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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

I. Introduction ..........................................................................................1328
II. Background .........................................................................................1330
   A. The Right to Privacy ........................................................................1330
      1. The Katz Test ...........................................................................1331
      2. Public Officials Acting in Official Capacity ..........................1332
   B. A History of Wiretapping Law ..................................................1332
      1. The Federal Wiretapping Statute ........................................1332
      2. State Wiretapping Statutes ...................................................1334
   C. The First Amendment Rights of Public Officials ......................1335
III. Analysis .............................................................................................1336
   A. Courts Should Find an Implicit Privacy Requirement in 
      Unanimous Consent Wiretapping Statutes When Used to 
      Charge Citizens for Recording On-Duty Police Officers ......1336
   B. Courts Should Analogize to the Federal Wiretapping 
      Statute When Interpreting State Wiretapping Laws. ..........1337
   C. Courts That Have Not Found Privacy Requirements in 
      Wiretapping Statutes are Wrong Because They Have 
      Incorrectly Construed Statutory Language and 
      Misinterpreted Legislative Intent ...........................................1338
   D. Courts That Have Used Wiretapping Statutes to Prosecute 
      Citizens Who Record On-Duty Police Officers Have Failed 
      to Follow Persuasive Precedent .............................................1340
   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 ....1342

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I. INTRODUCTION

In October 1998, Massachusetts police pulled over Michael Hyde for seemingly no reason. 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. The recording was evidence of a crime, but the crime was Hyde’s violation of the Massachusetts wiretapping statute. 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.

In another 2005 incident, Massachusetts police conducted a warrantless search of Paul Pechonis’s home after arresting him on a misdemeanor charge. Unbeknownst to the officers, a hidden “nanny cam” captured audio and video of the entire arrest and search. Pechonis turned over the surreptitiously recorded video to Mary Jean, who proceeded to post the video on her website. 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

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).


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. Part II of this Comment explores the development of the modern right to privacy. Part II also gives a brief review of current wiretapping statutes. 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. Part III also argues that unanimous consent laws burden First Amendment rights in various forms. Part IV suggests possible solutions to these policy problems. Finally, Part V concludes that citizens’ First Amendment rights outweigh police officers’ expectations of privacy and that change is wholly necessary.

II. BACKGROUND

A. The Right to Privacy

Although Americans enjoy a fundamental right to privacy, the word
"privacy" cannot be found anywhere in the Constitution. 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.

1. The Katz Test

The modern right to privacy first emerged in the landmark decision Katz v. United States. In a highly quoted passage, the Supreme Court held that the Fourth Amendment “protects people not places” and overturned Olmstead v. United States. Olmstead had previously interpreted the Fourth Amendment as requiring a physical search or seizure for privacy to be violated. 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. Articulated in Katz, the modern test for whether a right to privacy has been violated is twofold. First, the person alleging the violation must have a subjective expectation of privacy. 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).


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).
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. 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. 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.” 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. Concerned that Title III could not adequately provide for advances in the technology of wiretapping and eavesdropping, Congress amended Title III in 1986.

Today, Title III generally prohibits, with some exceptions, both private and state electronic surveillance. 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.


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).


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. Forty-nine states have anti-wiretapping laws. Like the federal wiretapping statute, the majority of these statutes permit recordings when only one party has consented. Thirteen state wiretapping laws have a unanimous consent or knowledge requirement. 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.

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. Courts have consistently interpreted Massachusetts’s statute as prohibiting the creation of all forms of secret records by the public. The statute does not provide an explicit exception for circumstances in which there is no reasonable expectation of privacy.

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

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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.


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. However, with the progression of technology, nearly every video recording device (from cell phones to point-and-shoot digital cameras) has an audio component. 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. Yet, courts in other jurisdictions have held that their respective wiretapping statutes do not criminalize this amateur videography. Courts sometimes do this by finding an implicit expectation of privacy requirement for police officers.

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. 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. Furthermore, the Court has determined that the right to gather information of public importance outweighs potential wiretapping


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).


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


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. 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.


The phrase “private conversation” is not used in the federal wiretapping statute. According to the Maryland wiretapping law, an “oral communication” is “any conversation or words spoken to or by a person in a private conversation.” 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.” 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.

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).


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.\(^7^2\) 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 \textit{Hyde}.\(^7^3\)

\textbf{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 \textit{Hyde} misapplies the Massachusetts wiretapping statute in holding Michael Hyde criminally liable because it ignores judicial precedent and misinterprets legislative intent.\(^7^4\) 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.\(^7^5\) However, the Court inaccurately explained the reasons for the disparity between Massachusetts’ wiretapping statutes and other states’ wiretapping statutes.\(^7^6\) 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.\(^7^7\)

The Massachusetts statute makes it illegal to record people without their

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\(^7^2\) 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. MacDonal 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).

\(^7^3\) 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).

\(^7^4\) 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).

\(^7^5\) 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).

\(^7^6\) 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).

\(^7^7\) 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).
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.” 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. 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.” 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. 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.”

Similarly, in Maryland, the wiretapping law does not regulate video recording alone and must include an audio communication for a violation to occur. 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. 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).

requires all-party consent. 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. 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. 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. 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.

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. 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. BALTIMORE 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).


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).
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

(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).

(N.J. 1993)) (stating that, as a police officer, the plaintiff had a diminished expectation
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.” 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.”

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. 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. 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. 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. Although some courts recognize the


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).
The right to gather information (specifically on public officials such as police officers), it is not universal. 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. 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. 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.

Other courts have already weighed the importance of this right against the police officers’ privacy expectations, holding that the First Amendment outweighed the Fourth. 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. Additionally, video evidence is becoming increasingly more important in cases of alleged police misconduct.

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. 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. 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.” 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.

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—permitted Massachusetts to criminalize the type of conduct in which Jean had engaged.

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. 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. Federal courts have also suggested there may be some weight to the notion that privacy is a requirement in wiretapping statutes.

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. 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. 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.

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. They are also ill equipped to deal with advances in...

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{138} It seems rather unlikely that a police officer would arrest a

\begin{thebibliography}{99}
\bibitem{Bast} 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).

\bibitem{Rittgers} 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).

\bibitem{Hyde} 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).

\bibitem{Mishra} 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).

\bibitem{id} 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).

\bibitem{Id} Id. at 1554 n.35 (explaining that citizens rarely win civil actions against police officers without corroborating evidence).

\bibitem{Thurlow} 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).

\bibitem{Rittgers} See Rittgers, supra note 9 (explaining that allowing this use of wiretapping

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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. 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.”

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. Such need arises because even though the defendants in these cases eventually have their charges dismissed, the deterrent effect has still exerted itself. 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. Citizens should be encouraged to record on-duty police officers because it holds the officers to a higher level of accountability for their actions. Any law that discourages holding public officials accountable for their actions is one that is against good policy and demands legislative intervention.

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.