts’s statute.⁹²

The Supreme Judicial Court of Massachusetts also cites Illinois precedent in its decision against Hyde, and once again the Court misinterprets the rule of law.⁹³ In *People v. Beardsley*, the Illinois Supreme Court reversed a conviction based on Illinois wiretapping laws because police officers were aware that the defendant was in a position to overhear their conversation and therefore not a private conversation as required by the Illinois statute.⁹⁴ The majority in *Hyde* erroneously implies that because the Illinois legislature amended the statute after the *Beardsley* decision, this diminishes the case’s persuasive value. In fact, the majority makes no effort to explain why the existence of such an amendment would mean the principles of statutory interpretation employed by the *Beardsley* court were not proper.⁹⁵

The court in *Hyde* holds that it does not need to address the issue of whether an interest in, or expectation of, privacy exists because the Massachusetts statute does not make an exception for when such an expectation is present.⁹⁶ The Massachusetts Court misinterprets the statute as it is specifically intended to protect “aggrieved person[s]” whose “privacy was invaded in the course of an interception”⁹⁷ Moreover, even if the officers had an expectation of privacy, Massachusetts precedent suggests that police officers are potentially not “persons” entitled to such statutory protection without express designation, and no such expression exists here.⁹⁸ Although the majority in *Hyde* thinks that it would be an injustice to not interpret the statute using the plain meaning of the words on

92. See *id.* at 1358 (holding that since the arrest was not in any way private, the officers could not have considered their words private).

93. See *Hyde*, 750 N.E.2d at 970 n.10 (citing *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986)) (discussing *Beardsley*, in which a defendant appealed from an eavesdropping conviction, and noting that the case is pertinent despite not being mentioned by either party).

94. See *Beardsley*, 503 N.E.2d at 350 (reasoning that the legislature must have intended to allow secret recordings of non-private conversations under the eavesdropping statute despite the plain language of the statute prohibiting recording any part of a conversation without consent).

95. See *Hyde*, 750 N.E.2d at 970, 970 n.10 (stating its intention to avoid “craft[ing] unwarranted judicial exceptions” and citing *Beardsley* and the subsequent amendment to the Illinois statute without explicitly stating its purpose for doing so).

96. See *id.* at 966 (providing a list of all the statutory exceptions and noting the absence of any exception for a private individual recording a police officer in the “carefully worded and unambiguous” statute).

97. See MASS. GEN. LAWS ANN. ch. 272, § 99(B)(6) (West 2010) (emphasis added).

98. See *Commonwealth v. Voight*, 556 N.E.2d 115, 117 (Mass. App. Ct. 1990) (suggesting that public employees acting in their official capacity could fail to be deemed “persons” under the statute, although the court did not explicitly address the issue).

the page, it is a fundamental rule of statutory construction that courts should not reach a result that plainly contradicts legislative intent, and using the statute in situations like *Hyde* opens the door for many unintended applications.⁹⁹

E. Police Have a Diminished Expectation of Privacy While On-Duty Because of Their Status as Public Officials and Their Knowing Exposure of Interactions with the Public.

The U.S. Supreme Court gives some weight to the idea that it is unlikely that police have any reasonable expectation of privacy during traffic stops.¹⁰⁰ In *Garcetti v. Ceballos*, the Supreme Court ruled that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and therefore the Constitution does not protect their communications.¹⁰¹ It does not seem far-fetched, then, to reason that public employees *acting* in the their public capacity should have diminished rights in the same way that public employees *speaking* in their official capacity have diminished rights.¹⁰²

Police officers are entitled to some degree of privacy, but even Massachusetts has recognized that officers' level of entitlement is probably less than that of private citizens.¹⁰³ Additionally, in New Jersey the courts have consistently held that police officers have a lesser expectation of privacy because of their status as police officers.¹⁰⁴ The New Jersey

99. See *Commonwealth v. Gordon*, 666 N.E.2d 122, 134 (Mass. 1996) (acknowledging that a literal reading of the wiretapping statute could criminalize the recording of police booking procedures, but declining to read the wiretapping statute literally as doing so literally would go against the perceived intention of the statute).

100. See *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984) (noting that the typical traffic stop is at least somewhat public because passersby on foot or in other cars are privy to the interaction between the police officer and motorist).

101. See *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006) (determining that the analysis hinged on whether the employee was speaking as a citizen on a matter of public concern).

102. Cf. *id.* at 410-12 (holding that when public employees make statements pursuant to their official duties the Constitution does not protect them from employer discipline).

103. See *Guiney v. Police Comm'r*, 582 N.E.2d 523, 528 (Mass. 1991) (citing several Massachusetts statutes that reflect the unique nature of the law enforcement officer as a public official whose power over the public creates a greater potential for abuse and misconduct than other public employees); see also *O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976) (finding that police officers have a lessened expectation of privacy in their financial records because the public interest in the integrity of the police force outweighed the officers' privacy expectations).

104. See *Hornberger v. Am. Broad. Cos., Inc.*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (quoting *Rawlings v. Police Dep't of Jersey City*, 627 A.2d 602, 605 (N.J. 1993)) (stating that, as a police officer, the plaintiff had a diminished expectation of privacy); *Hart v. City of Jersey City*, 706 A.2d 256, 259 (N.J. Super. Ct. App. Div. 1998) ("[P]olice officers, because they occupy positions of public trust and exercise special powers, have a diminished expectation of privacy.").

Supreme Court has also held that police officers who are “on-duty, searching a vehicle on a public street, cannot expect the same level of privacy as private citizens in a private place.”¹⁰⁵ Maryland courts have also affirmed the rule that a person has no reasonable expectation of privacy in statements that the person “knowingly exposes to the public.”¹⁰⁶

Hence, 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.¹⁰⁷ Moreover, police officers make on-duty statements knowing that the statements are being exposed to the public because such statements made between a police officer and a citizen during the course of an arrest are often used as evidence during any subsequent court proceedings—which are public record—related to the arrest.¹⁰⁸ Therefore, wiretapping laws requiring an expectation of privacy should not protect officers acting in their public capacity because police have no reasonable expectation of privacy due to the public nature of their jobs.

*F. Enforcing Wiretapping Statutes Without a Privacy Requirement
Burdens First Amendment Rights.*

The First Amendment grants all U.S. citizens (and resident aliens) not only freedom of speech and expression but also the right to gather information.¹⁰⁹ When courts interpret wiretapping statutes in the same manner as the Massachusetts statute, there is great potential for unanimous consent statutes to burden this right.¹¹⁰ Although some courts recognize the

105. *Hornberger*, 799 A.2d at 594.

106. *See* *Malpas v. State*, 695 A.2d 588, 595-96 (Md. Ct. Spec. App. 1997) (holding that defendant lacked a reasonable expectation of privacy in the argument that took place in defendant’s own home but was audible and recorded without amplification in a neighbor’s apartment).

107. *Cf.* Letter from Robert N. MacDonald to Samuel I. Rosenberg, *supra* note 68, at 5-6 (on file with author) (contemplating a situation in which a police officer could not be charged with a wiretapping violation for recording a traffic stop and arguing that it seems just as likely that the same logical process would be applied to a private citizen).

108. *See id.* at 6 (arguing that all citizens know, or should know, that comments made to police officers are admissible against them in court, and since citizens have no expectation of privacy in their conversation with police officers, then officers should have no expectation of privacy either).

109. *See* *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (emphasizing that free speech and free exchange of information are vital to interpreting the First Amendment); *see also* *Smith v. City of Cummings*, 212 F.3d 1332, 1333 (11th Cir. 2000) (acknowledging that the First Amendment protects the right to record matters of public interest as well as gather information about public officials).

110. *See* *Commonwealth v. Hyde*, 750 N.E.2d 963, 977 (Mass. 2001) (Marshall, C.J. dissenting) (observing that with the court’s current interpretation of the wiretapping statute, the statute would apply the same standard to Hyde as it would to a member of the press, which is problematic because freedom of the press is a guaranteed right).

right to gather information (specifically on public officials such as police officers), it is not universal.¹¹¹ The Supreme Judicial Court of Massachusetts seems motivated by a desire to guarantee equal privacy rights to both private citizens and police officers under the Fourth Amendment.¹¹² However, even assuming police have the same expectation of privacy as private citizens, the Court's misplaced emphasis upon on-duty police officers' Fourth Amendment privacy rights causes the Court to inexplicably overlook the effect on the First Amendment right to gather information.¹¹³ By reading the Massachusetts statute to prohibit the tape-recording of police officers to any degree, including secret recording, the Supreme Judicial Court of Massachusetts acknowledges and prioritizes the privacy rights of police above the First Amendment rights of its state's citizens.¹¹⁴

Other courts have already weighed the importance of this right against the police officers' privacy expectations, holding that the First Amendment outweighed the Fourth.¹¹⁵ An important logical consequence follows: even in the unlikely case that courts recognize the need for a reasonable expectation of privacy calculus and decide the police *do* have a reasonable expectation of privacy, courts should still find the laws unconstitutional when they violate the First Amendment's preferential treatment.¹¹⁶ Additionally, video evidence is becoming increasingly more important in cases of alleged police misconduct.¹¹⁷ In *Scott v. Harris*, the Supreme Court pronounced the value of video evidence by exclusively relying on it

111. See, e.g., *Smith*, 212 F.3d at 1333 (recognizing the First Amendment right to videotape police conduct is subject to reasonable time, manner, and place restrictions); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (appreciating that the right to film public officials extends from the First Amendment but that the reach is not indefinite because of relevant privacy concerns).

112. See *Hyde*, 750 N.E.2d at 975-77 (Marshall, C.J., dissenting) (discussing the implications of the majority's holding for protecting privacy rights of police officers whose privacy rights should actually be protected less vigorously).

113. See *id.* at 977 (Marshall, C.J., dissenting) (discussing how nothing in the decision prevents the court from applying the statute to the press in the same manner as the court applied it to Hyde, which is potentially an unconstitutional infringement on First Amendment rights). But see *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) (stating that the First Amendment will not necessarily invalidate all civil and criminal statutes that incidentally burden the press).

114. See generally *Hyde*, 750 N.E.2d at 965-70 (refusing to view the statute in terms of expectations of privacy while paradoxically finding Hyde guilty of invading the privacy of the police officer).

115. See *Jean v. Mass. State Police*, 492 F.3d 24, 25 (1st Cir. 2007) (finding Jean likely to prevail on her claim that posting the illegally obtained recording on YouTube.com was constitutionally protected speech).

116. See generally *id.* at 33 (implying that the facts in *Jean* strongly call into question the Massachusetts statute and explaining that Jean's claim of First Amendment protection was likely valid).

117. See Thurlow, *supra* note 17, at 809 (reporting that five percent of Americans believe themselves victims of police abuse).

in determining that an officer's actions were reasonable and did not constitute excessive force.¹¹⁸ The risk of stifling video evidence and greatly burdening First Amendment rights is further reason courts should find privacy requirements in wiretapping statutes.

G. The First Amendment Protects the Publication of Illegally Obtained Recordings of On-Duty Police Officers and Should be Held to Protect the Making of Such Recordings.

In *Jean v. Massachusetts State Police*, the First Circuit experienced the problematic interpretation of the Massachusetts statute.¹¹⁹ The court in *Jean* recognized *Bartnicki v. Vopper* as controlling precedent because the Supreme Court addressed the issue of “what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally-intercepted communication.”¹²⁰ The *Jean* court also recognized that as per the Massachusetts statute, Jean's conduct might have been unlawful as she disclosed to others the contents of an oral communication that she knew had been illegally intercepted, and she arguably participated with Pechonis in a conspiracy to disclose to others the contents of the illegally recorded conversation.¹²¹

The court in *Jean* appropriately recognized that the primary issue that the case needed to address was not whether Jean had violated the Massachusetts law, but rather whether the First Amendment—in light of the Supreme Court's precedential decision in *Bartnicki*¹²²—permitted Massachusetts to criminalize the type of conduct in which Jean had engaged.¹²³

In a similar decision, the Western District of Pennsylvania correctly

118. See *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (finding that video evidence from the camera inside the defendant's police cruiser discredited the petitioner's version of the alleged excessive police force and holding that the video evidence was sufficient to resolve the factual issue of excessive force and justify summary judgment).

119. See *Jean*, 492 F.3d at 30 (noting that *Bartnicki* implicated protecting privacy but here privacy is “virtually irrelevant” because of the circumstances of the recorded search).

120. See *Bartnicki v. Vopper*, 532 U.S. 514, 517, 535 (2001) (finding the right to speak on issues of public importance outweighed the violation of the federal wiretapping statute that occurred when Vopper played an illegally intercepted communication on his radio show).

121. *Jean*, 492 F.3d at 31 (explaining that while this behavior would technically violate the statute, the determinative question for the court was whether the First Amendment permitted Massachusetts to criminalize the conduct since Jean obtained the tape lawfully).

122. See *Bartnicki*, 532 U.S. at 535 (holding that the First Amendment's shield for speech that is a matter of public concern trumped the illegal means by which the information was obtained and made its disclosure lawful).

123. *Jean*, 492 F.3d at 27.

found a privacy requirement in Pennsylvania's wiretapping law and dismissed charges against an individual who was arrested after recording an encounter with police officers on his cell phone.¹²⁴ Despite the previously discussed jurisprudence, the court stated that the law is "plainly underdeveloped" on the issue of whether individuals have First Amendment protection when video and audio recording on-duty police officers.¹²⁵ Federal courts have also suggested there may be some weight to the notion that privacy is a requirement in wiretapping statutes.¹²⁶

The First Amendment also contains a provision that gives citizens the right to petition the government for potential redress when individual rights have been violated.¹²⁷ Hyde tried, unsuccessfully, to argue that his prosecution subsequent to providing the recorded conversation as evidence of misconduct was the equivalent of holding him criminally liable for exercising this important constitutional right.¹²⁸ Despite the Court's determination that Hyde had no claim on this matter, the statute's application still burdened Hyde's right because if misconduct had been found, Hyde's recording would have been inadmissible because, based on the Court's interpretation of the law, it was obtained illegally.¹²⁹

IV. POLICY ARGUMENT AND RECOMMENDATIONS

Current wiretapping, electronic surveillance, and eavesdropping laws are insufficient to handle the complicated issues arising from overprotection of police privacy.¹³⁰ They are also ill equipped to deal with advances in

124. *See Matheny v. Cnty. of Allegheny Pa.*, CIVA No. 09-1070, 2010 WL 1007859, at *4 (W.D. Pa. Mar. 16, 2010) (holding that due to an officer's lack of reasonable expectation of privacy, the Pennsylvania wiretapping law did not apply in a case where a police officer was recorded with a cell phone video camera, but taking odds with Matheny's assertion that his arrest violated a "clearly established" First Amendment right to record on-duty police officers).

125. *See id.* at *6 (explaining that there is insufficient case law on First Amendment protection afforded to the videotaping of on-duty police officers to provide sufficient guidelines or "define the contours of the right" clearly enough to find infringement on Matheny's right).

126. *See Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (suggesting that photographing or videotaping the police performing their duties on public property may be an activity that the First Amendment protects).

127. U.S. CONST. amend. I (providing that Congress shall make no law abridging the people's right to "petition the Government for a redress of grievances").

128. *Contra Commonwealth v. Hyde*, 705 N.E.2d 963, 969 (Mass. 2001) (suggesting that Hyde was prosecuted for secretly making the recording, not simply for making the recording itself).

129. *See also* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 837-38 (1998) (providing anecdotal examples of cases where the Court found "linchpin" evidence of recorded conversations inadmissible because all parties did not consent to the recording).

130. *See Mishra, supra* note 16, at 1555 (discussing how current wiretapping laws

technology, which have made amateur cell phone videographers legion.¹³¹ Thanks to the Internet (and specifically websites such as YouTube), disseminating audio and video recorded on a cell phone or other device has never been easier.¹³²

Because the right of private citizens to record public officials and police officers holds public officials such as police officers accountable for their actions, it is of the utmost importance in an increasingly marginalized society.¹³³ Very few checks on police misconduct currently exist, and often suits brought against police for misconduct and civil rights violations come down to the word of the plaintiff against the word of the police officer.¹³⁴ Although juries are not supposed to view police officers as any more credible than private citizens, this generally does not hold true in practice.¹³⁵ Additionally, the availability of video evidence in misconduct suits against the police would help such plaintiffs successfully bring claims and alleviate the problem of potential juror bias in favor of police officers.¹³⁶ The availability of this type of video evidence would also lessen the load of an already heavily burdened judicial system because frivolous civil rights lawsuits would be dismissed more easily if corroborating video evidence existed.¹³⁷

Furthermore, there is a great potential for the state to selectively enforce wiretapping laws if courts like the Supreme Judicial Court of Massachusetts allow the laws to apply against citizens recording police officers.¹³⁸ It seems rather unlikely that a police officer would arrest a

overprotect police privacy and explaining the need for a rule that prevents overprotection but still respects the idea that police are entitled to some privacy).

131. See Bast, *supra* note 129, at 838 (arguing that state wiretapping laws generally did not anticipate how pervasive portable audio and video recording devices, such as those found in nearly all cell phones, would become).

132. See Rittgers, *supra* note 9 (discussing the need to amend Maryland's wiretapping law in light of the proliferation of new technologies such as the cell phone video recorder and the widespread use of the internet as a means for disseminating information).

133. See Hyde, 750 N.E.2d at 972 (Marshall, C.J., dissenting) (illustrating, by the example of the infamous Rodney King incident, the importance of laws that allow citizens to record on-duty police and do not hinder their ability to do so).

134. See Mishra, *supra* note 16, at 1553 (arguing that external checks on police misconduct are extremely important because they are not subject to intradepartmental corruption).

135. See *id.* at 1554 (suggesting that citizens with criminal records are the targets of police abuse and juries in civil actions brought by such citizens can easily be biased in favor of the police).

136. *Id.* at 1554 n.35 (explaining that citizens rarely win civil actions against police officers without corroborating evidence).

137. See Thurlow, *supra* note 17, at 808 (discussing how requiring recording of all police interactions would eliminate the commonly seen "swearing contest" where a trial becomes an officer's word against the word of the defendant or plaintiff).

138. See Rittgers, *supra* note 9 (explaining that allowing this use of wiretapping

citizen who uses a cell phone to record a police officer rescuing a woman from a purse-snatcher, but if the police officer then decided to use excessive force in arresting the purse-snatcher, nothing would prevent the officer from arresting the videographer and preventing the recorded misconduct from being used against the officer.¹³⁹ Rather, if police are allowed to avail themselves of wiretapping laws' recording protections, then police are more likely to apply wiretapping laws to arrest people who are in what is colloquially referred to as "contempt of cop."¹⁴⁰

Since the majority of courts (even in unanimous consent states) have held wiretapping laws inapplicable to citizens recording police conduct when the charged citizens eventually have their day in court, one might question why there is an urgent need to explicitly codify that this use of the law is not permissible.¹⁴¹ Such need arises because even though the defendants in these cases eventually have their charges dismissed, the deterrent effect has still exerted itself.¹⁴² Simply the chance of the hassle and embarrassment of being arrested, coupled with time consuming and costly litigation, is enough to make someone think twice before trying to record any kind of police misconduct.¹⁴³ Citizens should be encouraged to record on-duty police officers because it holds the officers to a higher level of accountability for their actions.¹⁴⁴ Any law that discourages holding public officials accountable for their actions is one that is against good policy and demands legislative intervention.¹⁴⁵

V. CONCLUSION

Because all wiretapping statutes should require a reasonable expectation of privacy, and because police officers have no expectation of privacy in their public interactions, unanimous consent wiretapping statutes are being incorrectly used against citizens who record on-duty officers. Additionally,

laws turns civil servants into nothing more than bullies and sends the message that police are not interested in any transparency in their activities).

139. *See id.* (showing that even citizens without intent to record a conversation with a police officer are subject to search and seizure under Maryland's broad wiretapping statute if they do surreptitiously record the conversation).

140. *See id.* (articulating a view of this application of wiretapping laws that is commonly held in civil rights circles).

141. *See Mishra, supra* note 16, at 1556 (arguing that although certain states have made exceptions to their wiretapping laws for citizens recording police, these exceptions fail to balance police privacy with public interest effectively).

142. Rittgers, *supra* note 9.

143. *Id.*

144. *See Solove, supra* note 14, at 1267-68 (explaining how surveillance in general is highly effective when used as a tool for maintaining social order).

145. *See Mishra, supra* note 16, at 1558 (arguing that states such as Massachusetts should amend their wiretapping laws to allow citizens to record police officers as a check on police abuse of power).

this same use of unanimous consent statutes unconstitutionally burdens the First Amendment right to gather information of public importance. Using unanimous consent wiretapping laws to prosecute citizens who record on-duty police officers is not only bad public policy (as it encourages a lack of transparency in police activities) but is also incorrect judicial practice as it goes against established law. The scope of the right to gather information of public importance must be legislatively clarified to include recording on-duty officers. Alternatively, Congress must create a law requiring state wiretapping laws to conform to the reasonable expectation of privacy requirement present in the federal statute. If a change is not made, innocent citizens will continue to be prosecuted under laws that were never intended to apply to them in the first place.