NOTE

Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity

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ABSTRACT

In recent years, the proliferation of miniature recording devices and free video-sharing websites has led to a dramatic increase in citizen journalism. The effect of this development is clearest in the context of civilian recordings of police activity, particularly in instances of police misconduct. To protect police privacy and safety, several states have responded by prosecuting civilian recorders under state wiretapping laws. However, states' reliance on wiretapping laws in this context is misplaced. Because an on-duty police officer's right to privacy is necessarily diminished, it should generally be outweighed by a civilian's First Amendment right to freedom of the press—irrespective of whether the police officer being recorded is engaging in misconduct at the time.

To reconcile the countervailing constitutional rights and policy interests at stake, this Note proposes a legislative amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, also known as the federal wiretapping law. The Amendment provides that an on-duty police officer's oral communications may be lawfully recorded unless the fact or method of recording creates or significantly exacerbates a substantial risk of imminent harm to the officer, other persons, or national security. The proposed amend-

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ment remedies the constitutionally defective status of state wiretapping laws by serving three equally important objectives: (1) protecting civilians' First Amendment free press right to record police activity, (2) protecting police officers' privacy and safety interests when the unique circumstances so demand, and (3) ensuring uniformity and resolving ambiguity among and within the states in this highly controversial area.

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INTRODUCTION

Chicago artist and teacher Chris Drew has long been waging a private war against the city's stringent regulations regarding the sale

of artwork on the streets.[1] Frustrated by the lack of support from his fellow artists, Mr. Drew took his campaign to a new level.[2] On December 2, 2009, he stood on one of Chicago's most heavily trafficked blocks, wearing a vibrant red poncho marked "Art for sale—$1," and defiantly sold his artwork to pedestrians until beat cops took the bait and arrested him.[3] Mr. Drew went peaceably, expecting to be charged with a violation of the peddling law.[4] This miscalculation would cost him dearly. Instead of being charged with a misdemeanor, Mr. Drew was charged with a first-class felony for violating Illinois's wiretapping law.[5] The prosecution's evidence for this unexpected charge was, quite literally, in the bag: namely, a digital recorder in a sandwich bag taped to Mr. Drew's poncho, which Mr. Drew had used to record the audio of his own arrest.[6] At a hearing in May 2010, Mr. Drew's attorney moved to dismiss the felony charge on the grounds that Mr. Drew's First Amendment right to freedom of the press outweighed the police officer's right to privacy.[7] An Illinois circuit court judge denied the motion[8] and Mr. Drew's case is now pending.[9] If convicted, he could serve up to fifteen years in prison—only slightly less time than he would serve had he been convicted of first degree murder.[10]

In recent years, the proliferation of miniature recording devices and free video-sharing websites has led to a dramatic increase in citizen journalism.[11] The effect of this development is clearest in the con-

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1 Deanna Isaacs, *The Accidental Poster Child: Courting Arrest to Protest Street-Art Laws, Chris Drew Stumbled into a More Serious Fight*, CHI. READER, Sept. 23, 2010, http://www.chicagoreader.com/chicago/chris-drew-art-peddling-law-arrest-illinois-eavesdropping-act-aclu/Content?oid=2448923; Don Terry, *Eavesdropping Laws Mean That Turning On an Audio Recorder Could Send You to Prison*, N.Y. TIMES, Jan. 23, 2011, http://www.nytimes.com/2011/01/23/us/23cnceavesdropping.html.

2 Isaacs, *supra* note 1.

3 Terry, *supra* note 1.

4 Isaacs, *supra* note 1.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Terry, *supra* note 1.

10 Isaacs, *supra* note 1; Jason Mick, *Chicago Police: Tape Us, Get Sentenced to 15 Years in Prison*, DAILYTECH (Jan. 24, 2011, 2:25 PM), http://www.dailytech.com/Chicago+Police+Tape+Us+Get+Sentenced+to+15+Years+in+Prison/article20735.htm; *see also* 730 ILL. COMP. STAT. 5/5-4.5-20(a) (2010) (providing that the minimum prison sentence for first degree murder is twenty years).

11 *See* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 526 (2007).

text of civilian recordings of police activity,[12] particularly instances of police misconduct.[13] Indeed, the "Founding Father" of citizen journalism is George Holliday, who famously used his Sony Handycam to record a group of Los Angeles policemen delivering over fifty blows to Rodney King on March 3, 1991.[14]

The increase in civilian recordings of police activity has not gone unnoticed by opponents of the practice. In a concerted effort to protect police privacy and safety, several states have responded by prosecuting civilian recorders under state wiretapping laws.[15] Frequently, they have done so on the grounds that the method of recording was surreptitious or that the recorded conversation was construable as "private."[16]

States' reliance on wiretapping laws in this context is misplaced. Specifically, because an on-duty police officer's right to privacy is necessarily diminished, it should generally be outweighed by a civilian's First Amendment right to freedom of the press—irrespective of whether the police officer being recorded is engaging in misconduct at the time.[17] Policy concerns, such as the need to ensure police accountability, similarly point in favor of protecting such citizen journalists.

To correct this injustice, Congress should pass a legislative amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, ("Title III"),[18] also known as the federal wiretap-

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12 *See* Steven Greenhouse, *At the Bar: Secret Tape-Recording: A Debate that Divides Old-Line Ethicists from New-Wave Technocrats*, N.Y. TIMES, Sept. 16, 1994, at B18 (noting that microelectronics make "clandestine recordings as easy as flipping a light switch"); *see also* Keith B. Richburg, *New York's Video Vigilante, Scourge of Parking Enforcers: 'Jimmy Justice' Posts Images of Officers Breaking the Law*, WASH. POST, Aug. 3, 2008, at A4 (discussing how amateur videos posted on YouTube are "increasingly being used to hold law enforcers to account and shine a public spotlight on their excesses").

13 Although "police misconduct" is commonly understood to describe the use of excessive force, this Note defines the term more broadly, as "[a]ny deviation from authorized conduct." *See* Christopher A. Love, *The Myth of Message-Sending: The Continuing Search for a True Deterrent to Police Misconduct*, 12 J. SUFFOLK ACAD. L. 45, 46 (1998).

14 Eric Deggans, *How the Rodney King Video Paved the Way for Today's Citizen Journalism*, CNN (Mar. 7, 2011, 6:20 AM), http://www.cnn.com/2011/OPINION/03/05/deggans.rodney.king.journalism/index.html?iref=allsearch.

15 *See, e.g.*, State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Md. Cir. Ct. Sept. 27, 2010); Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001); State v. Flora, 845 P.2d 1355 (Wash. Ct. App. 1992).

16 *See, e.g.*, *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *7; *Hyde*, 750 N.E.2d at 966.

17 *See* Iacobucci v. Boulter, 193 F.3d 14, 18, 25 (1st Cir. 1999) (upholding a damages award against a police officer who arrested an amateur video journalist for recording a conversation between government officials because the plaintiff's activities involved "the exercise of his First Amendment rights").

18 Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2522 (2006).

ping law, providing that an on-duty police officer's oral communications may be lawfully recorded unless the fact or method of recording creates or significantly exacerbates a substantial risk of imminent harm to the officer, other persons, or national security.

Part I of this Note provides a historical overview of wiretapping law in the United States and also examines the recent application of state wiretapping laws to civilians who record police activity.[19] Part II deconstructs the competing rights implicated by this issue: the civilian's First Amendment right to record and the police officer's right to privacy. Part III explores the relevant policy arguments on both sides of the debate, including the need for police accountability, basic fairness concerns, and police safety. To combat the constitutionally defective application of wiretapping law to civilian recorders of police activity, Part IV proposes a federal statutory amendment to Title III that would preempt conflicting state laws. The Note concludes that the proposed legislative amendment would effectively and efficiently reconcile the countervailing constitutional rights and policy interests at stake.

I. WIRETAPPING LAW: A LEGAL HISTORY

Wiretapping law is, in many ways, a creature of the twentieth century: a direct result of the numerous technological advancements that abruptly pervaded, and have come to define, our collective social and cultural reality.[20] The legal and theoretical justifications for wiretapping law, however, can be traced back much further in American history. Wiretapping law is, fundamentally, a reflection of the belief that every citizen has the right to be free from unbridled governmental intrusion.[21]

The importance of citizens' right to privacy is demonstrated by the Framers' decision to include it in the Fourth Amendment to the U.S. Constitution, which protects people from unreasonable government searches and seizures.[22] The Amendment provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

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19 For the sake of brevity, this Note refers to civilians who record police activity as "civilian recorders."

20 *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 337 (2011).

21 *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 576 (1999).

22 *Id.* at 557–58.

> but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[23]

The spirit of the Fourth Amendment was given considerable clout by the U.S. Supreme Court, which has held that evidence seized by the government in violation thereof is inadmissible at trial (the "exclusionary rule").[24] Under the Supreme Court's construction of the Fourth Amendment, the right to be let alone is thus the "enabling rule," and a government search and seizure is the exception.[25]

In the early twentieth century, a number of technological innovations facilitated the creation of a type of search and seizure unforeseen by the Framers: government-authorized police recordings of civilian communications.[26] Although the Supreme Court initially refused to hold that the Fourth Amendment protected such conversations,[27] the Court ultimately reversed its position in the seminal case of *Katz v. United States*.[28] In so doing, the Court laid the foundation for modern electronic surveillance law.[29]

In *Katz*, the petitioner had been convicted in district court under an eight-count indictment charging him with placing illegal bets.[30] At trial, the government was permitted to introduce evidence of the petitioner's end of telephone conversations, which had been overheard by FBI agents who attached an electronic recording device to the public telephone booth where the petitioner had placed the calls.[31] The Ninth Circuit held that there was no Fourth Amendment violation because the government did not physically intrude into the area occu-

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23 U.S. CONST. amend. IV.

24 *See* Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (declaring that the exclusionary rule applies to both state and federal officials).

25 Anjali Singhal, *The Piracy of Privacy? A Fourth Amendment Analysis of Key Escrow Cryptography*, 7 STAN. L. & POL'Y REV. 189, 191 (1996).

26 In *Olmstead v. United States*, 277 U.S. 438, 455 (1928), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967), the petitioners were convicted of conspiracy to violate the National Prohibition Act by "unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors." The conspiracy was discovered when four federal prohibition officers began intercepting messages on the conspirators' telephones. *Id.* at 456.

27 *See id.* at 464 ("The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects.").

28 Katz v. United States, 389 U.S. 347 (1967).

29 Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 988 (2009).

30 *Katz*, 389 U.S. at 348.

31 *Id.*

pied by the petitioner.[32] The Supreme Court overturned the conviction, holding that the Fourth Amendment "protects people, not places."[33] According to the Court, Mr. Katz was entitled to privacy even though the conversation for which he was arrested transpired in a public phone booth.[34]

Congress acknowledged the importance of citizens' right to privacy when it applied the principles embodied by *Katz* to Title III, which applies to state actors and private parties alike.[35] Under the federal wiretapping law, electronic surveillance is presumed illegal unless one of the following conditions is satisfied: (1) one or more parties to the recorded conversation consented to be recorded,[36] (2) one party to the recorded conversation lacked a reasonable expectation of privacy,[37] or (3) a warrant was procured by a law enforcement official prior to the recording.[38] After Title III was enacted, forty-nine states passed their own wiretapping laws, which, for the most part, emulated their federal counterpart.[39] To date, Vermont is the only state without an explicit wiretapping law.[40]

According to the legislative history of Title III, state wiretapping laws are subject to the sole limitation that they be at least as restrictive as Title III itself.[41] States are thus authorized to enact *more* restrictive

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32 *Id.* at 348–49.

33 *Id.* at 351.

34 *Id.* at 351–52 ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

35 *See* 18 U.S.C. § 2510(6) (2006); *see also* Skehill, *supra* note 29, at 989.

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

37 *Id.* § 2510(2) (defining "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, but such term does not include any electronic communication").

38 *Id.* § 2511(2)(a)(ii)(A)–(B) (authorizing providers of wire or electronic communication service to provide information, facilities, or technical assistance to "persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance" if the persons were provided with a court order or written certification from the appropriate party directing such assistance).

39 Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversation When They Believe the Child Is in Danger?*, 28 SEATTLE U. L. REV. 955, 965 (2005).

40 *Id.* at 965 n.58. However, the Vermont Supreme Court has held that the government's surreptitious and warrantless electronic monitoring of communications in a person's home is unconstitutional. *See* State v. Geraw, 795 A.2d 1219, 1220 (Vt. 2002). Therefore, although Vermont lacks a wiretapping law, the state does provide its citizens with a measure of protection against government wiretapping of quintessentially private communications.

41 S. REP. NO. 90-1097, at 98 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187 (stating the

wiretapping laws,[42] and many have done so.[43] Moreover, some state courts have interpreted their state wiretapping laws to be more restrictive than what the statutory language mandates. For example, although Nevada's law does not explicitly require that all parties to a telephone conversation consent to a recording for the recording to be lawful, the Nevada Supreme Court has read this requirement into the law.[44]

The distinction between lenient and stringent state wiretapping laws generally rests on the breadth of the law's consent requirement. More specifically, whether a wiretapping law is lenient or stringent depends on how many parties to a communication must consent to the communication being recorded for the recording to be lawful. The most lenient state wiretapping laws, similar to Title III, allow for interception of a communication with the consent of only one party to the communication, at least in some circumstances.[45] Under Title III, an "interception" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[46] "Consent exists where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights," and it may be express or implied.[47]

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legislative intent that under Title III, "[s]tates would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation"); *see also* People v. Conklin, 522 P.2d 1049, 1057 (Cal. 1974) ("The legislative history of [T]itle III reveals that Congress intended that the states be allowed to enact more restrictive laws designed to protect the right of privacy.").

42 *Conklin*, 522 P.2d at 1057.

43 States that have adopted a more stringent wiretapping law include California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington. *See* CAL. PENAL CODE § 632 (West 2010); CONN. GEN. STAT. § 53a-189 (2011); FLA. STAT. § 934.03 (2010); 720 ILL. COMP. STAT. 5/14-2 (2010); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2000); MICH. COMP. LAWS ANN. § 750.539c (West 2004); MONT. CODE ANN. § 45-8-213 (2009); N.H. REV. STAT. ANN. § 570-A:2 (2001); 18 PA. CONS. STAT. § 5703 (2008); WASH. REV. CODE § 9.73.030 (2010); *see also* Dinger, *supra* note 39, at 967 n.66.

44 *See* Lane v. Allstate Ins. Co., 969 P.2d 938, 939–41 (Nev. 1998).

45 86 C.J.S. *Telecommunications* § 247 (2010). In Nebraska, for example, it is unlawful to deliberately intercept any "oral communications" unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception. State v. Hinton, 415 N.W.2d 138, 143 (Neb. 1987). For a statement to fall within the protection of Nebraska's wiretapping law, it must be deemed an "oral communication," defined as a communication uttered by someone who had a subjective expectation of privacy that was objectively reasonable. *See* State v. Weikle, 474 N.W.2d 486, 488 (Neb. 1991).

46 18 U.S.C. § 2510(4) (2006).

47 People v. Ceja, 789 N.E.2d 1228, 1240 (Ill. 2003). In some states, "a communicating party will be deemed to have consented to having his or her communication recorded when the

By contrast, under state wiretapping laws that are more restrictive than Title III, *all* parties to the intercepted communication must consent to be recorded for the recording to be lawful.[48] Massachusetts's wiretapping law further distinguishes between legal and illegal recordings based on the manner in which the recording was made, specifically, whether it was made in plain view of the person being recorded as opposed to "secretly."[49] This Note next examines three of the most stringent state wiretapping laws, with a focus on how these laws have enabled the prosecution of numerous civilians for recording police activity without the police officer's knowledge or affirmative consent.

A. Maryland: The Bad

Maryland, as mentioned above, has a significantly more stringent wiretapping law than Title III.[50] Except as otherwise authorized, Maryland's wiretapping law provides that an individual may not "[w]illfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."[51] "Oral communication" is defined as "any conversation or words spoken to or by any person in private conversation."[52] As such, the legality of a recording in Maryland hinges on whether the recorded statements were part of a "private conversation" and therefore fall within the definition of an "oral communication."[53] Unless the interceptor is a law enforcement officer or an employee of a wire communication service, to whom different rules apply,[54] a person can intercept a wire, oral, or electronic communication only if she is a party to the communication and all of the parties to the communication have given prior consent to the interception.[55]

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party knows that the messages will be recorded." State v. Townsend, 57 P.3d 255, 260 (Wash. 2002).

48 86 C.J.S. *Telecommunications* § 247.

49 *See* MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4) (West 2000) ("The term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . . .").

50 *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (LexisNexis 2006).

51 *Id.* § 10-402(a)(1).

52 *Id.* § 10-401(2)(i).

53 *See* Letter from Robert N. McDonald, Chief Counsel, Opinions & Advice, Office of the Attorney General, State of Md., to The Honorable Samuel I. Rosenberg, Member, House of Delegates, State of Md. 4–6 (July 7, 2010) (on file with author).

54 *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(1)–(2).

55 *Id.* § 10-402(c)(3).

Maryland's wiretapping law was enacted in the 1970s, before VHS players were invented; it could not, and did not, "anticipate the advent of video cameras attached to helmets or embedded in cellphones."[56] In the late twentieth century, its "most infamous alleged violator" was Linda Tripp—then a resident of Columbia, Maryland—who taped conversations with Monica Lewinsky about her affair with former President Clinton.[57] Since then, a series of unexpected violators have emerged: Maryland citizens who record police activity and upload the recordings to the Internet for public viewing.[58]

State v. Graber[59] provides fitting evidence that whether a communication is "private," and thus protected from interception, truly is in the eye of the beholder. On March 5, 2010, Anthony Graber, a staff sergeant for the Maryland Air National Guard, was driving his motorcycle on Interstate 95 when "an unmarked gray sedan cut him off as he stopped behind several other cars" on Exit 80.[60] A man emerged from the driver's side of the sedan, wearing a gray sweatshirt and jeans and brandishing a gun.[61] Only after ordering Mr. Graber to dismount his bike did the man identify himself as a state police officer and cite Mr. Graber for "doing 80 in a 65 mph zone."[62] Mr. Graber recorded the traffic stop using a camera on the top of his motorcycle helmet, which he had long since installed and "often used to record his journeys."[63] On March 10, Mr. Graber uploaded the recording of the incident to YouTube.[64]

On April 8, he was awakened by six officers searching through his parents' home in Abingdon, Maryland, at which point he learned that state prosecutors had "obtained a grand jury indictment alleging he had violated state wiretap laws by recording the trooper without his consent."[65] Police confiscated four computers, Mr. Graber's camera, external hard drives, and thumb drives during a ninety-minute

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56 Annys Shin, *From YouTube to Your Local Court: Video of Traffic Spot Sparks Debate on Whether Police Are Twisting Md. Wiretap Laws*, WASH. POST, June 16, 2010, at A1.

57 *Id.*

58 *Id.*

59 State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Md. Cir. Ct. Sept. 27, 2010).

60 Shin, *supra* note 56.

61 *Id.*

62 *Id.* (internal quotation marks omitted).

63 *Id.*

64 *Id.* See *Motorcycle Traffic Violation—Cop Pulls Out Gun*, YOUTUBE (Mar. 10, 2010), http://www.youtube.com/watch?v=BHjjF55M8JQ&feature=related, to view the video.

65 Shin, *supra* note 56.

search.[66] Mr. Graber spent twenty-six hours in jail and was arraigned on June 1, 2010, facing up to sixteen years in prison for the alleged offense.[67]

Maryland prosecutor Joseph Cassilly expressed his surprise to reporters about the ensuing public outcry over Mr. Graber's arrest and prosecution.[68] Cassilly, like many members of the law enforcement community, thinks that police officers "should be able to consider their on-duty conversations to be private."[69] Ultimately, the judge disagreed and the charges against Mr. Graber were dismissed on the grounds that the oral exchange between himself and the police officer was not, in fact, a private one.[70] The lasting significance of Mr. Graber's arrest and subsequent prosecution should not be understated. After all, had another judge concluded that the recorded oral exchange *were* private, the outcome of his case would have been drastically different.[71] Instead of going home, Mr. Graber could have spent the next sixteen years behind bars for recording a conversation that occurred in public, between himself and a public officer.[72]

Graber was neither the first nor the last Maryland case in which a civilian was pursued for recording the police in public. More recently, a twenty-seven-year-old woman named Yvonne Shaw faced similar charges for recording a police officer with her cell phone when he was acting aggressively toward one of her friends.[73] The officer, upon seeing the phone, grabbed it from Ms. Shaw's hand, followed Ms. Shaw into her friend's house, and arrested her.[74] The prosecutor ultimately dropped the charges, but not without cost to Ms. Shaw; she spent almost $200 to buy a new cell phone, in addition to having been issued a $60 traffic ticket by the same officer whom she had recorded.[75] Although these costs may seem insignificant, they constitute a further injustice that only compounds the significant injury of Ms. Shaw's improper arrest.

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66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *See* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *19 (Md. Cir. Ct. Sept. 27, 2010).

71 *See* Letter from Robert N. McDonald, *supra* note 53, at 10–11.

72 Shin, *supra* note 56.

73 John Wharton, *Fritz Says Recording of Deputy Legal: State's Attorney to Drop Charges Against Woman Whose Cell Phone Was Snatched*, S. MD. NEWSPAPERS ONLINE, June 23, 2010, http://www.somdnews.com/stories/06232010/entetop163018_32318.shtml.

74 *Id.*

75 *Id.*

Yvonne Shaw and Anthony Graber's arrests illustrate the monetary and psychological damage, and harm to dignity, caused by ambiguous wiretapping laws like Maryland's. Without guidance as to what constitutes a "private communication," civilians and police officers are left in a state of uncertainty concerning their respective rights. This uncertainty places a heavy burden on the civilian recorder, whose First Amendment right to free press is at risk of being impermissibly chilled.[76] After all, in the words of the Supreme Court, "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."[77]

B. Massachusetts: The Worse

Similar to Maryland's wiretapping law and Title III, the Massachusetts wiretapping law criminalizes the interception of wire and oral communications.[78] Massachusetts differs appreciably, however, insofar as its wiretapping law is concerned with the method by which a recording is made, as opposed to the privacy expectations of the parties to the recording. In Massachusetts, to intercept means "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication."[79] Thus, unless all parties have given consent to be recorded, the legality of a recording hinges on whether it was made covertly as opposed to openly.[80] The absence of privacy language in the law has led Massachusetts state courts to hold that a surreptitious recording is illegal even if the party being recorded had no expectation of privacy whatsoever.[81] Therefore, had George Holliday videotaped the Rodney King beating in Massachusetts and not California, Mr. Holliday would have almost certainly been subject to criminal prosecution rather than being lauded as a public hero.[82] Simply put, whereas Maryland's wire-

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76 *See infra* Part II.A.

77 Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

78 MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (West 2000).

79 *Id.* § 99(B)(4).

80 *See* Skehill, *supra* note 29, at 983.

81 *See* Commonwealth v. Hyde, 750 N.E.2d 963, 966 (Mass. 2001) ("The Commonwealth asserts that the plain language of the statute unambiguously expresses the Legislature's intent to prohibit the secret recording of the speech of anyone .... We agree with the Commonwealth."); *see also* Skehill, *supra* note 29, at 990–91.

82 *Hyde*, 750 N.E.2d at 972 (Marshall, C.J., dissenting).

tapping law makes the issue of privacy unclear, Massachusetts's makes it entirely irrelevant.

The lack of privacy language in Massachusetts's wiretapping law has, in recent years, been utilized in state prosecutions of civilians who secretly recorded police activity.[83] The archetypical case is *Commonwealth v. Hyde*.[84] In that case, defendant Michael Hyde was pulled over by an Abington police officer on October 26, 1998.[85] Three other officers arrived shortly thereafter, and Mr. Hyde began to secretly record the police officers' statements with a tape recorder.[86] As the officers' search of Mr. Hyde and his vehicle continued, the interaction between Mr. Hyde and the officers became increasingly heated and ultimately led to the exchange of profanities.[87] Six days after the traffic stop, Mr. Hyde lodged a formal complaint with the internal affairs division of the Abington Police Department.[88] To substantiate his allegations against the police officers, Mr. Hyde submitted a copy of his tape recording of the incident.[89] Unbeknownst to Mr. Hyde, his recording would lead to his own prosecution, as opposed to disciplinary action against the police officers.[90]

Mr. Hyde was convicted of violating Massachusetts's wiretapping law for secretly recording the police officers without their knowledge or consent.[91] He was sentenced to six months probation.[92] The Massachusetts Supreme Judicial Court upheld Mr. Hyde's conviction, reasoning that "our Legislature chose not to follow those States whose statutes prohibit wiretapping or secret electronic recording based on privacy rights."[93] Because it did not matter whether the officers could have reasonably expected their interaction with Mr. Hyde to be private, his conviction plainly conformed to the statutory language.[94]

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83 *See* Daniel Rowinski, *Police Fight Cellphone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, BOSTON.COM (Jan. 12, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/ (discussing the arrests of Massachusetts citizens Jeffrey Manzelli in 2002, Peter Lowney in 2006, Simon Glik in 2007, and John Surmacz in 2008).

84 Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001).

85 *Id.* at 964.

86 *Id.* at 964–65.

87 *Id.* at 964.

88 *Id.* at 965.

89 *Id.*

90 *Id.*

91 *Id.*

92 Denise Lavoie, *SJC Upholds Conviction of Man Who Secretly Taped Police*, BOSTON.COM (July 13, 2001), http://www.boston.com/news/daily/13/police_recording.htm.

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

94 *Id.*

The fact that Michael Hyde did not receive jail time, like Anthony Graber and Yvonne Shaw, is of little consolation to the citizens of Massachusetts, who are now on notice that if they secretly record a police officer—even if she is on duty, in public, *and* engaging in misconduct—they are subject to criminal prosecution, notwithstanding the constitutional rights at stake.[95]

Massachusetts is unique in its distinction between public and secret recordings. Although troubling, Massachusetts's law is by no means the most restrictive state wiretapping law in existence today. That title is held by the state of Illinois, where civil rights groups have been among the first to challenge the law's application to civilian recorders of police activity as a violation of the First Amendment to the U.S. Constitution.[96]

C. *Illinois: The Ugly*

Illinois's wiretapping law is the most restrictive wiretapping law in the country.[97] It provides:

> A person commits eavesdropping when he[ ] [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation or electronic communication . . . .[98]

The law further defines "conversation" to mean "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."[99] Thus, under Illinois's wiretapping law, regardless of whether any party to a recording had a reasonable expectation of privacy, *all parties* to a communication must consent to be recorded for a recording of the communication to be lawful.

A string of prosecutions against civilian recorders of police activity,[100] including Chicago artist Chris Drew,[101] has shed new light on the

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95 *See infra* Part II.A.

96 *See* ACLU of Ill. v. Alvarez, No. 1:10-cv-05235, 2010 U.S. Dist. LEXIS 115354 (N.D. Ill. Oct. 28, 2010).

97 *See* Isaacs, *supra* note 1.

98 720 ILL. COMP. STAT. 5/14-2(a)(1) (2010).

99 *Id.* 5/14-1(d).

100 *See* Amended Complaint at 15, *ACLU of Ill. v. Alvarez*, 2010 U.S. Dist. LEXIS 115354 (Oct. 28, 2010).

101 *See supra* notes 1–10.

problematic application of Illinois's wiretapping law in this context. One such case is pending against Tiawanda Moore, a twenty-year-old woman charged with violating the wiretapping law for using her Blackberry to record internal affairs investigators at police headquarters.[102]

Ms. Moore's case is particularly disturbing. In July 2010, during a domestic violence incident, Ms. Moore's boyfriend called the police.[103] Upon arriving at the scene, according to Ms. Moore, one of the two police officers took her upstairs, fondled her, and left her with his personal telephone number.[104]

On August 18, with the officer's phone number in hand, Ms. Moore and her boyfriend went to police headquarters to file a sexual harassment claim.[105] Instead of helping Ms. Moore with her claim, the internal affairs investigators attempted to convince her to drop it, emphasizing that the officer had a "good record" and that they could ensure he would never bother her again.[106] Outraged by the investigators' behavior, Ms. Moore began recording the conversation.[107] Upon discovering that the recording was taking place, the investigators arrested Ms. Moore and charged her with two counts of eavesdropping.[108] Ms. Moore's case is unusually compelling given that—unlike Chris Drew, Anthony Graber, and Michael Hyde—she had committed no alleged crime other than the recording itself. "Before they arrested me for it," Ms. Moore has since stated, "I didn't even know there was a law about eavesdropping. . . . I just wanted somebody to know what had happened to me."[109] Like Chris Drew, Tiawanda Moore faces up to fifteen years in prison.[110]

The American Civil Liberties Union of Illinois ("ACLU") has recently joined the fray in support of civilian recorders, filing a complaint in federal district court on August 18, 2010.[111] In its preenforcement action, the ACLU declared its intention to undertake a program to record police officers, without the officers' consent, pro-

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102 Terry, *supra* note 1.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* (internal quotation marks omitted).

110 *Id.*

111 ACLU of Ill. v. Alvarez, No. 1:10-cv-05235, 2010 U.S. Dist. LEXIS 115354 (N.D. Ill. Oct. 28, 2010).

vided that the officers are (1) performing public duties, (2) in public places, (3) speaking at a volume "audible to the unassisted human ear," and (4) "the manner of recording is otherwise lawful."[112] The ACLU further indicated its intention to disseminate these recordings to the public and to use them to petition the government for a redress of grievances.[113] Alleging fear of prosecution under Illinois's wiretapping law, the ACLU sought declaratory and injunctive relief against Anita Alvarez, in her official capacity as Cook County State's Attorney.[114] The court did not rule on the ACLU's constitutional contentions, however, as the case was ultimately dismissed without prejudice for lack of standing.[115] Nevertheless, *ACLU of Illinois v. Alvarez*[116] illustrates the First Amendment issues raised by the application of Illinois's wiretapping law to civilian recorders of on-duty police officers.[117] The ACLU may be one of the first plaintiffs to argue that a wiretapping law, so applied, contravenes the First Amendment, but it likely will not be the last.

State wiretapping laws, as illustrated above, are increasingly employed to prosecute civilians for recording on-duty police officers.[118] In some cases, the prosecutions have resulted in convictions.[119] Civilian recorders who were not convicted nevertheless bear considerable scars from their experiences. Until the issues surrounding civilian recordings of police activity are resolved, more Americans will be prosecuted pursuant to laws originally enacted to protect them. Many will likely cease monitoring the police altogether, lest they be jailed for unknowingly contravening state wiretapping laws. Civilians' First

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112 *Id.* at *2 (internal quotation marks omitted).

113 *Id.* at *2–3.

114 *Id.* at *1.

115 *Id.* at *6–7. The ACLU later moved to alter the judgment and to file an amended complaint. ACLU of Ill. v. Alvarez, No. 10 C 5235, 2011 U.S. Dist. LEXIS 2088, at *1 (N.D. Ill. Jan. 10, 2011). The court denied the motion, *id.* at *13, and held that although the ACLU had "cured the limited standing deficiencies" identified by the previous court, it had not "alleged a cognizable First Amendment injury," *id.* at *10. Thus, the court concluded, amending the complaint would be "futile." *Id.* at *13. The case is currently on appeal before the Seventh Circuit. Allie Carter, *Appeal Filed in* ACLU v. Alvarez, ACLU (Apr. 20, 2011, 4:43 PM), http://www.aclu-il.org/appeal-filed-in-aclu-v-alvarez/.

116 ACLU of Ill. v. Alvarez, No. 1:10-cv-05235, 2010 U.S. Dist. LEXIS 115354 (N.D. Ill. Oct. 28, 2010).

117 *Id.* at *3–4.

118 *See* Shin, *supra* note 56; Rowinski, *supra* note 83; Terry, *supra* note 1; Wharton, *supra* note 73.

119 *See* Commonwealth v. Hyde, 750 N.E.2d 963, 971 (Mass. 2001) (affirming Hyde's conviction).

Amendment rights—and the effectiveness of law enforcement throughout the country—will suffer the severe consequences.[120]

II. THE CONSTITUTIONAL DEBATE

The application of wiretapping law to civilian recorders of police activity raises serious questions implicating the First Amendment's Free Press Clause and the right to privacy.[121] This Part examines each of the foregoing rights in turn.

A. The First Amendment Protects Civilians' Right to Record Police Activity

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[122] The relationship between the free flow of information and a self-governing people is "[a]t the heart of the First Amendment."[123] As such, in the words of the Second Circuit, courts "must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections."[124] This Section contends that restrictive state wiretapping laws abridge civilian recorders' right to freedom of the press—specifically, their right to gather news by recording police officers while the officers are on duty and performing official police duties in the public sphere. The Section concludes that this freedom should not be restricted absent a state need of the highest order.

1. Civilian Recorders of Police Activity, as Citizen Journalists, Are Protected by Freedom of the Press

Journalism is an unlicensed vocation in the United States,[125] with no continuing education requirements or entry examination.[126] The absence of government regulation derives from the fundamental First

120 *See infra* Parts II, III.

121 The First Amendment and the right to privacy have been incorporated through the Fourteenth Amendment's Due Process Clause; both the states and the federal government are therefore prohibited from encroaching on those rights. *See* Gitlow v. New York, 268 U.S. 256, 666 (1925) (incorporating the First Amendment); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3032–34 (2010) (describing the general incorporation of the Bill of Rights).

122 U.S. CONST. amend. I.

123 *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1047 (2d Cir. 1979).

124 *Id.*

125 LEE C. BOLLINGER, IMAGES OF A FREE PRESS 1 (1991); KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 74 (7th ed. 2008).

126 Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 482 (1984).

Amendment vision that "no one should have to obtain a license to speak."[127] According to the Supreme Court, the word "freedom" vis-à-vis the press includes not only the right to be free from prior restraints on publication, but also a nearly absolute exemption from subsequent punishment when reporting on matters of public concern.[128] Whether civilian recorders of police activity are protected by freedom of the press is thus contingent upon the resolution of two factors: (1) that recordings of police activity necessarily implicate matters of "public concern," and (2) that civilian recorders of the police belong to the special category of the "press."

The first condition is easily satisfied, as exemplified by the Supreme Court's rulings in *Near v. Minnesota ex rel. Olson*[129] and *New York Times Co. v. Sullivan*.[130] In *Near*, the Court stated that public officials, "whose character and conduct remain open to debate and free discussion in the press," cannot institute proceedings to restrain publications commenting on those topics.[131] The Court applied this rule to strike down a Minnesota law that allowed the suppression of publications containing malicious, scandalous, or defamatory material targeting public officials.[132] After *Near*, the Court extended its emboldened reading of the First Amendment to establish that any punishment for publications concerning public officials must be extremely limited to withstand judicial scrutiny.[133] In *Sullivan*, the Court stated that even falsehoods concerning public officials are constitutionally protected unless the statements were made with "actual malice."[134] *Near* and *Sullivan* express the Court's position that information about the conduct of public officials is necessarily of public concern, and therefore is protected by freedom of the press from both prior restraint and almost all subsequent punishment.

Whether civilian recorders of police activity are members of the "press" is slightly more difficult to establish. Historically, members of the press consisted only of "traditional media" such as newspapers, television, and radio.[135] In the twenty-first century, however, "spatial

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127 Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1407 (2003).

128 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–71, 279–80 (1964).

129 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

130 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

131 *Near*, 283 U.S. at 718–19.

132 *Id.* at 701–02, 722–23.

133 *See Sullivan*, 376 U.S. at 279–80.

134 *Id.*

135 Papandrea, *supra* note 11, at 523.

and temporal barriers" to journalistic endeavors have disappeared.[136] Due to the advent of miniature recording devices and the Internet, participation in public debate has never been easier.[137]

The Supreme Court has yet to define citizen journalists as members of the "press."[138] In August 2011, the First Circuit became the only federal circuit court to explicitly so hold in *Glik v. Cunniffe*.[139] Simon Glik was arrested on October 1, 2007, for using his cell phone's video camera to film an arrest transpiring in the Boston Commons.[140] The Commonwealth charged Glik under Massachusetts's wiretapping law,[141] and following the dismissal of these charges, Glik brought suit under 42 U.S.C. § 1983.[142] The district court denied the defendant police officers' claim to qualified immunity.[143] On appeal, the First Circuit affirmed the district court order, concluding that Glik was exercising "clearly-established First Amendment rights in filming the officers in a public space,"[144] and that the police officers violated Glik's Fourth Amendment rights by arresting him without probable cause.[145]

Although *Glik* constitutes the first instance of an federal appellate court defining civilian recorders as citizen journalists, at least one commentator[146] and several federal circuit courts have suggested that citizen journalists may constitute members of the "press" in the related context of reporter privilege.[147]

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136 *Id.*

137 *Id.*; Erica Hepp, Note, *Barking Up the Wrong Channel: An Analysis of Communication Law Problems Through the Lens of Media Concentration Rules*, 85 B.U. L. REV. 553, 584 (2005).

138 *See* Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972) (discussing the "practical and conceptual difficulties" of defining the press if the Court were to find a constitutional reporter's privilege).

139 *See generally* Glik v. Cunniffe, No. 10-1764, 2011 WL 3769092 (1st Cir. Aug. 26, 2011); *see also id.* at *5 ("The First Amendment right to gather news is . . . not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press.").

140 *Id.* at *1.

141 *Id.*

142 *Id.* at *2; *see also* 42 U.S.C. § 1983 (2006) (providing a civil cause of action to redress deprivations under color of state law of constitutional rights).

143 *Glik*, 2011 WL 3769092, at *2.

144 *Id.* at *1; *see also id.* at *3 ("[I]s there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.").

145 *Id.* at *1.

146 Papandrea, *supra* note 11, at 585.

147 *See, e.g.*, Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998) ("Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists."); *In re* Madden, 151 F.3d 125, 129–30 (3d Cir. 1998) ("As

In *von Bulow v. von Bulow*,[148] for example, the Second Circuit adopted a functional test to distinguish journalists from nonjournalists, holding that whether a person is a journalist, and thus deserving of reporter privilege, must be determined by the person's intent at the onset of the information-gathering process.[149] According to the court, only persons who intend to distribute the information they acquire qualify as journalists.[150] Importantly, the court emphasized that a person could be a journalist even if she is someone "not traditionally associated with the institutionalized press."[151] In *Shoen v. Shoen*,[152] the Ninth Circuit adopted the *von Bulow* test and extended a First Amendment privilege to a nonfiction writer of investigative books.[153] The *von Bulow* test was also upheld by the First Circuit in *Cusumano v. Microsoft Corp.*,[154] and by the Third Circuit in *In re Madden*.[155] Insofar as it emphasizes the intent to distribute as the essential criterion for classification as a journalist, this test protects civilians like Chris Drew, who recorded the police with the intent to distribute the recordings and thus bring attention to Chicago's street art laws.[156] It does not, however, protect civilians who record the police with the initial intent to keep the recording for themselves.[157]

Constitutional law scholar Mary-Rose Papandrea suggests that although the *von Bulow* test is a step in the right direction, it should be extended to cover scenarios where the journalist did not initially intend to disseminate her information to the public, but ultimately did

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we see it, the [reporter] privilege is only available to persons whose purposes are those traditionally inherent to the press; persons gathering news for publication."); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) ("The journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance."); von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987) ("We hold that the individual claiming the [reporter] privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.").

148 von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987).

149 *Id.* at 144.

150 *Id.*

151 *Id.* at 144–45.

152 Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).

153 *Id.* at 1293.

154 Cusumano v. Microsoft Corp., 162 F.3d 708, 714–15 (1st Cir. 1998).

155 *In re* Madden, 151 F.3d 125, 129–30 (3d Cir. 1998) (upholding the test but with the added requirement that the person claiming journalist status be involved in news gathering or investigative reporting).

156 Isaacs, *supra* note 1.

157 von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

so.[158] This extension of the rule recognizes that, sometimes, a person does not realize that what she is witnessing is newsworthy until the moment has passed.[159] Anthony Graber, who had long recorded his motorcycle trips but decided to upload his traffic stop to YouTube after it occurred, is an example of such a person.[160]

Under the combined *von Bulow* and Papandrea tests, many civilian recorders of police activity should be considered journalists protected by freedom of the press under the First Amendment. But what of the civilian recorders whose recordings were intended to remain private and ultimately were not distributed to the public? There is, in fact, a strong argument that such recorders should also be protected under the Free Press Clause. Indeed, the *von Bulow* and Papandrea tests fail to acknowledge that information of public concern is fundamentally valuable even if it is *not* exposed to millions of people. At least one commentator has argued that the inquiry should avoid distribution concerns and should instead turn on whether the information at issue is of value to a self-governing public.[161] The First, Ninth, and Eleventh Circuits appear to have agreed with this proposition.[162] In *Smith v. City of Cumming*,[163] for example, the Eleventh Circuit stated that that members of the public have "a First Amendment right . . . to photograph or videotape police conduct" because "[t]he First Amendment protects the *right to gather information* about what public officials do on public property."[164] As such, the court explicitly acknowledged that the initial *gathering* of information concerning public officials, as opposed to its eventual publication, is itself constitutionally protected.[165] Under the Eleventh Circuit's interpretation, even civilians who neither intend nor decide to publish their record-

158 Papandrea, *supra* note 11, at 585.

159 *Id.* at 572.

160 Shin, *supra* note 56.

161 Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609, 639 (2006).

162 *See, e.g.*, Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (stating that the First Amendment protects "a right to record matters of public interest"); Iacobucci v. Boulter, 193 F.3d 14, 24–25 (1st Cir. 1999) (protecting an independent reporter's recording of a town hall meeting); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (holding that a genuine dispute of material fact existed as to whether Fordyce, while videotaping a public protest march, was assaulted by a police officer attempting to dissuade him from exercising his "First Amendment right to film matters of public interest").

163 Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000).

164 *Id.* at 1333 (emphasis added).

165 *Id.*

ings of police activity are protected by the Free Press Clause.[166] The First Circuit, as discussed above, has unequivocally held that civilian recorders are protected by the First Amendment.[167]

This approach to distinguishing journalists from nonjournalists is also most consistent with the dual purposes of the Free Press Clause: to ensure freedom in the "marketplace of ideas" and to establish a so-called "Fourth Estate check" on the government.[168]

The theory of the marketplace of ideas, conceptualized in a 1919 dissent by Justice Holmes, posits that a democracy will arrive at truth only by providing everyone with a competing voice in the public discourse.[169] Under Holmes's theory, a model press would necessarily incorporate a variety of viewpoints, methods of collection and distribution, and audiences.[170]

Under the related Fourth Estate theory, the goal of the Free Press Clause is to "create a fourth institution outside the Government as an additional check on the three official branches."[171] In *Estes v. Texas*,[172] the Court explained the importance of the Fourth Estate model, noting that the press has "been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences."[173] Unlike freedom of speech, which protects the individual, freedom of the press is meant to protect the press as an institution.[174]

Because any man, woman, or child with a cell phone or similar device is capable of recording conversations, civilian recorders of police activity ensure greater variety in the marketplace of ideas as to viewpoint, method of collection, and audience—even if the audience is only the recorder's immediate family and friends. Civilian recorders also provide an important check on the significant police power

166 *Id.*

167 Glik v. Cunniffe, No. 10-1764, 2011 WL 3769092, at *5 (1st Cir. Aug. 26, 2011) (explaining that the "news-gathering protections of the First Amendment cannot turn on professional credentials or status").

168 *See* Roy S. Gutterman, Note, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 SYRACUSE L. REV. 197, 207–08 (2000).

169 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3.

170 Joseph S. Alonzo, Note, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 763 (2006).

171 Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975).

172 Estes v. Texas, 381 U.S. 532 (1965).

173 *Id.* at 539.

174 Stewart, *supra* note 171, at 633.

wielded by the state because police officers who know they are being recorded will amend their behavior accordingly. After all, a police officer being recorded cannot know whether the civilian recording her will ultimately share the footage with the rest of the world. Because civilian recorders of police activity gather news of public concern, in a manner supportive of the dual theories behind the Free Press Clause, they should constitute members of the press protected by the First Amendment regardless of whether they intend or decide to share their recordings with the world.[175] As James Madison stated in 1800,

> In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands[.][176]

It is, indeed, from this very foundation that the right to record has arisen and pursuant to which it must be protected from abridgment.

2. *Civilians' First Amendment Right to Record the Police Should Not Be Restricted*

Having determined that the First Amendment's Free Press Clause protects civilians' right to record the police, the second question is whether, and to what extent, that right can be constitutionally restricted.[177] Of interest here is the overlap between the civilian's right to record and the legal protections of the person or event being recorded. In the context of civilian recorders of police activity, civilians are not merely gathering information; they are gathering information at the expense of the police officer, whose image and words are being consigned to posterity. Under such circumstances, the right to gather information is not absolute—a balance must be struck between the civilian's First Amendment rights and the potential privacy interests at stake.[178] The Supreme Court, in *Zemel v. Rusk*,[179] used the

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175 Recently, one commentator has suggested that because "image capture" is inherently expressive, it constitutes speech within the ambit of the First Amendment's right to freedom of speech. Kreimer, *supra* note 20, at 372–74. No court, however, has explicitly endorsed this view, and this Note does not discuss it for this reason.

176 James Madison, *Report on the Virginia Resolution*, *reprinted in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 570 (Jonathan Elliot ed., 2d ed., J. B. Lippincott Co. 1941) (1836).

177 *See* Avins v. Rutgers, 385 F.2d 151, 152 (3d Cir. 1967) (stating that "the validity of a restraint on speech in each case depends on the particular circumstances").

178 *See* Zemel v. Rusk, 381 U.S. 1, 17 (1965).

179 Zemel v. Rusk, 381 U.S. 1 (1965).

prohibition of unauthorized entry into the White House as an example of this delicate balance, noting that such a prohibition "diminishes the citizen's opportunities to gather information he might find relevant" but is nevertheless legal because "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[180]

Several cases illustrate that limitations on the right to record the police, though permissible, should be extremely narrow.[181] In *Bartnicki v. Vopper*,[182] for example, the Court considered application of the Title III provision that imposes liability for disclosing the contents of an illegally intercepted communication.[183] The Court found the law to be content-neutral and generally applicable, meaning that it did not discriminate based on the content of speech and it applied to a wide variety of conduct including both speech and nonspeech.[184] The Court nevertheless held that the disclosure provision violated the First Amendment as applied to the broadcaster of the communication and to the person who received the broadcast.[185] The Court based its reasoning on the principle that as a regulation of "pure speech,"[186] the Title III provision was bound by the First Amendment rule that publication of "lawfully obtain[ed] truthful information" on a matter of public interest cannot be constitutionally punished barring a need "of the highest order."[187] Thus, whether and to what extent civilians' First Amendment right to record can be constitutionally abridged by state wiretapping laws is contingent upon a thorough assessment of the countervailing interest at stake and the state's proffered interest in protecting it.

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180 *Id.* at 17.

181 *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (holding that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"); Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

182 Bartnicki v. Vopper, 532 U.S. 514 (2001).

183 *Id.* at 517; *see* 18 U.S.C. § 2511(1)(c) (2006).

184 *Bartnicki*, 532 U.S. at 526.

185 *See id.* at 535.

186 *Id.* at 526.

187 *Id.* at 528 (internal quotation marks omitted).

B. *Police Officers Have a Right to Privacy*

The Fourth Amendment provides one of the clearest expressions of a constitutional right to privacy.[188] As such, it is natural to assume that police officers' Fourth Amendment right to privacy protects them from civilian recorders. Because the Fourth Amendment's protection of privacy only applies against state action,[189] such a challenge cannot succeed. This does not mean, however, that police officers lack any right to privacy whatsoever; the Fourth Amendment is not the sole guarantor of privacy rights in the U.S. Constitution.[190]

Indeed, in a series of landmark twentieth-century decisions, the Supreme Court substantially expanded the constitutional right to privacy beyond the express terms of the Fourth Amendment.[191] In *Griswold v. Connecticut*,[192] the Court held that specific guarantees in the Bill of Rights have "penumbras," into which the right to privacy falls.[193] The Court applied this logic to invalidate a Connecticut law prohibiting the use of contraceptives on the grounds that the law violated the right to privacy in marriage.[194] In *Stanley v. Georgia*,[195] the Court upheld a citizen's privacy-based right to possess obscenity in his own home.[196] In *Roe v. Wade*,[197] the Court held that the right to privacy protects a woman's right to choose to have an abortion.[198] Most recently, in *Lawrence v. Texas*,[199] the Court invalidated a Texas sodomy law on the grounds that it violated the right to privacy in intimate consensual sexual conduct.[200]

Admittedly, these decisions all protected privacy interests from *state* infringement, suggesting that even an expanded interpretation of the constitutional right to privacy might not protect police officers from civilian recorders.[201] However, this fact alone does not resolve

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188 *See* U.S. CONST. amend. IV.

189 Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

190 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding that various amendments in the Bill of Rights create "zones of privacy").

191 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); Roe v. Wade, 410 U.S. 113, 153 (1973); Stanley v. Georgia, 394 U.S. 557, 565 (1969); *Griswold*, 381 U.S. at 484.

192 Griswold v. Connecticut, 381 U.S. 479 (1965).

193 *Id.* at 484.

194 *Id.* at 485–86.

195 Stanley v. Georgia, 394 U.S. 557 (1969).

196 *Id.* at 568.

197 Roe v. Wade, 410 U.S. 113 (1973).

198 *Id.* at 164–66.

199 Lawrence v. Texas, 539 U.S. 558 (2003).

200 *Id.* at 578.

201 *See supra* notes 191–200 and accompanying text.

the issue, as the relevance of privacy in wiretapping law remains undoubtedly muddled. Most significantly, Title III itself expressly regulates wiretapping by *both* civilians and government officials.[202] Notwithstanding the inapplicability of the Fourth Amendment to civilian recorders of police activity, numerous courts have accordingly operated under the assumption that police officers have a right to privacy from wiretapping in limited situations.[203] These courts have done so by applying Justice Harlan's two-prong test delineated in *Katz v. United States*, the decision that prompted Congress to enact Title III.[204] This test provides that the Fourth Amendment privacy inquiry is twofold, hinging on whether a person had a genuine expectation of privacy and whether that expectation was objectively reasonable.[205]

Examples abound. In *Hornberger v. American Broadcasting Cos.*,[206] the New Jersey Superior Court's Appellate Division emphasized that "police officers do not have a reasonable expectation of privacy when they are interacting with suspects."[207] The inference is that police officers, when they are *not* interacting with suspects, do have a right to privacy. In *Jean v. Massachusetts State Police*,[208] the First Circuit stated that a police officer's privacy interest is "virtually irrelevant" where the police officer's allegedly private communications were intercepted during a search by the officer of a private civilian's home.[209] Again, the court's language is telling; in the First Circuit's words, a police officer's right to privacy is virtually irrelevant, but not *completely* irrelevant. In sum, although the Supreme Court has yet to rule on the issue, there are both state and federal cases supporting the proposition that police officers have a right to privacy, albeit a diminished one.

A number of statutes and policies recognize that police officers' expectation of privacy is objectively less reasonable than civilians'.[210] For example, 42 U.S.C. § 1983 provides civilians with a private cause

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202 18 U.S.C. § 2510(6) (2006).

203 *See, e.g.*, Jean v. Mass. State Police, 492 F.3d 24, 30–31 (1st Cir. 2007); People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986); Rawlins v. Hutchinson Publ'g Co., 543 P.2d 988, 992 (Kan. 1975); Hornberger v. Am. Broad. Cos., 799 A.2d 566, 625 (N.J. Super. Ct. App. Div. 2002).

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

205 *Id.*

206 Hornberger v. Am. Broad. Cos., 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002).

207 *Id.* at 594 (citing Angel v. Williams, 12 F.3d 786, 790 (8th Cir. 1993); State v. Flora, 845 P.2d 1355, 1357 (Wash. Ct. App. 1992)).

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

209 *Id.* at 30.

210 *See, e.g.*, 42 U.S.C. § 1983 (2006); Skehill, *supra* note 29, at 997 (discussing the ways in which many police departments voluntarily limit their officers' right to privacy).

of action against law enforcement officials and municipalities for damages resulting from constitutional violations.[211] Section 1983 reflects society's consensus that police officers, who act under color of state law, cannot be entirely immune from civilian monitoring; to the contrary, the law sets up a clear mechanism by which police officers are directly liable to civilians whose rights they infringed.[212] In addition, numerous police departments have taken it upon themselves to limit the privacy expectations of their officers.[213] For example, a large number of police agencies have begun recording custodial interrogations,[214] and police departments are also increasingly recording public rallies and traffic stops.[215]

These laws and policies, in addition to the Supreme Court's privacy jurisprudence, compel four conclusions. First, the Fourth Amendment's primary purpose is to protect civilians from unbridled governmental intrusion, not to protect members of law enforcement from watchful civilians. Second, society has a constitutionally valid and socially significant interest in monitoring police activity. Third, police officers have a legitimate expectation of privacy that derives from the penumbras of the Bill of Rights[216] and has been expressed by a substantial line of precedent.[217] Fourth, police officers' right to privacy, though legitimate, is seriously diminished while on duty due to the public nature of their office. The question remains, how do we reconcile civilians' right to freedom of the press with police officers' right to privacy?

C. *A Balancing of the Interests Counsels in Favor of the Right to Record*

Resolving competing free press and privacy claims is a daunting task; indeed, the Supreme Court itself has purposely avoided doing so.[218] In *Florida Star v. B.J.F.*,[219] a rape victim sought damages from a newspaper that had published her name in violation of a Florida

211 42 U.S.C. § 1983; *see also* Skehill, *supra* note 29, at 995–96.

212 *See* 42 U.S.C. § 1983.

213 Skehill, *supra* note 29, at 997.

214 *Id.*

215 *Id.*

216 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

217 *See, e.g.*, Jean v. Mass. State Police, 492 F.3d 24, 30 (1st Cir. 2007); People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986); Rawlins v. Hutchinson Publ'g Co., 543 P.2d 988, 993 (Kan. 1975); Hornberger v. Am. Broad. Cos., 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002).

218 Kreimer, *supra* note 20, at 392.

219 Fla. Star v. B.J.F., 491 U.S. 524 (1989).

law.[220] The Court held that the law violated the First Amendment, on the limited grounds that a newspaper that publishes truthful information about a matter of public significance cannot be punished absent a compelling state interest.[221] The Court acknowledged its avoidance of more sweeping principles, explaining that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights" counseled in favor of its narrow holding.[222]

The Court's concern is certainly valid. A law that favors one of two competing constitutional rights is likely to restrict the other.[223] However, the difficulty of striking a balance between privacy and free press interests simply cannot preclude legislative attempts to do so in the context at issue. The *B.J.F.* Court, after all, expressed unease over balancing First Amendment and privacy rights in 1989, before the invention of miniaturized electronic recording devices.[224] Citizen journalism covering police activity could not have occurred, and did not occur, in the manner it does today. Times have changed and so must the law.

III. Policy Concerns

In addition to constitutional arguments, significant policy concerns are implicated by the application of wiretapping law to civilians who record the police. This Part examines such concerns on both sides of the debate and discusses why a federal solution in this area is preferable to a state one.

A. Policy Concerns in Favor of the Right to Record Include Ensuring Police Accountability and Principles of Basic Fairness

Policy concerns in favor of the right to record include ensuring police accountability to the public[225] and basic fairness. This Section examines each of these considerations in turn.

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220 *Id.* at 527–28.

221 *Id.* at 533.

222 *Id.*

223 *See id.*

224 *See id.* at 524.

225 The ideas in the text accompanying notes 226–30 are borrowed from Dina Mishra and Lisa Skehill, who have explored the policy concerns of civilian recordings of police in their own scholarly work.

1. *Civilian Recordings Ensure Police Accountability to the Public*

Despite the development of judicial and legislative remedies intended to prevent abuses of power by law enforcement officials, police corruption and misconduct still occur.[226] Police misconduct, as compared to harms inflicted by civilians, is problematic for two reasons.[227] First, "the government's coercive and invasive powers" exceed private citizens'.[228] Second, "police abuses [of power] are symbolically worse" insofar as all police actions, as the actions of public officers, are "taken on behalf of all citizens."[229] Viewed in this light, the argument in favor of permitting recordings to ensure police accountability is straightforward. If on-duty police officers know that they could be recorded at any given moment, they will be more likely to act in full accordance with the law, lest their misconduct be published for the world to see.[230] There is empirical evidence to support this conclusion: "Nationally, the use of video and audio recordings has proven instrumental in both criminal and civil cases against wayward police officers."[231]

As this Note has discussed, internal checks on law enforcement officers, such as the recording of custodial interrogations, already limit the officers' privacy to protect civilians from law enforcement abuses.[232] However, police officers are capable of turning off their recorders, recording over questionable footage, or hiding recordings from the public under the guise of national security or confidentiality.[233] Because civilian recordings are not subject to such misdeeds, permitting them will simultaneously improve the citizenry's respect for law enforcement and the effectiveness of law enforcement overall.[234] Specifically, civilian recordings could "thwart frivolous civil

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226 *See* Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 2–3 (2001).

227 Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1551 (2008).

228 *Id.* (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (stating that a government agent "possesses a far greater capacity for harm than an individual trespasser")).

229 *Id.*

230 *See* Skehill, *supra* note 29, at 1003; *see also* Mishra, *supra* note 227, at 1554 ("Officers may generally avoid performing illegal activities, [if they are] mindful of the risk of being recorded and the attendant public scorn").

231 Skehill, *supra* note 29, at 985.

232 Mishra, *supra* note 227, at 1552.

233 *Id.* at 1553; *see also* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1052 (1996).

234 *See* Mishra, *supra* note 227, at 1553 ("[C]itizen recording provides an external check not subject to [police] corruption").

rights lawsuits" by providing plaintiffs' attorneys with proof of what occurred (and did not occur) while their clients were in police custody.[235] Police-civilian recordings could also encourage settlement in situations where legitimate civil rights claims exist.[236] Thus, protecting civilians' right to record the police serves three closely related policy interests: ensuring police accountability, strengthening society's faith in the police force, and ensuring efficiency in the criminal justice system.

2. *Basic Fairness Also Counsels in Favor of the Right to Record*

Police departments have long benefited from recording technology by documenting custodial interrogations, public rallies, and traffic stops.[237] The Supreme Court has consistently upheld these recordings as constitutional, even when the civilian being recorded neither knew of the recording nor consented to it.[238] The Court has done so, moreover, because "the typical traffic stop is public, at least to some degree."[239] If police can constitutionally record civilians without civilians' consent, on the grounds that civilians lack an expectation of privacy under the circumstances, basic fairness suggests that civilians should similarly be able to record the police without transgressing the federal Constitution.

There are, of course, counterarguments to such a proposition, including that police officers record civilians for legitimate reasons, such as to protect civilians' safety and to ensure a fair trial,[240] whereas civilians can record police officers to obstruct police duties or to unfairly influence public opinion of the police.[241] However, this argument fails to recognize that a civilian's motivation in monitoring the police is not nearly as important as the monitoring itself. As explained in Part II,

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235 Skehill, *supra* note 29, at 1008.

236 *Id.*

237 *See id.* at 997.

238 *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 525–26 (1984) (conversation in a jail cell); United States v. White, 401 U.S. 745, 751 (1971) (conversation with a police informant wearing a wire); Lanza v. New York, 370 U.S. 139, 142–44 (1962) (conversation in a jail visitors' room); United States v. Turner, 209 F.3d 1198, 1201 (10th Cir. 2000) (conversation in a police squad car).

239 Berkemer v. McCarty, 468 U.S. 420, 438 (1984).

240 *See* Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 245–47 (2000); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735–41 (1997); Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 547–52 (2001).

241 *See* Richburg, *supra* note 12 (quoting James Huntley, president of the traffic enforcers' union).

civilians have a crucial right to gather information on police officers, regardless of whether the collected information is intended to convey or actually conveys a pro- or antipolice message. Police officers are servants of the public, and what they do is, by definition, relevant to the public discourse.[242] Civilians' use of video technology to monitor the police, far from being unfair, simply levels a playing field that has long been tilted in favor of the government.

B. *Policy Concerns in Favor of Police Privacy Include Protecting Police Safety and National Security*

The primary policy concern in favor of shielding the police from civilian recorders is safety. Because technology has facilitated recording through "passive devices carried on one's person," a civilian recorder may be encouraged to engage in such dangerous actions as resisting arrest in order to record, physically obstructing an officer's performance of her duties by putting the device in direct contact with the officer's person, or otherwise distracting the officer.[243] Such behavior threatens the immediate physical safety of police officers and makes law enforcement less efficient and less attractive to potential recruits.[244]

The possibility of future harm to police officers provides another safety reason for limiting the right to record. First, civilians enraged by misleading or inflammatory videos could become vigilantes who track the police to harass them.[245] Patrick Lynch, president of the New York City Patrolmen's Benevolent Association, similarly cautions that sound bites and short clips never tell the whole story.[246] Police officers themselves have expressed concern "about a flood of citizen videos by people who might not understand that police work is sometimes a messy business."[247] James Huntley, president of Communications Workers of America Local 1182 (which represents 2500 traffic enforcement agents and sanitation workers in New York City) has

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242 *See supra* Part II.A.1.

243 Mishra, *supra* note 227, at 1556.

244 *See* Brandon Payne, Estimating the Risk Premium of Law Enforcement Officers 11 (Nov. 27, 2002) (unpublished M.S. thesis, East Carolina University), *available at* http://www.ecu.edu/cs-educ/econ/upload/payne.pdf (explaining how "crime rates help determine the wages of law enforcement officers").

245 This practice is particularly dangerous when the officer being recorded is undercover and her exposure could result in serious harm both to the officer and her operation.

246 Richburg, *supra* note 12.

247 *Id.*

also voiced concern about traffic agents facing harassment and assaults in the streets for "simply doing their jobs."[248]

In addition to causing harassment by civilians, recordings that track the locations and habits of police officers could be utilized by criminals as a means of physically harming their arresting officers, identifying and exposing undercover officers, framing officers for crimes, or avoiding detection of their own criminal activities. The possibility of facilitating criminal activity is of even greater concern after September 11, 2001. Specifically, there is a fear that permitting recordings of police conduct in public places could "be a precursor to terrorist attacks," insofar as such recordings may constitute a veritable instruction manual to terrorists for when and where to strike.[249]

Concerns regarding direct and future harm to police safety and national security are likely to arise in conjunction with any law permitting the recording of police activity. A law that protects the right to record the police should expressly incorporate such concerns into its language. As explained in Part IV, this Note's proposed legislation does just that.[250]

C. *A Federal Solution Is Necessary*

States have long exercised control over the performance of their police powers.[251] However, a federal solution is preferable to a state solution for two primary reasons.

First, the issue of civilian recorders of police activity transcends a discussion of police powers and involves the substantially different field of electronic communications regulation. This is an area over which the federal government has long exercised control—as is evidenced by the successful enactment and implementation of Title III itself.[252] A federal legislative amendment would in fact be consistent

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248 *Id.*

249 Kreimer, *supra* note 20, at 364. Although the terrorist threat is an important issue, it seems probable that surreptitious recordings by terrorists will occur regardless of how wiretapping law is written and applied. Terrorists are not, after all, likely to post their recordings on YouTube or submit them to internal affairs departments. Thus, measures to combat terrorist recordings should be addressed by different laws and are beyond the scope of this Note.

250 *See infra* Part IV.

251 United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals . . . is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.").

252 *See supra* Part I (discussing Title III).

with tradition, as it merely clarifies to what (and to whom) preexisting law applies.

Second, any solution must reconcile constitutionally enumerated rights. A federal solution would be controversial because it would preempt conflicting state law, but the statutory floor, enacted on constitutional grounds, has already been set by Title III.[253] Thus, although state interests will certainly be affected by the proposed amendment, the federal interest in preserving the constitutional rights of all of citizens outweighs those interests and makes federal legislation preferable to state action.

A possible objection is that a judicial solution is preferable to a statutory one. In this controversial area, however, a bright-line statutory solution is preferable to the caprices of judicial decisionmaking that necessarily accompany developing common law dealing with sensitive constitutional questions. Fourth Amendment jurisprudence is instructive of this point. In the Supreme Court's own words, the test of "reasonableness" under the Fourth Amendment is "not capable of precise definition or mechanical application."[254] Rather, it requires in each case "a balancing of the need for the particular search against the invasion of personal rights that the search entails."[255] Applying this nebulous balancing test, courts have drawn line after line between protected and unprotected conduct.[256] The effect of judicial discretion, coupled with the limitations inherent in case-by-case adjudication, has created a world where Fourth Amendment law more closely resembles a crazy quilt than it does a blanket. A judicial solution to the problem of civilians recording police activity is likely to be fraught with even more confusion, given the existence of *two* competing constitutional rights.[257] Moreover, a judicial solution does not seem likely

253 Title III is essentially a codification of the Court's decision in *Katz v. United States*. *See supra* text accompanying notes 28–38.

254 Bell v. Wolfish, 441 U.S. 520, 559 (1979).

255 *Id.*

256 *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 90 (1998) (finding that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not"); New York v. Burger, 482 U.S. 691, 700 (1987) (finding that although a business owner has an expectation of privacy in commercial property, that interest is "less than[ ] a similar expectation in an individual's home"); United States v. King, 55 F.3d 1193, 1195–96 (6th Cir. 1995) (finding that letters are in the general class of effects protected by the Fourth Amendment, but that the sender's expectation of privacy ordinarily terminates upon delivery of a letter to another); United States v. Grandstaff, 813 F.2d 1353, 1357 (9th Cir. 1987) (per curiam) (finding that "a guest who stays overnight and keeps personal belongings in the residence of another might have a reasonable expectation of privacy, [but] mere presence in the hotel room of another is not enough" (citations omitted)).

257 *See generally supra* Part II; *see also supra* notes 218–22 and accompanying text.

to occur: as discussed in Part II.C, the Supreme Court has deliberately avoided issuing a blanket rule that balances First Amendment rights with the right to privacy.[258]

IV. THE PROPOSED LEGISLATION

Civilians across the country are increasingly prosecuted under state wiretapping laws for recording on-duty police officers while the officers are performing official duties in the public sphere.[259] This Note illustrates that such application of wiretapping law infringes the recorders' First Amendment right to freedom of the press.[260] The right to record, however, cannot be absolute; a crucial consideration remains the recorded police officers' privacy interests. To reconcile these competing claims, this Note proposes that Congress amend 18 U.S.C. § 2510, Title III's definition section, as follows:

> (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication; *nor does such term include any oral communication uttered by an on-duty police officer performing official duties in the public sphere, unless the fact or method of interception would create or significantly exacerbate a substantial risk of imminent harm to the police officer, other persons, or national security. A police officer's expectation of privacy, while the officer is on duty and in public, is thus presumptively unreasonable.*[261]

Additionally, the following new provisions should be added to the definition section:

> The term "on duty" means that the police officer is working during an assigned or impromptu shift (the latter case covering, for example, scenarios where the police officer happens to be present at the commission of a crime and engages in police activity in response thereto). The term does not include scenarios where, for example, the officer has

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258 *See* Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989) ("We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.").

259 *See* Rowinski, *supra* note 83; Shin, *supra* note 56; Terry, *supra* note 1; Wharton, *supra* note 73.

260 *See supra* Part II.A.

261 The text in regular typeface represents the current language of 18 U.S.C. § 2510(2) (2006). Additions are indicated in italics.

> completed her daily police duties and is returning home in her capacity as a private citizen.
>
> The term "official duties" means that the police officer is engaged in police action, including but not limited to making arrests, performing traffic stops, or performing searches and seizures. The term does not include actions or conversations unrelated to police business, including but not limited to personal errands or discussions about family members.
>
> The term "public sphere" means that the police officer is in a public area, in a private area generally accessible to the public, or in a private area where the police officer is performing official duties as defined herein. Therefore, the term includes but is not limited to areas such as streets, sidewalks, parks, police stations, police cars, and locations where the police officer is performing a search and seizure or investigation.

The proposed amendment remedies the constitutionally defective status of state wiretapping laws by serving three equally important objectives: (1) protecting civilians' First Amendment free press right to record police activity, (2) protecting police officers' privacy and safety interests when the unique circumstances so demand, and (3) ensuring uniformity and resolving ambiguity among and within the states in this highly controversial area.

As evidenced by the proposed language, the amendment's primary feature is the rebuttable presumption that an on-duty police officer's oral communications, if uttered in the public sphere, are subject to recording by civilians. This component of the amendment protects the recorder's First Amendment right to freedom of the press from unnecessary abridgment. The second component of the amendment is an exception to this rule, which dictates that an interception of an oral communication uttered by a police officer is lawful "unless the fact or method of interception would create or significantly exacerbate a substantial risk of imminent harm to the police officer, other persons, or national security." This exception acknowledges and protects the police officer's limited right to privacy when substantial safety and security concerns so demand. Moreover, this legislative amendment is designed to protect civilian recorders of police activity from prosecution under *wiretapping laws* only. In the event that a civilian endangers the safety and security of a police officer, the officer may still arrest the civilian for the commission of other crimes, such as resisting arrest and obstruction of justice.

Finally, insofar as Title III is a federal statute and its amendment would apply to all of the states, implementation of the proposed statutory solution would lead to consistency throughout the states with respect to this important issue.[262] Congressman Edolphus Towns (N.Y.) recently demonstrated his belief in the need for consistency in this area by proposing a concurrent resolution in the U.S. Congress that would shield civilians who record the police in public from prosecution.[263]

The benefits of the proposed legislative amendment, as illustrated above, are also illustrated by its application in two hypothetical scenarios.

In the first hypothetical, a police officer arrests a civilian on a sidewalk, surrounded by passersby, on suspicion of drug possession. The police officer, under her breath, harasses and threatens the arrestee. The arrestee uses the cell phone in his pocket to record the arrest and later uploads it to YouTube. Under the Maryland, Massachusetts, and Illinois wiretapping laws, discussed in Part I, the recorder could certainly be prosecuted even though there are no safety issues that mandate limiting his First Amendment right to record. After all, he made the recording secretly and arguably recorded a "private" communication.[264] Under the proposed amendment, by contrast, the civilian's recording would rightly be protected because the recorded oral communication occurred while the officer was on duty and performing official duties in the public sphere. Also, the recording neither created nor substantially exacerbated a threat of imminent harm to any person.

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262 *See* James A. Pautler, Note, *You Know More Than You Think:* State v. Townsend, *Imputed Knowledge, and Implied Consent Under the Washington Privacy Act*, 28 SEATTLE U. L. REV. 209, 238 (2004) ("[W]e may be at the point where the federal government's occupation of the field of regulating electronic communications is so pervasive so as to make out an argument for federal preemption."); *see also id.* (stating that there would be significant advantages to having "a consistent law regulating the monitoring of electronic communications that applies uniformly across all fifty states").

263 H.R. Con. Res. 298, 111th Cong. (2010). The resolution is entitled: "Expressing the sense of Congress that the videotaping or photographing of police engaged in potentially abusive activity in a public place should not be prosecuted in State or Federal courts." *Id.* Although an admirable step toward protecting civilian recordings of police activity, the primary weakness of this bill is the fact that, as a concurrent resolution, even if adopted, it will lack the force of law. The resolution also fails to take into account police privacy and safety interests. Nevertheless, its introduction indicates not only that this is a national issue, but also that Congress itself is aware of the need to address it through federal legislative action.

264 *See, e.g.*, State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Md. Cir. Ct. Sept. 27, 2010); Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001).

In the second hypothetical, a police officer is struggling to arrest a violent suspect who is armed with a knife. A civilian recorder jumps in between the officer and the arrestee, waving a handheld video camera in the officer's face. Under Massachusetts law, even though there are significant safety concerns at stake, the recording would be protected from prosecution under wiretapping law because it was made overtly as opposed to surreptitiously.[265] Under the proposed amendment, by contrast, the civilian's recording would not be protected, because the civilian's First Amendment right to record would be limited by the countervailing threat of imminent harm to the police officer caused by the method of recording.

The application of wiretapping law to civilian recorders of police activity is a novel and problematic phenomenon. In the interest of uniformity and clarity, action by the federal government is essential. The proposed amendment sufficiently protects civilian recorders' right to freedom of the press without sacrificing police officers' important right to safety and security in the performance of official police duties.

CONCLUSION

Stimulated by the advent of miniaturized and affordable recording technology, the recent rise of citizen journalism has prompted the widespread application of state wiretapping laws to civilian recorders of police activity. Such application poses unavoidable constitutional questions regarding civilians' First Amendment right to free press and police officers' right to privacy. Given that civilian recordings of on-duty police activity fall within the scope and purpose of the First Amendment, and that police officers' right to privacy is diminished by virtue of their public office, civilians' right to record the police must ordinarily prevail. Public policy considerations, such as the need to ensure police accountability, further support this conclusion.

By establishing a presumption that an on-duty police officer's oral communications may be lawfully recorded, barring a threat of imminent harm to the officer or to others, the legislative amendment proposed in this Note remedies the constitutionally defective status of stringent state wiretapping laws as applied in this context, while ensuring protection of every person's safety and security.

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265 *See Hyde*, 750 N.E.2d at 971.