Officer! You Are on Candid Camera: Why the Government Should Grant Private Citizens an Exemption from State Wiretap Laws When Surreptitiously Recording On-Duty Officers in Public

Alexander Shaaban
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* The author is a J.D. Candidate at Western State University College of Law ("WSCL"), 2016, and holds a B.S. in Chemistry from University of California, Irvine, 1998. The author wishes to acknowledge and thank Professor Monica Todd, Professor of Law at WSCL: thank you for your unwavering support and guidance. The author also wishes to thank the Western State Law Review tech-editing team, with special thanks to Samantha Ortiz, McKenzee McCammack, Joe Hudack, and Elizabeth Kircher: thank you for all your thoughtful comments and feedback.
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I. INTRODUCTION

An officer executing an arrest shouts profanities and says to the suspect: “Shut up or I’m going to punch you in the mouth.” A crowd forms and the officer, turning her attention to the crowd, notices you with your smartphone, recording the scene. The officer approaches you and says, “Ok, put that thing away, I think you have taken enough pictures.” You reply, “Actually, this is a video recording, I heard you say you

1. See, e.g., Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011) (explaining a situation where a third-party overheard a bystander saying “you are hurting him, stop”).

2. See id.
were going to punch that guy.” The officer immediately places you under arrest and seizes your smartphone.

Intuitively, the scene described above feels wrong. Without any knowledge of the law, without being versed in the amendments of the Constitution, we as a society view police officers as those who protect us from those who will do us harm, or unlawfully dispose us of our property.

Yet if one Googled: “citizens videotaping police officers,” one would find a staggering amount of news articles covering this topic. Why? Because every day more and more citizens are turning on their cameras, pointing them at police officers in public, and pressing “record.” With little to no notice, this simple act is turning citizens into felons.

A. The Role of Law Enforcement: To Protect and Serve

Law enforcement claims police officers have a reasonable expectation of privacy when they are in public. Moreover, law enforcement claims video recording police officers during the performance of their duties would interfere with their ability to safely do so. Finally, some in law enforcement claim if the right to record on-duty officers existed, they were unaware of its existence.

The following is from the Law Enforcement Code of Ethics ("Code").

AS A LAW ENFORCEMENT OFFICER, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is

3. See id. ("I am recording this. I saw you punch him.").
4. A February 27, 2015 Google search for “arrested for recording police” yielded 91,200,000 results. A YouTube search for “arrested for recording police” yielded 66,700 results. While no statistical analysis has been performed on the number of arrests that resulted from secret recordings, the ease of finding this great number of examples sheds light on the severity of the problem.
5. See, e.g., Glik, 655 F.3d 78, 81-82 (indicating that public officials need to be shielded from harassment, distraction, and liability when performing duties but nevertheless holding the First Amendment clearly established that citizens may record on-duty police officers on public property).
6. See, e.g., Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) (holding no interference when officers did not give an express order to stop recording).
7. See, e.g., Kelly v. Borough of Carlisle, 622 F.3d 248 (3rd Cir. 2010) (denying officer’s claim for qualified immunity because right to record is clearly established).
confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I WILL never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I RECOGNIZE the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God9 to my chosen profession... law enforcement.10

Section C-3-1 provides that the purpose of the Code is “[t]o insure that all peace officers are fully aware of their individual responsibilities to maintain their own integrity and that of their agency, [therefore] every peace officer . . . shall be administered the Law Enforcement Code of Ethics, as prescribed in Regulation 1013.”11

So, if every police officer is administered this code of ethics, then why is the Internet overflowing with videos of police behaving badly? What happened to “be[ing] constantly mindful of the welfare of others?”12

Lastly, officer misconduct is not limited to interactions with the public. Does society accept that police officers may play cards when they are on duty?13

B. The Role of the Citizen Watchdog

What some are hailing as a new First Amendment right,14 videotaping the police has become a cultural phenomenon with the aid of advances in technology. In 1991, George Holliday (“Holliday”)15 secretly recorded Los Angeles Police Department (“LAPD”) officers beating Rodney King and for the first time exposed police brutality in a way that shocked the nation.16 After the LAPD refused to accept

9. See id. (“Reference to religious affirmation may be omitted where objected to by the officer.”).
10. Id. This Code has been adopted in California.
11. Id.
12. Id.
13. See Officers Caught Playing Cards While on Duty, SPARTANBURG HERALD-JOURNAL, Jan. 9, 2004, at C6, available at http://news.google.com/newspapers?id=1876&dat=20040107&id=djgfAAAAI BAJ&sjid=ONAEAAAAIBAI&pg=3109,2959911 (“Five uniformed officers and a trainee who were supposed to be patrolling the streets were caught playing cards at a court building.”).
his recording, and without YouTube and social media, Holliday did the only thing he could do: he sent a copy of the nine-minute video to a local television station, and put the department on notice.

This same department, nearly twenty years later, is implementing a program where all of its officers will be issued a front-facing camera. This camera is mounted on their shirts and is meant to capture every interaction an officer may have. Los Angeles “Mayor Eric Garcetti announced [ ] that the city would purchase 7,000 body cameras for police officers in an effort to increase transparency.” Advocates of this movement state that front-facing camera recordings “could help guard against officer misconduct and clear cops falsely accused of wrongdoing.”

Yet, it does not escape simple logic that these cameras are only front-facing, meaning these cameras will only capture the police interaction from one point of view – that of the officer. In a disciplinary hearing or under a 42 U.S.C. § 1983 claim, without both points of view, the trier of fact will not get the complete story. This is because the camera is not pointed at the officer, but only at the subject. Thus important and probative details such as the mannerisms and non-verbal conduct of the officer will be missing. Moreover, police cameras may fail or be tampered with.

On the other hand, today’s high-end smart phones are making “Spielbergs” out of average private citizens. So why not allow private citizens to record on-duty peace officers in public places, when such recordings can only help the trier of fact? Unless such a citizen is interfering with an officer’s ability to perform his or her duties, there should be no reason to prohibit a citizen from recording. However, let citizens be warned; on its face the federal wiretap statute prohibits ownership of “any device”
capable of intercepting oral communications, this definition inherently includes cell phones.

C. The Purpose of This Article

The term illegal wiretapping, or surreptitious recording, conjures thoughts of a slimy-private investigator intentionally recording a private conversation with intent to capture an adulterer in the act, or a secret business meeting where sensitive stock information is being exchanged. Yet, surreptitious, covert, discreet, unobtrusive, or in essence any recording of an on-duty officer in public that does not interfere with her duties, should not hold the same negative connotation that illegal wiretapping does.

There is a legitimate concern that citizens recording police officers could interfere with official police business. Thus this author contends that surreptitious recordings should be preferable to open and obvious recordings because of the diminished likelihood that a secret recording would interfere with official business.

Nevertheless, over the last fifteen years, YouTube has given the average civilian an avenue to reach millions of people. There, evidence of police using state wiretap statues against private citizens, who are simply recording the misconduct in their neighborhoods, has risen to alarming proportions.

In any situation, this author contends recording police officers surreptitiously is safer for both the officer and the citizen for two reasons: 1) it is difficult to distract or interfere with an officer with a recording-act that an officer is not aware of, and 2) surreptitious recording of officer misconduct is safer than a citizen attempting to execute a lawful citizen's arrest on an officer who is misbehaving.

This article serves several purposes. The first is an invitation to federal and state legislature to amend current federal and state statutes to include an exemption for citizens to record on-duty public officials when they are in public. Second, this article will aid the proponent of such an amendment when they challenge state wiretap laws by providing legal arguments beyond the First Amendment right to record. Finally, this article will put law enforcement on notice that they cannot arrest a citizen for lawfully exercising their right to record because their conduct is merely an annoyance or unwelcomed.

27. But see 18 U.S.C. § 2510(5)(a)(i) (2012) (providing that a telephone is exempt so long as the service provider or user uses the equipment in the ordinary course of business).


30. See, e.g., Maurielle Lue, Driver Who Demanded Cop Buckle His Seat Belt Says No Regrets, MYFOXDETROIT.COM (Dec. 4, 2012, 4:43 PM), http://www.myfoxdetroit.com/story/20256866/driver-who-demanded-cop-buckle-his-seat-belt-says-no-regrets (indicating that Steven McClain attempted to enforce safety belt laws on an officer and was then arrested and charged with reckless driving).
The first section of the article will give a detailed overview of the federal wiretapping act and the intent of the legislature to protect private citizens, not police officers, from the nonconsensual recording of their private conversations. Further, this section will explain why an exemption for the police to record makes sense in light of their efforts to fight organized crime.

The second section of the article will provide several examples of state wiretap statutes, examine the effect the variations among the state statutes have had on the state courts, and review the application of state wiretap laws.

The third section of the article will provide an explanation of why, especially in California, the legislature should afford private citizens the right to surreptitiously record officers who are behaving badly. In California, it is currently lawful for a private citizen to physically restrain an officer when executing a citizen’s arrest, however discreetly recording an officer in a manner that does not interfere with that officer’s actions is a felony.

II. Congress Enacted the Federal Wire Tapping Act to Protect Civilians

A. Federal Wire Tapping Act (“FWTA”)

The Constitution provides protections for private citizens against unreasonable conduct from the government. Our Framers believed strongly in a citizen’s right to privacy, cementing this interest in the Fourth Amendment. 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, 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.

The United States Supreme Court has used the protections of the Fourth Amendment to create extreme preventative measures, such as making evidence inadmissible if law enforcement acquired such evidence in violation of a citizen’s

31. See CAL. PENAL CODE § 834 (Deering 2015) (California’s citizen’s arrest code). Due to the inherit risks of attempting to restrain an armed police officer, this author does not recommended executing a citizen’s arrest. See, e.g., Giveaway Daily, Attempted Citizens Arrest on a Cop, YOUTUBE (Nov. 18, 2002), https://www.youtube.com/watch?v=OEUKknJUMol.
32. See CAL. PENAL CODE § 632 (Deering 2015) (codifying California’s state wiretap statute, which is a two-party consent statute).
33. See Marbury v. Madison, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).
34. See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 MICH. L. REV. 547, 576 (1999).
35. U.S. CONST. amend. IV.
constitutional right, to deter the government from violating those rights. Some argue that "government-authorized police recordings of civilian communications" are a type of search and seizure that our Framers did not foresee.

There is no argument our Framers had neither cell phones nor hand held recording devices — save a pen and paper. However, to claim that our Framers, composed of visionaries like Benjamin Franklin, the lightning tamer and one of the greatest minds of his time, could not foresee a need to protect the people from the government intercepting their communications seems a faulty conclusion.

Nevertheless, when audio recording technology was first being used by the government to record civilian communications, the Supreme Court initially allowed such recordings stating: such recordings did not fit neatly into "papers and effects" as provided by the Fourth Amendment. However, the Court reversed its position in Katz v. United States. In doing so the Court paved the way for two major principles, the first is the concept of "reasonable expectation of privacy," and second the Court "laid the foundation for modern electronic surveillance law."

B. Congress Acts to Protect Civilian Communications

In 1968, Congress expressed the importance of citizens’ right to privacy in their communications by enacting Title III, which applies to private parties and state actors. In sum, the federal wiretapping law presumes any electronic surveillance is illegal unless: (1) one or more parties to the recording consented to the recording, (2) one party to the recording lacked a reasonable expectation of privacy, or (3) a warrant was issued by a neutral magistrate prior to the recording.

38. See Olmstead v. United States, 277 U.S. 438, 455 (1928) (discussing that the petitioners were convicted of conspiracy that four federal officers discovered after intercepting messages on the conspirators’ telephone), overruled by Katz v. United States, 389 U.S. 347 (1967).
40. Id. at 351 (“What [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).
41. Kies, supra note 37, at 279.
44. See 18 U.S.C § 2511(2)(d) (2012) (“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 . . . .”).
45. See 18 U.S.C. § 2510(2) (2012) (“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[.]").
46. See 18 U.S.C. § 2511(2)(a)(ii)(A) (2012) (“Providers of wire or electronic communication service . . . are authorized to provide information, facilitates, or technical assistance to persons
The legislative history demonstrates Congress enacted Title III because of its "concern over the startling increase in the crime rate and the threat which [crime] poses to the peace, security and general welfare of the Nation and its citizens." A close look at the legislative history is in order to appreciate the divergence from the intent of the Legislature – to protect the privacy of citizens – to the current questioned application of the respective state laws by law enforcement.

1. Problem Identified

The authors of Title III identified several circumstances that exemplified the privacy "problems" facing our citizens. Similarly, the authors identified the lack of uniformity in state laws and in the application of such laws by law enforcement as other problems.

However, Congress made it very clear that "[t]he major purpose of title III is to combat organized crime." The authors went on to describe, in a detailed manner, "the historical development of our system of criminal law and . . . the challenge put to it today by modern organized crime."

Quoting the “President’s Crime Commission” report Congress explained “[t]he ‘American system was not designed with (organized crime) . . . in mind.' Organized crime, in its evolution, relies on oral and written communication as does any legitimate “business enterprise,” and “the telephone remains an essential vehicle for communication.” This evolution in crime and science is what Congress used to justify “wiretapping [as] an indispensable weapon in the fight against organized crime.”

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47. See id. at 43 (“The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result . . . privacy of communication is seriously jeopardized . . . [c]ommercial and employer-labor espionage is becoming widespread . . . [t]rade secrets are betrayed. Labor and management plans are revealed. No longer is possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man’s personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor . . . .”).

48. See id. at 45 (“On the State level, there is little uniformity . . . [however], those existing statutes . . . must now be reformed in light of the standards for constitutional electronic surveillance laid down by the Supreme Court . . . .”).

49. See id. at 46 (“Guidance and supervision must be given to State and Federal law enforcement officers.”).

50. Id. at 46.

51. Id.

52. Id.


55. See id. at 47 (“Organized crime has not limited itself to criminal endeavors. It has large spheres of legitimate business . . . .”).

56. Id. at 48.

57. Id.
2. A Solution to Organized Crime is Presented – Law Enforcement Exception

The argument that phone conversations are an essential component of the “organizational” aspect of organized crime allowed Congress to create an exception for law enforcement to record conversations in the interest of public safety.  

Nowhere in the report will a reader find references to protecting police officers from being recorded. Nowhere will a reader find that the federal government was concerned with someone recording an officer’s conduct while that officer is on duty and in public.

C. The Statute Is Created to Protect Private Citizens

In fact, a close look at the section addressing the prohibition of “electronic surveillance techniques by private unauthorized hands” reveals law enforcement was never considered one of the victims this law was intended to protect. This section describes a victim of electronic surveillance as someone who experienced “an unlawful invasion of privacy,” or a person who needs “other remedies” including civil recourse.

These descriptions do not describe law enforcement officers because an officer, while in public and on duty, like a teacher in a classroom, has no reasonable expectation of privacy, hence there can be no invasion of privacy. Further, if a private citizen interferes or obstructs an officer’s lawful conduct, that officer will always have the remedy of executing a lawful arrest.

Congress intended to create a law that protects private citizens from the unlawful recording of their conversations, however, Congress also stated this shield has a place in our society so long as the government does not abuse the law.
Now, the federal government had acted, providing the states the opportunity to either act, or do nothing. However if a State chose to act, then its actions must be "fair." 65

III. THE EVOLUTION OF STATE WIRETAP ACTS

A. Subsequent Creation of State Wiretap Acts

Following the enactment of Title III, forty-nine states enacted their own wiretapping laws. 66 To date, Vermont is the sole state remaining without an explicit wiretapping law, however, most states enacted such laws emulating Title III, and some made their laws more restrictive. 67

1. States Following the Federal Standard – One Party Consent

Many states have adopted the federal standard of one-party consent. 68 Therefore, persons who interact with an officer, or are a third party to such an interaction, are protected so long as they consent to their own recording, or the person engaged with the police consents to the recording. However, the protections provided under these statutes are limited to open and obvious recordings. 69 The person recording must announce their intent to record otherwise they are subject to felony charges for taking an unauthorized recording.

65. See id. at 45 (discussing the need for protections and the lack of uniformity of current state “mischief” statutes, the authors stated “existing [state] statutes ... must now be reformed in light of the standards for constitutional electronic surveillance ... [(t)he need for comprehensive, fair and effective reform ... is obvious. This can only be accomplished through national legislation.”) (emphasis added).


67. Id.


69. See, e.g., WASH. REV. CODE § 9.73.030 (2014) (indicating that consent is considered to have been obtained when one party has announced to all other parties that the conversation is about to be recorded and that announcement is recorded).
2. All-Party Consent States

Like California\(^\text{70}\), several other states\(^\text{71}\) require all parties to consent to the recording for it to be lawful.\(^\text{72}\) However, under judicial review, District Courts in Illinois recognized that citizens have a First Amendment right to record police officers when the police officers are on duty and in public,\(^\text{73}\) and that arresting these citizens is unconstitutional.\(^\text{74}\)

Unless the act of recording somehow interferes with an officer’s duty or places the officer in danger,\(^\text{75}\) the officer should not arrest a citizen for making a recording; yet in many states on-duty officers in public continue to arrest citizens who record them.\(^\text{76}\)

B. Massachusetts – Unlawful to Secretly Record

Massachusetts\(^\text{77}\) is an example of a state that determined “instead of using a reasonable expectation of privacy standard, the line between protected and unprotected communication” depends on whether it was made openly or surreptitiously.\(^\text{78}\) This means the Katz objective person standard is omitted\(^\text{79}\) and the Legislature is ignoring that society may find that it is unreasonable for an on-duty officer to expect privacy while in public.\(^\text{80}\) Taking away the reasonable expectation test and finding fault squarely from surreptitious acts sets the stage for a series of challenges to the constitutionally of the state law.\(^\text{81}\)

\(^{70}\) CAL. PENAL CODE §§ 630-38 (Deering 2015).

\(^{71}\) See e.g., CAL. PENAL CODE § 632 (Deering 2015); DEL. CODE ANN. tit. 11, § 1335 (2014); FLA. STAT. § 934.03 (2014); HAW. REV. STAT. § 711-1111 (2014); 720 ILL. COMP. STAT. 5/14-2 (2014); MD. CODE ANN., CRIM. & JUD. PROC. § 10-402 (LexisNexis 2014); MASS. GEN. LAWS ch. 272, § 99 (2014); MICH. COMP. LAWS § 750.539c-d (2014); N.Y. REV. STAT. ANN. § 570-A:2 (2014); 18 PA. CONS. STAT. § 5704(4) (2014); WASH. REV. CODE § 9.73.030 (2014).


\(^{73}\) See Glik v. Cunniffe, 655 F.3d 78, 78 (1st Cir. 2011).

\(^{74}\) See Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014).

\(^{75}\) See id.


\(^{77}\) See Van Tassell, supra note 72, at 183.

\(^{78}\) Id. at 187.


\(^{80}\) See MASS. GEN. LAWS ch. 272, § 99 (2014).

\(^{81}\) See Van Tassell, supra note 72, at 191 (drawing a line between “hidden”).

In 1998, an Abington police officer stopped Michael Hyde’s (“Hyde”) Porsche for having a loud exhaust and instructed Hyde and his passenger to exit the car.82 Three more officers arrived and the situation quickly escalated and became confrontational.83 Both sides alleged misconduct.84 More mud-slinging ensued, by both sides,85 until the officers allowed Hyde to leave without issuing any citations.86 Hyde’s trouble did not start until six days later, when he went to the Abington police station to file a formal complaint.87

To substantiate his allegation, Hyde produced a recording he had made of his traffic stop.88 This, however, did not go well for Hyde because, “Abington police sought a criminal complaint . . . for four counts of wiretapping in violation of G. L. c. 272, § 99.”89 Hyde filed a motion to dismiss, stating as his main argument that the police officers did not have a reasonable expectation of privacy.90 Yet, the lower court rejected his argument.91

The court reasoned that a plain reading of the Massachusetts wiretap statute did not include any mention of the victim’s expectation of privacy and focused only on surreptitious conduct.92 On appeal, the appellate court affirmed the lower court concluding, “the Legislature intended . . . to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials . . . when made without their permission or knowledge.”93 The appellate court emphasized that Hyde “was not prosecuted for making the recording; he was prosecuted for doing so secretly.”94

83. Id. at 964. “According to the testimony of the officers who made the stop, the defendant was loud, argumentative, and uncooperative. [Moreover], the police officers and Daniel Hartesty, [the] passenger[,] . . . attempted to calm the defendant who became more and more unruly as the stop progressed. Hartesty, on the other hand[,] . . . stated that the defendant was not combative, but that the defendant and the officers "were [merely] bickering."” Id. at 964 n.1.
84. See id. at 964 (explaining that Hartesty alleged an officer told Hyde that the officer will administer a field sobriety test, “which the officer 'promised'” Hyde would fail).
85. See id. ("[Hyde] stated that the stop was 'a bunch of bullshit,' . . . Later, another officer called [Hyde] "an asshole."”).
86. Id. at 964-65 (“According to the testimony of one police officer . . . it was deemed in everyone's interest simply to give the defendant a verbal warning.”).
87. Id. at 965.
88. Hyde, 750 N.E.2d at 965 (“A subsequent internal investigation conducted by the Abington police . . . exonerated the officers of any misconduct.”).
89. Id. (indicating that the clerk-magistrate actually refused to issue the complaint, however, the Commonwealth appealed, and a District Court judge ordered the clerk-magistrate to issue the complaint).
90. Id.
91. Id.
92. Id.
93. Id. at 967.
94. Hyde, 750 N.E.2d at 969.
In her dissent, Chief Justice Margaret Marshall provided that “the actions of public officials taken in their public capacities are not protected from exposure.” She pointed out a very critical misstep of the majority that “[t]he court’s ruling today also threaten[s] the ability of the press – print and electronic – to perform its constitutional role of watchdog.”

More importantly, Chief Justice Marshall stressed that when looking at the legislative intent of the statute, it was extremely doubtful that this result is what the Legislature had in mind. A closer look revealed, “there is no suggestion that the Legislature had in mind outlawing the secret tape recording of a public exchange between a police officer and a citizen.”

2. **Glik v. Cunniffe: A Reasonable Officer Should Know Recording Is Not a Crime**

More than a decade later, the United States Court of Appeals for the First Circuit affirmed the holding in *Hyde.* However, the court provided that when a private citizen openly records an officer, there is no probable cause to make the arrest lawful because openly recording is not a crime.

In *Glik,* Simon Glik (“Glik”) was walking past the Boston Common when he noticed “three police officers . . . arresting a young man.” Glik heard a bystander say, “[y]ou are hurting him, stop.” Concerned the officers were using excessive force, Glik stood “ten feet away and began recording” the arrest using his cell phone. After placing the young man in handcuffs, the police officers turned to Glik, approached him, to which Glik notified them that he had recorded them punching the arrestee. The officers immediately seized the phone and arrested Glik.

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97. *Id.* at 977 (“The statute, on its face, makes no exception for members of the media or anyone else.”).
98. See *id.* at 974.
99. *Id.* at 973-74 (discussing the two reasons the state provided for enacting the statute: 1) to authorize “the police to engage in secret electronic surveillance of citizens suspected of organized crime,” and 2) the concern that the “uncontrolled development of modern devices posed grave danger to the privacy of all citizens”).
100. *Id.* at 974.
101. See *id.* at 964 (majority opinion) (holding that surreptitious recordings of public officials are not permissible); *Glik v. Cunniffe,* 655 F.3d 78, 86 (2011).
102. See *Glik,* 655 F.3d at 88 (“Glik’s recording was not secret within the meaning of Massachusetts’s wiretap statute.”).
103. *Id.* at 80.
104. *Id.*
105. *Id.*
106. *Id.* The facts of the anecdote at the beginning of this article are loosely based on the facts in *Glik.*
107. *Id.*
Glik was charged with "violat[ing] . . . the wiretap statute,"\(^{108}\) disturbing the peace,\(^{109}\) and inexplicably with "aiding in the escape of a prisoner."\(^{110}\) Glik moved to dismiss the remaining two charges, which the court granted in part noting, "[t]he fact that the officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime."\(^{111}\) Prior to the dismissal of his charges, Glik had "filed an internal affairs complaint with the Boston Police Department," but the Department "did not investigate" nor initiate disciplinary action.\(^{112}\) As a result, Glik filed this claim under 42 U.S.C. § 1983.\(^{113}\)

The officers moved to dismiss Glik's claims, but the court denied their motion concluding that, "in the First Circuit . . . this First Amendment right publicly to record the activities of police officers on public business is established."\(^{114}\) The court provided that as long as the recording is not made in secret, such recordings of on-duty public officials would always be lawful.\(^{115}\)

The court in Glik announced that an on-duty officer, who is in public, has no reasonable expectation of privacy.\(^{116}\) Yet, officers in Massachusetts continue to unconstitutionally arrest private citizens.\(^{117}\)


It is important to note that while recording an on-duty officer in public is a protected right, the citizen should do so in a manner that does not interfere with an officer's ability to perform her duties. This next case explored what it means to interfere with an officer in the commission of his or her duties.\(^{118}\)

In Gericke, Sergeant Joseph Kelley ("Kelley") arrested Carla Gericke ("Gericke") after she attempted\(^{119}\) to record a traffic stop on the night of March 24, 2010.\(^{120}\) Gericke was caravanning with her friend, Tyler Hanslin ("Hanslin"), when Kelley pulled Hanslin's vehicle over.\(^{121}\) Gericke also pulled over, but then Kelley


\(^{109}\) See MASS. GEN. LAWS ch. 272, § 53(b) (2014).

\(^{110}\) See MASS. GEN. LAWS ch. 268, § 17 (2014); Glik, 655 F.3d at 80 ("Acknowledging lack of probable cause for the last of these charges, the Commonwealth voluntarily dismissed the count of aiding in the escape of a prisoner.").

\(^{111}\) Glik, 655 F.3d at 80.

\(^{112}\) Id.

\(^{113}\) Id. (explaining that Glik also filed state claims "under the Massachusetts Civil Rights Act, Mass. Gen. Laws. Ch. 12, § 11(1), and for malicious prosecution").

\(^{114}\) Id. at 80.

\(^{115}\) Id. at 86 ("The critical limiting term in the statute is 'interception,' defined to mean 'to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication.'").

\(^{116}\) Id. at 78.

\(^{117}\) See Balko, supra note 76.

\(^{118}\) See Gericke v. Begin, 753 F.3d 1, 10 (1st Cir. 2014) (holding there can be no interference in the absence of a direct order to stop recording from the officer).

\(^{119}\) See id. at 3 (Unbeknownst to Kelley, Gericke's camera was not recording).

\(^{120}\) Id.

\(^{121}\) Id.
informed her “that it was Hanslin who was being detained, and told her to move her car.”122 Gericke told Kelley she was going to park in the adjacent middle school parking “to wait for Hanslin.”123 Kelley said that was fine, but after Gericke parked, Gericke “approached the fence” and stood “at least thirty feet from Kelley.”124 Gericke then announced her intent to record.125 At no point did Kelley ever ask Gericke to stop recording.126

Had Gericke not announced her intent to record, but instead surreptitiously recorded the traffic stop, she likely would not have been arrested.127 However, Kelley called for backup and Officer Brandon Montplaisir (“Montplaisir”) arrived on the scene.128 Montplaisir went to Gericke, who by now had hid her camera in her car, and “demanded to know where her camera was, but she refused to tell him.”129 Montplaisir arrested Gericke “for disobeying a police officer.”130

The court, citing to *Hyde* and *Glik*, explained under these facts, “any reasonable officer would have understood that charging Gericke with illegal wiretapping for attempted filming that had not been limited by any order or law, violated her First Amendment right to film.”131 There is no question that Gericke’s conduct could distract an officer from his or her duties; however, without an express order to stop recording, there could have been no meaningful interference with that particular officer’s ability to perform his duties.132

The court provided, “police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights.”133 Further, the court expressed, “we made clear that the same restraint demanded of police officers in the face of ‘provocative and challenging’ speech, must be expected when they are merely the subject of videotaping that memorialized, without impairing, their work in public spaces.”134 Even when looking at the totality of the circumstances surrounding the

122. *Id.*
123. *Id.*
124. *Gericke*, 753 F.3d at 3.
125. *Id.*
126. *Id.*
127. It is the opinion of the author that if Gericke had simply pulled over, did not attempt to record, but stayed in her vehicle, then Kelley would not have paid any attention to Gericke because she would not have caught Kelley’s attention. Or in the alternative, Gericke could have avoided the arrest if she had recorded discretely.
128. *Gericke*, 753 F.3d at 3.
129. *Id.* at 4.
130. *Id.* (explaining that Officer Montplaisir also asked Gericke to furnish her license and registration, which Gericke refused to do).
131. *Id.* at 9.
132. See *id*.
133. *Id.* at 8.
134. *Gericke*, 753 F.3d at 8.
The court held, “It would be nonsensical to expect Gericke to refrain from filming when such filming was . . . [not] the subject of an officer’s order to stop.”

When combining the holding from Glik and Gericke it seems reasonable to infer that surreptitious recordings satisfy these holdings because an on-duty officer has no reasonable expectation of privacy in public, and a recording cannot distract an officer who is unaware of it.

C. Pennsylvania – Reasonable Expectation of Privacy State

The State of Pennsylvania, which is also concerned with the high rate of organized crime, enacted its own wiretap laws, joining the ranks of “all party” consent states.

I. Escaping Judicial Review: Police Department Settles an Unlawful Arrest

On January 3, 2012, Kevin Lukart ("Lukart"), a Point Marion Police Officer, arrested Gregory Rizer ("Rizer") for video recording Lukart’s interactions with a third party. As was mentioned before, most of these arrests never see a day in court. Similarly, Rizer’s home arrest will not be challenged in court, not because the District Attorney dropped the charges, but because the “southwestern Pennsylvania police department [had] offered to pay out $65,000 to settle [the] lawsuit.”

a. The Uncontested Facts

On July 19, 2012, the American Civil Liberties Union ("ACLU") in a press release detailed the circumstances around Rizer’s arrest, the unlawful seizure of his

135. See id. at 5 (explaining that the officers alleged the recording interfered with their ability because: 1) there were several vehicles, 2) several detainees, and 3) Hanslin admitted he had a gun, when he was asked if he had any firearms).
136. Id. at 9 (the court also noted that Gericke “was permissibly at the site of the police encounter with Hanslin,” and “therefore her presence was lawful”).
137. See Glik v. Cunniffe, 655 F.3d 78, 78 (1st Cir. 2011) (holding an on-duty officer has no reasonable expectation of privacy while in public).
138. See Gericke, 753 F.3d at 1 (holding an arrest is only lawful if there is meaningful interference with an officer’s ability to perform her duties).
141. Kelly v. Borough of Carlisle, 544 Fed. Appx. 129, 131 (3d Cir. 2013) (explaining that the district attorney dropped wiretap charges after Kelly was released from jail, where he was held for twenty-seven hours).
142. See Campisi, supra note 140.
phone, and filed a lawsuit on behalf of Rizer. The following uncontested facts are found in Rizer’s complaint.

On the day of the arrest, Rizer visited his friend, Shannon Hughes (“Hughes”), at Hughes’ home. Later that evening, Lukart went to Hughes’ home “to question [Hughes] about the whereabouts of his cousin, Donald Cooley.”

Rizer described Lukart’s behavior as: aggressive, bullying, disrespectful, and menacing. Lukart instructed Rizer to stand “approximately twelve feet behind” Lukart. Rizer, concerned for his quadriplegic friend’s safety, took out his cell phone and started to record the defendant’s interactions with Hughes.

Rizer recorded Lukart’s abusive behavior until his memory card had become full. Unfortunately for Rizer, because the memory card was full, the automatic replay function was triggered, which Lukart overheard.

Lukart shifted his attention to Rizer and asked if Rizer was recording; Rizer admitted he was, and Lukart seized the phone. Lukart went back to “questioning” Hughes about his cousin but Rizer “repeatedly asked [ ] Lukart to return his cell phone, even offering to erase the video if that would facilitate the return.”

If Lukart had been acting lawfully, then this author concedes that Rizer’s repeated request for his phone back equated to meaningful interference with Lukart’s ability to execute his questioning. Under this hypothetical circumstance, it is the opinion of this author that Rizer’s arrest would have been lawful. However, Lukart arrested Rizer for violating Pennsylvania’s Wiretap Act, and took him to a holding cell at the Port Marion Police Station.

b. Unlawful Use of State Wiretap Laws

Lukart informed Rizer “that he had committed a felony and would be sent to prison for ten years,” however, Lukart was willing to offer Rizer a “deal.” Lukart said if Rizer “wrote a statement admitting that he had recorded Lukart without his consent and in violation of the . . . Act,” then Rizer would be allowed to leave.

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145. See generally id.
146. See generally id.
147. Id. para. 9.
148. Id. para. 10.
149. Id. para. 11.
150. Id. para. 12-13.
151. Complaint, supra note 144, at para. 9.
152. Id. para. 14.
153. Id.
154. Id. para. 15.
155. Id. para. 16-17.
156. Id. para. 20.
158. Id. para. 23, 25.
159. Id. para. 25.
Rizer complied, but when his admission included that “he did not know that such conduct was illegal,” Lukart demanded Rizer rewrite the statement “to include an admission that he knew the recording was against the law.” In response to Lukart’s request, Rizer asked for an attorney, which Lukart denied.

Instead, Lukart placed the phone and Rizer’s written statement in an evidence bag. Lukart “warned” Rizer that Lukart had “five years to file charges for felony wiretapping and that if [ ] Rizer gave [ ] Lukart any trouble,” he would file the charges. Three hours following the arrest, Lukart drove Rizer back to Hughes’ residence, released Rizer, and then resumed questioning Hughes about Hughes’ cousin, Donald.

2. The ACLU settles the Case

On October 9, 2013, the ACLU, in a second press release, announced that the “Point Marion Police Department [had] paid $65,000 to settle” Rizer’s lawsuit. Reggie Shuford (“Shuford”), an Executive Director of the ACLU of Pennsylvania, expressed: “Recording police is a check on the extraordinary power they have in our society.”

Shuford further hoped “that this case [would] educate other police departments about the right of citizens to record and observe police officers on the job.” The ACLU published the settlement letter, however, in the letter there is no explanation for why the police department wanted to settle.

3. The Insurance Agency drops the Police Department Due to Liability Claims

There are several possible reasons for the department’s choice to settle. Point Marion Borough Manager, Arthur Strimel (“Strimel”), explained “[w]e had to lay off the officers due to the fact that we do not have police liability insurance.” Strimel explained the “insurance carrier dropped the department after paying two

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160. Id. para. 27-28.
161. Id.
162. Id. para. 29.
163. Complaint, supra note 144, at para. 29.
164. Id. para. 30.
166. Id.
167. Id.
170. Id. (internal quotation marks omitted).
settlements against the department’s only two police officers,” Lukart\textsuperscript{171} and Mark Thom (“Thom”).\textsuperscript{172} Strimel promised to re-open\textsuperscript{173} the police department, but for now, the local community had to rely on the state police.\textsuperscript{174} What is most disturbing to this author is the officers did not get laid off because of their abusive and felonious conduct; rather, they were laid off because the insurance carrier dropped the police department.

After what occurred in Borough, Pennsylvania, law enforcement in Pennsylvania should be on notice that there is an established right for a citizen to surreptitiously record their interactions with an on-duty official in public. However, this right is not absolute and can be subject to reasonable restrictions.\textsuperscript{175}

4. \textit{The Right to Record Is Not Absolute} — Fleck v. Trustees of University of Pennsylvania

\textit{a. A Right to Record Is Not a Right to Endanger an Officer’s Safety}

On the corner of Walnut and South 43rd Street, on the evening of July 3, 2010, two Christian evangelists, Kenneth Fleck (“Fleck”) led by Michael Marcavage (“Marcavage”), drove to Masjid Al Jamia Mosque to engage in “open-air-preaching.”\textsuperscript{176}

Knowing the hour “coincided with evening prayers at the mosque,” they intended to engage in “contentious” preaching, which had led to prior litigation in the same jurisdiction.\textsuperscript{177} That night “was family night at the mosque,” with more than sixty people, “including children,” in attendance.\textsuperscript{178}

Fleck and Marcavage, “[b]ecause they wanted to be effectively heard, [...] stationed themselves immediately in front of the mosque door, [...] [sang] a hymn,” and then took turns preaching.\textsuperscript{179} This continued past 9:00 p.m. when finally a security

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\textsuperscript{171} \textit{Id.} (emphasis added) (“[Lukart] had been previously fired from the Apollo Police Department after he was charged with exposing himself to a 17-yr-old. He was also fired from the Braddock Police Department after a [...] news camera captured Lukart punching a man in handcuffs.”).


\textsuperscript{173} \textit{See} Cipriani, \textit{supra} note 169 (indicating that the department had to shut down once it lost its insurance).

\textsuperscript{174} \textit{See id.} (disclosing how a local resident, Esther Shaffer, was quoted saying: “The state police are good, don’t get me wrong, but [the state police are] too many miles [away]”).

\textsuperscript{175} \textit{See generally} Fleck v. Trustees of Univ. of Penn., 995 F. Supp. 2d 390 (E.D. Pa. 2014).

\textsuperscript{176} \textit{Id.} at 395-96.


\textsuperscript{178} Fleck, 995 F. Supp. 2d at 395.

\textsuperscript{179} \textit{Id.}}
guard patrolling on her bike observed Fleck and Marcavage “shouting in a hostile manner . . . that Islam is a hate religion” towards the Mosque’s congregation.\(^{180}\) The security guard asked Fleck and Marcavage to lower their voices, warning if they did not, he would be forced to call the local police; Fleck and Marcavage welcomed this opportunity and responded, “They had a free-speech right.”\(^{181}\)

Two Pennsylvania police officers, Gary Cooper (“Cooper”) and Nicole Michel (“Michel”), arrived on the scene and observed the disturbance.\(^{182}\) Cooper noted Fleck and Marcavage were “exhorting congregants,” standing by the doorway, and blocking traffic such that the crowd that had gathered around Fleck and Marcavage was “beginning to spill into the street.”\(^{183}\)

Cooper told Fleck and Marcavage “that they could continue their activity provided they: moved down the street, did not block the entrance to the mosque, and did not cause a disturbance.”\(^{184}\) Fleck and Marcavage, ignoring the officer’s suggestions, continued yelling and “preaching loudly to the congregants” in front of the mosque door; “[s]everal of the small children present began to cry.”\(^{185}\)

This entire time Marcavage had been “filming the preaching,” so during the course of their “dialogue” he turned the camera on Michel, holding the video camera “less than a foot from [Michel’s] face.”\(^{186}\) Fearing for her safety, Michel instructed Marcavage to stop recording and to move the camera away from her face.\(^{187}\) Marcavage refused and “called 911 on his cell phone (while still holding the camera) . . . ."\(^{188}\) Michel ended his phone conversation when she “placed him in handcuffs.”\(^{189}\)

Fleck and Marcavage, achieving their ultimate goal, were “arrested for disorderly conduct and obstruction of a public highway.”\(^{190}\)

\(b\). Public Safety Exceptions Preempt the First Amendment Right to Record

Without providing the reasoning of the court, intuitively, the facts above provide a clear example that a private citizen cannot disturb the peace without civil, or criminal, consequences for their actions. This author’s proposal for an exemption to state wiretap statutes that allows citizens to record officers surreptitiously, or openly, can only be reasonable if it has time, manner, and place restrictions.

\(180\). Id. at 396.
\(181\). Id.
\(182\). Id.
\(183\). Id.
\(184\). Fleck, 995 F. Supp. 2d at 396.
\(185\). Id.
\(186\). Id.
\(187\). Id.
\(188\). Id. at 397.
\(189\). Id.
\(190\). See Fleck, 995 F. Supp. 2d at 397. The plaintiffs were released an hour and half later; the police returned their camera, however, the plaintiffs alleged the video footage was gone. Id.
Surely one who is disturbing the peace and interferes with an officer’s ability to execute his or her lawful duties of maintaining such peace should not be afforded any protections or exemptions from criminal or civil liability. The court did stress, in the course of the interaction between the plaintiffs and the officers, that the “officers made no remarks about the content of the [ ] speech, displayed no animosity toward [the] plaintiffs, and made no pro-Islamic or anti-Christian remarks.”

c. No Right to Endanger an Officer’s Safety—Continued

Sadly, six weeks later, on August 22, 2010, Fleck and Marcavage returned to the mosque with two Repent America adherents. Marcavage, leading the group, once again stood facing the mosque door and “began to sing hymns and preach in loud voices.” Again, a crowd formed and after a short time, “[k]nowing that the police were on their way,” Fleck and the other two preachers “headed back to their car to avoid being arrested.”

Marcavage confronted Lieutenant Stanford (“Stanford”), a Philadelphia police officer, threateningly “holding the video camera close to the officer’s face.” Believing “at one point . . . Marcavage was making an attempt to strike him,” Stanford took Marcavage’s camera. No one was arrested that day, and after talking to Marcavage and instructing him to leave, Stanford returned Marcavage’s camera to him.

Marcavage brought several claims under federal and state statutes. The court dismissed all of them. The court explained “[t]he First Amendment does not promise citizens an unfettered speech right even on public byways.” States “may enforce regulations of the time, place, and manner of expression . . . .”

191. Id. at 396 (addressing any Establishment clause violations that could be gleaned from the officers’ actions).
192. Id.
193. Id.
194. Id.
195. Id. at 398.
196. Fleck, 995 F. Supp. 2d at 398 (explaining that Stanford logged the camera as property for safekeeping).
197. Id. at 396.
198. See id. (“[Plaintiffs filed suit] seeking redress for First Amendment, Fourth Amendment, Due Process and Equal Protection Clause violations . . . as well as for false arrest, false imprisonment, and malicious prosecution under state law.”).
201. See Fleck, 995 F. Supp. 2d at 398.
202. See id. (“Pursuant to our August 8, 2013 Order, [Pennsylvania] and the City filed motions for summary judgment on September 20, 2013. Plaintiff’s reply was due on October 11, 2013, but none was filed.”). In footnote 7, the court noted, “[o]ddly, plaintiffs had counsel from the filing of the complaint to the completion of discovery.” Id. at 398 n.7.
203. Id. at 399.
204. See id. (internal quotation marks omitted) (providing that restrictions are constitutional so long as they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”).
Finally, the court stated there were no Fourth Amendment violations to consider because the officers had probable cause to arrest the plaintiffs.\textsuperscript{205}

Not every case involves someone getting arrested. As the following section will showcase, sometimes the legislation can be so restrictive that it preempts speech.

**D. Illinois — No Recording of Any Kind — Restricted Speech**

Regarding restrictions, the State of Illinois constructed their state wiretap statute in a manner that makes it illegal for a private citizen to record anyone without consent, even if there is no reasonable expectation of privacy.\textsuperscript{206}

Dubbed the most restrictive wiretapping law in the country, the Act\textsuperscript{207} provides: “A person commits eavesdropping when he[] [k]nowingly and intentionally . . . record[s] all or any part of any conversation” without the consent of all the parties.\textsuperscript{208} The Act states such conduct is a felony regardless of whether “one or more of the parties intended their communication to be of a private nature . . . .”\textsuperscript{209}

1. **ACLU v. Alvarez — A First Amendment Right to Record Exists When Recording Is Reasonable**

There were no arrests in the ACLU’s suit against Anita Alvarez ("Alvarez").\textsuperscript{210} Rather, the ACLU sought injunctive relief under 42 U.S.C. § 1983 barring Alvarez “from enforcing the eavesdropping statutes against audio recording in connection with [the ACLU’s] ‘police accountability program.’”\textsuperscript{211} The ACLU intended to openly record police officers without their consent during “expressive activity” events “in public in and around the Chicago area.”\textsuperscript{212}

As part of the program’s initiatives, the ACLU also intended to “publish these recordings online and through other forms of electronic media.”\textsuperscript{213}

To understand why the ACLU sought an injunction when the officers should have no expectation of privacy at such public speaking forums, the court went into the legislative history of Illinois’ eavesdropping law.\textsuperscript{214}

\textsuperscript{205} Id. at 406.

\textsuperscript{206} See Kies, supra note 37, at 287.

\textsuperscript{207} See generally 720 ILL. COMP. STAT. 5/14-2 (2014).

\textsuperscript{208} Id. 5/14-2(a)(1).

\textsuperscript{209} Id. 5/14-1(d).

\textsuperscript{210} See Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

\textsuperscript{211} See id. at 588.

\textsuperscript{212} See id. (detailing an intended program where a recording would only occur when: “1) the officers are performing their public duties, 2) the officers are in public places, 3) the officers are speaking at a volume audible to the unassisted human ear, and 4) the manner of recording is otherwise lawful”).

\textsuperscript{213} Id.

\textsuperscript{214} See id. at 587.

Illinois's eavesdropping law was codified in 1961, seven years before the federal government enacted its own wiretap law. The law evolved since its inception; at first, the law required the consent of at least one party. In 1976, the Legislature "amended the law to require the consent of 'all of the parties' to the conversation."

The Illinois Supreme Court "adopted a narrow interpretation of the eavesdropping statute, declaring . . . recording a conversation was punishable . . . only if the conversing parties had an 'expectation of privacy.'" Less than a decade later, the Illinois Supreme Court "reaffirmed its Beardsley decision['s]' holding that "there can be no expectation of privacy by the declarant where the individual recording the conversation is a party to that conversation."

In 1994, the Illinois legislature "amended the eavesdropping statute so that it applies to any oral communication between [two] or more persons regardless of whether one or more of the parties intended their communication to be of a private nature." Though very restrictive, the statute had two exemptions: first law-enforcement could record without the subject's consent; and second, any recording made by the media was exempt.

b. Wiretap Laws Preempt Free Speech

The ACLU challenged the most recent amendment, stating the amendment preempted its First Amendment right to record and publish, and the Seventh Circuit Court of Appeals agreed. The court reasoned "the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of the government."

The court further expressed this right to record exists for media and private citizens alike because "[t]o the founding generation, the liberties of speech and press were intimately connected with . . . the right of the people to see, examine, and be

215. See id.
216. Alvarez, 679 F.3d at 587 ("[I]t is a crime to . . . record all or part of any oral conversation without the consent of any party thereto.").
217. Id.
218. Id. (quoting People v. Beardsley, 503 N.E.2d 346, 349-50 (Ill. 1986)). However, in Chief Justice Bilandic's dissent, he argued normal people assume their conversations are not being recorded. Id.
219. See People v. Herrington, 645 N.E.2d 957 (Ill. 1994). But see People v. Nestrock, 735 N.E.2d 1101, 1107 (Ill. App. Ct. 2000) (indicating that the definition of "conversation" has been added to the statute to include all conversations "regardless of whether they were intended to be private").
220. Alvarez, 679 F.3d at 587 (quoting Herrington, 645 N.E.2d at 958).
221. Id. (internal quotation marks omitted).
222. See id. at 587-88.
223. See id. at 597-98.
224. Id. at 597.
informed of their government."\(^{225}\) The court concluded, "[a]ny way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny."\(^{226}\)

2. **On the Other Hand — Privacy Matters**

Again, it should be clear that this right to record public officials is not absolute. On May 20, 2014, a Federal District Court in Michigan distinguished the facts before it from the holding in *Alvarez* and determined, "[t]here is no First Amendment right for citizens to record courtroom proceedings."\(^{227}\)

In *McKay*, Robert McKay ("McKay") "filed suit challenging the constitutionally of an administrative order . . . [that] prohibit[ed] members of the public from possessing and using cell phones, camera[s], and other electronic communication devices in the Saginaw County Governmental Center."\(^{228}\) Like the ACLU in *Alvarez*, McKay sought injunctive relief from the order.\(^{229}\) The court quickly dismissed McKay’s challenge, citing to Supreme Court precedent, concluding "that there is no First Amendment right to have electronic media in the courtroom."\(^{230}\)

This dismissal seems reasonable in light of *Alvarez* because there the ACLU sought to record on-duty officers while they were in public; whereas here, McKay sought to record courtroom proceedings when he could have always used a pen and paper to capture the ongoing events.

3. **Balancing Competing Demands: Right to Record and Privacy Interests**

Following a wave of reform, Allegheny County District Attorney Steve Zappala announced that the Allegheny County Chiefs of Police Association has developed guidelines for police action in regards to private citizen recordings.\(^{231}\) The guidelines begin with the following direction: "Upon discovery that a bystander is observing, photographing or video recording the conduct of police activity, do not impede or prevent the bystander’s ability to continue doing so based solely on your discovery of his/her presence."\(^{232}\)

\(^{225}\) See *id.* at 599.
\(^{226}\) *Alvarez*, 679 F.3d at 600.
\(^{228}\) *Id.*
\(^{229}\) *Id.*
\(^{230}\) *Id.* However, the court ultimately concluded that "[b]ecause there is no First Amendment right to record courtroom events, the Court need not consider whether personal recording devices, such as cell phones, are less disruptive than broadcasting equipment." *Id.* at 736.
\(^{231}\) *Id.* at 734.
\(^{232}\) *Id.* (alteration in original).
However, it is important to remember that behind the badge is a person. A police officer is a person, with an ego, faults, and the ability to make mistakes; thus, it stands to reason that when the state gives this person the right to police our actions and carry a gun, this person’s expectations of privacy should be diminished.

E. Privacy that Society Is Willing to Accept

This author does not suggest that police officers may never have a reasonable expectation of privacy that society is willing to accept.233

In United States v. Taketa, the United States Court of Appeals for the Ninth Circuit provided that law enforcement officers have a reasonable expectation of privacy in their personal work office against unlawful wiretapping.234

In Taketa, a Drug Enforcement Administration (“DEA”) agent, David Taketa (“Taketa”), and an officer of the Nevada Bureau of Investigations (“NBI”), Thomas O’Brien (“O’Brien”), were convicted of illegal wiretapping after their fellow officers set up surveillance cameras in their shared office.235 Fellow DEA agent, Beth Walther Latheberry, reported to her superior “that Taketa had shown her how to modify a pen register236 to intercept telephone conversations illegally.”237

In an effort to catch Taketa and O’Brien in the act, Taketa’s fellow officers obtained a master key and entered the shared office, stole and made copies of taped-recorded conversations,238 and finally setup surveillance equipment.239

Over the next three days the equipment captured Taketa and O’Brien’s activities.240 After gathering enough evidence, Taketa’s fellow agents executed an arrest warrant “based on what [they] had learned during” the covert operation.241

Taketa and O’Brien “were indicted on several counts of illegal interception of wire communications, conspiracy to intercept such communications, and use of intercepted communications, all in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20.”242 The two DEA agents, who were convicted for violating the Fourth Amendment rights of others, challenged their
officer convictions on the basis that their own Fourth Amendment rights had been violated.\textsuperscript{243} 

The court thoroughly discussed privacy rights, including what is reasonable in light of the totality of circumstances.\textsuperscript{244} The court concluded that “O’Brien’s office was not open to the public, and was not subjected to regular visits for inspection by DEA personnel.” Therefore the fact that others could access the office did not “defeat O’Brien’s expectation of privacy in his office.”\textsuperscript{245} 

The court extended this expectation of privacy to Taketa but expressly stated that “[v]ideo surveillance does not in itself violate a reasonable expectation of privacy.”\textsuperscript{246} The court provided “police may record what they normally may view with the naked eye”\textsuperscript{247} because “[v]ideotaping of suspects in public places, such as banks, does not violate the fourth amendment.”\textsuperscript{248} 

\textbf{F. Open Surveillance} 

Should citizens afford the police any privacy when they are openly talking on their police radio? Is recording this type of communication permissible, or is it a violation of wiretapping laws? The following case addressed this exact question.\textsuperscript{249} 

\textbf{1. Johnson v. Hawe: A Day at the Park} 

On January 28, 2000, Anthony Johnson (“Johnson”) videotaped his friends at a public skateboard park when he noticed a police vehicle drive up to the park,\textsuperscript{250} Chief Nelson (“Nelson”), who was on duty, came to the park to locate a missing juvenile.\textsuperscript{251} 

Johnson and Nelson were seventy-five feet apart when Nelson noticed that Johnson was recording him with a camera.\textsuperscript{252} 

After a short while, Johnson stopped recording Nelson and approached the patrol vehicle.\textsuperscript{253} Meanwhile, Nelson’s police radio was on and Nelson dialed his personal cell phone to contact dispatch so he could get a description of the runaway juvenile.\textsuperscript{254} 

\textsuperscript{243} See \textit{Taketa}, 923 F.2d at 669. 
\textsuperscript{244} See \textit{id.} at 672-73. 
\textsuperscript{245} \textit{Id.} at 673. 
\textsuperscript{246} \textit{See \textit{id.} at 677.} 
\textsuperscript{247} \textit{Id.; \textit{See, e.g., Sponick v. City of Detroit Police Dep’t}, 211 N.W.2d 674, 690 (Mich. Ct. App. 1973) (holding a tavern is a public place where videotaping suspect did not violate fourth amendment).} 
\textsuperscript{248} \textit{Taketa, 923 F.2d at 677.} 
\textsuperscript{249} See generally \textit{Johnson v. Hawe}, 388 F.3d 676 (9th Cir. 2004). 
\textsuperscript{250} \textit{Id.} at 679. 
\textsuperscript{251} \textit{Id.} 
\textsuperscript{252} \textit{Id. at 679-80.} 
\textsuperscript{253} \textit{Id. at 680.} 
\textsuperscript{254} \textit{Id.}
When Johnson finally reached the patrol vehicle he resumed videotaping Nelson and approached Nelson’s passenger side window, which Nelson then rolled down. Nelson turned off his cellphone and asked, “[w]hat do you think you’re doing?” Johnson did not respond. Johnson stopped recording, but kept his camera pointed at the patrol vehicle.

Nelson repeated his question a second time, this time elaborating that recording him without permission is a crime because it violated the law due to his lack of consent. Alas, Johnson continued to point the camera at Nelson’s direction. After the second warning, Nelson called for backup, got out of his patrol car, physically struggled with Johnson, took away Johnson’s video camera, and arrested Johnson with the help of backup.

After spending three days in county jail, prosecutors “filed a criminal complaint against [Johnson], charging him with” one count of resisting arrest, and another count of “recording communication without permission” in violation of the state’s Privacy Act.

The prosecutor moved for a determination of probable cause based on Nelson’s testimony that Johnson recorded him while he contacted dispatch for information. Johnson was initially released and both of the charges were dropped, despite a finding of probable cause for the arrest. The issue was not resolved because two months later Johnson was once again charged with resisting arrest and this time for “attempted recording communication [sic] without permission.”

Several months following the arrest, Johnson’s case was heard. Judge Coughenour dismissed the charges because Nelson was not engaged in any communication; Johnson “could not have intended to record a conversation that [was not] occurring.”

Further, Judge Coughenour explained even if Nelson talked to someone, the charges would be dismissed because Nelson had no expectation of privacy when he “voluntarily exposed any such communication to the public by parking his vehicle in a public place with the windows rolled down.”

255. Johnson, 388 F.3d at 680.
256. Id.
257. Id.
258. Id.
259. Id.
260. Id.
262. Johnson, 388 F.3d at 680.
263. Id.
264. Id.
265. See id.
266. Id.
267. Id.
Seeking injunctive relief, monetary damages, and attorney’s fees, Johnson filed an action pursuant to 42 U.S.C. § 1983 against the City and Nelson. Not deterred by this action Nelson “filed counterclaims against Johnson for malicious prosecution.”

The fact remained; Johnson did not violate the state’s Privacy Act because the Act had an exemption to record police while they are on duty on public grounds. The court, citing two earlier precedents, rejected Nelson’s claim that he had a reasonable expectation of privacy in his official business.

Moreover, the court reasoned, due to the nature of operation of a police radio, any communication sent over a police radio is inherently a broadcast where anyone within earshot can hear it. In support of their reasoning the court offered a quote from the Washington Attorney General that stated in relevant part:

First, we understand that a large percentage of conversations between 911 Central Dispatch and law enforcement . . . [are] radio communication[s], commonly monitored . . . by private citizens owning devices that scan the radio frequencies used by police . . . . In our opinion, the participants in a conversation that can be readily overheard and recorded by the general public do not have a reasonable expectation of privacy in their conversation.

Second, even where a conversation is not “public” in that it is not monitored or heard by the public, it may be “public” in that the subject of the conversation is strictly of a public business nature. We assume that virtually all conversations between 911 Central Dispatch and public officers are official, public business conversations.

The court held that “Johnson was arrested without probable cause,” in violation of his Fourth Amendment rights, because “his conduct was not criminal under the Act.”

2. A Reasonable Officer Should Know Recording Is Lawful

It is unclear whether the court held Nelson to a higher standard (than an average police officer) because of his position as chief, but the court denied his claim for qualified immunity because Nelson should have known that Johnson was not...

268. Johnson, 388 F.3d at 680.
269. Id.
270. See id. at 683.
271. See State v. Flora, 845 P.2d 1355 (Wash. Ct. App. 1992); see also State v. Clark, 916 P.2d 384, 392 (Wash. 1996) (holding a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of a passerby is not private [under the act]).
272. See Johnson, 388 F.3d at 683.
273. Id.
274. Id. at 684.
275. Id. at 685.
committing a crime. The court explained, "in light of the many Washington cases dealing with unlawful arrests under the Privacy Act," the recent opinion from the Washington Attorney General, and the "well-established precedent of Katz that there could be no reasonable expectation of privacy" in a communication made in public places.

Uncomfortable with the decision, Judge Gould (in his dissent) stressed that declaring that a police officer has no expectation of privacy when on duty and in public was too broad a holding; a holding that should not have been expressed by a court at this level, and instead ought to be left to the Washington State Supreme Court. However, a petition for rehearing, en banc, was denied. Moreover, the Supreme Court denied certiorari casting serious doubt on Judge Gould’s concern that such matters are better left to the higher courts to decide.

The denials of review demonstrate the likely position higher courts may have on arresting citizens for recording police officers when they are in public and on duty. However, how would the decision come out if there was no police officer recording exception in the statute? Or if Johnson had in fact been recording when he was arrested? These questions will continue to evade a judicial answer; hence the Legislature should address the issue and explicitly allow citizens to record on-duty officers both openly and in secret.

IV. PROPOSAL: THE GOVERNMENT SHOULD ALLOW CIVILIANS TO RECORD POLICE OFFICERS OPENLY AND SECRETLY

The following section presents two legal arguments available in California for the Legislature to create an exemption for secretly recording on-duty police officers when they are in public. The focus of the first legal argument centers on the execution of a citizen’s arrest. However, the application of the following legal argument should not be attempted in the absence of a recording device to document police misconduct. The second legal argument is based on the principle that there is no reasonable expectation of privacy in criminal activity.

276. See id. at 684 ("[T]here is no reasonable expectation of privacy in communications over police dispatch ... because those communications are knowingly exposed to the public by virtue of their transmission.").

277. Id. at 685.

278. See Johnson, 388 F.3d at 688 (Gould, dissenting).

279. Id. at 679 (majority opinion).


281. This author presents the following legal argument as an exercise in legal theory. This author in no way condones, promotes, or suggests that it is permissible to attempt nor execute a citizen’s arrest on an officer believed to be misbehaving for two reasons: 1) police officers are trained to defend themselves with deadly force, and 2) as a witness to an encounter between a police officer and a suspect one must acknowledge that not all the facts are available to warrant such a breach of the peace.
Officer! You Are on Candid Camera

A. First Argument: Options for the “Good Samaritan”

California provides a prime example that surreptitious recordings of police officer misconduct is safer for both the citizen and the officer for the following two reasons. First, the California Penal Code allows private citizens to arrest anyone in the commission of a felony. Second, California is a two-party consent state to oral and video recordings.

When these two facts are combined it becomes clear that in California a private citizen has the right to execute an arrest on a police officer that has “gone rouge,” but that same citizen would be committing a felony if they instead recorded the rouge officer.

1. Secretly Recording Police Misconduct Is Safer Than Executing a Lawful Citizen’s Arrest

Black’s Law Dictionary defines a “citizen’s arrest” providing, “[a]n arrest of a private person by another private person on the grounds that (1) a public offense was committed in the arrester’s presence, or (2) the arrester has reasonable cause to believe that the arrestee has committed a felony.”

California has codified the citizen’s arrest in the California Penal Code. First, the state provides an “arrest” occurs when a person is taken into custody, “in a manner authorized by law,” and “may be made by a peace officer or a by a private person.”

Second, an arrest is made “by an actual restraint of the person” and the “person arrested may be subjected to such restraint as is reasonable for his arrest and detention.”

Finally, a private person may arrest another “[f]or a public offense committed or attempted in his presence,” and the private citizen has “reasonable cause for believing the person arrested to have committed” the public offense.

To understand the application of these rules the following assumptions must be made: 1) the officer in question is not the “objectively reasonable officer” but an officer committing a public offense but an officer committing a public offense, 2) the state does not endorse this type of
misconduct, and 3) the citizen executing the arrest is acting based on the reasonable belief that the officer has committed the public offense.

So, California allows a private citizen to physically restrain a tortfeasor, and if he or she did physically restrain a police officer that had committed aggravated battery, per current California law, that private citizen would be protected from liability and the arrest made would be lawful.

Now, in Rizer, a police officer was bullying Hughes, a quadriplegic. Should a private citizen interfere, should he or she try to physically restrain officer Lukart? For the private citizen’s safety, and the safety of others, the objectively reasonable person should answer “no.” Nevertheless, such an arrest made by the community would be lawful. However, someone making a recording of the event without the rogue officer’s consent would be guilty of a felony.

2. Second Argument: Clandestine Surveillance Doctrine – Time and Place Restrictions

The final argument explains why, especially in California, law enforcement should know that recording tortfeasors in public is lawful. Legislatures are once again invited to carve out the following exception because there should be no expectation of privacy in criminal conduct.

Smayda v. United States demonstrates that privacy expectations are diminished in public places. Even if the public place is a place for conducting the most private of activities, because even though someone may have a subjective expectation of privacy when they use a restroom, society will not honor the actor’s view if the court deems the location a public place.

In Smayda, two men were convicted of oral copulation under California Penal Code Section 288(a) because their act was committed within Yosemite National Park (“Yosemite”). The offense occurred in a community men’s restroom, located in a tent-cabin portion, at Camp Curry.
Prior to the incident, park rangers and guests noticed that homosexuals had used the restroom as a "hangout," and the restroom was a place in "which homosexual activities were being carried on." Unknown persons had cut out two-inch square holes, about waist high from the floor, in the partitions separating stall number two and stalls number one and three. Upon inspection, stains on the partitions lead the rangers to believe that the stalls had been used, and would be used again, in violation of the state anti-sodomy law.

In response, the rangers and camp manager cut out six-inch holes in the ceiling above each stall and installed a screen (to make it look like an air vent), for the purposes of observation. After consulting with the law enforcement specialist at Yosemite, Ranger Twight decided to conduct surveillance "after the family-type people had quit using the facility" from 11:00 P.M. to midnight.

The surveillance was limited in scope and only conducted on Saturday nights, for one hour, by placing a photographer on the roof of the building that was to take pictures of only those who violated the Penal Code. On July 20, 1963, the appellants came in and occupied two adjacent stalls, "peered at each other, masturbated, and then committed the crime through the hole in the partition." Photographs were taken and the two appellants were arrested.

The court distinguished this situation from earlier California cases, where the evidence collected from such activity was held to be inadmissible. This court stated that the scope for the surveillance was limited, and provided two alternative grounds explaining why the rangers’ conduct did not violate the Fourth Amendment.

First, the appellants’ conduct—and choice of location—equated to an implied consent to the "search" because the rest room was in a public park; and second "there was no ‘unreasonable search’ within the meaning of the [A]mendment” because the recording was limited in time and manner focusing only on capturing criminal activity.

The federal wiretapping statute isn’t implicated by the facts presented in Smayda because taking photographs has nothing to do with recording private conversations. However, the court expressed social policy concerns (of exposing children to harm), and relied on the clandestine surveillance doctrine to justify the rangers’ conduct, taking language from the California District Court of Appeal:

301. Id.
302. Smayda, 352 F.2d at 252.
303. Id.
304. Id.
305. Id.
306. Id. at 253.
307. Id.
308. Smayda, 352 F.2d at 253.
310. See Smayda, 352 F.2d at 251.
311. Id. at 253-54.
312. Id. at 254.
To hold that the public areas of such toilets are to be ‘off limits’ from clandestine surveillance by police would be to encourage the use of such places by perverts, panderers, pickpockets, addicts and hoodlums. Such persons would seek asylum or refuge in such places with the assurance that they could conduct their illicit activities therein while fully protected from the secret surveillance of the vice squad. Should the areas of such toilets, where the members of the public are free to circulate, as distinguished from areas where one may seclude oneself from public view, such as in an enclosed commode or toilet stall, become areas removed from such secret surveillance by the police, the peril to immature and innocent youth would be increased immeasurably...[p]arents would not rest secure that their youngsters could use such facilities without fear that they would witness scenes of shocking adult degeneracy such as witnessed by the police in the instant case.314

The doctrine of clandestine surveillance has the following two elements: 1) the party doing the surveillance has “reasonable cause to believe” there is a “commission of a crime,” and 2) the recording was confined to a proper “time” and place “when such crimes [were] most likely to occur.”315

The same interest in protecting the public from harm presented in this case should extend to recording police, with or without consent, when the police officer is causing harm to the public. As stated earlier, the premise is police officers are people and people make mistakes, and sometimes these mistakes are made with malice and intent to harm.

Therefore, when a police officer is in public (with no real expectation of privacy), and the person videotaping has reasonable cause to believe the police officer is in the commission of a crime or is behaving badly (the first element), and the recording is confined to a proper time and place when the officer is in public (where the crimes or misconduct are likely to occur), then the doctrine of Clandestine Surveillance should extend to a citizen recording police officers under these circumstances.

V. CONCLUSION

This article urges the legislature to create an exemption allowing private citizens to surreptitiously record rogue police officers when they are on-duty and in public. Beyond the First Amendment protections to freedom of press and beyond the Fourth Amendment protections against unreasonable searches and seizures, there are two theories that allow surreptitious recording.

First, California permits a private citizen to physically arrest a rogue officer, and while recording that same rogue officer surreptitiously is safer, California permits

313. See id at 257.
314. Id. at 254-55.
315. See id. at 257.
the more dangerous act of arresting an armed and hostile, specially trained, officer of the law.

Second, the Clandestine Surveillance doctrine is one that police officers have utilized and have been aware of since at least 1965, in California, for recording illegal activities that occur in public, and this should apply to on-duty police officers who break the law in public.

This author recognizes the social benefits of the wiretapping laws. Understanding the limitations of the Constitution, Congress appropriately created a statutory mechanism to protect private citizens from intrusion into their private lives. When Congress did so, Congress carved out an exception to control organized crime, and now Congress has an opportunity to hold law enforcement up to the Code they swore to respect, an oath to be our example, an oath to serve and protect by allowing citizens to record on-duty police officers when in public.

316. See Flanagan v. Flanagan, 41 P.3d 575, 581 (Cal. 2002) (finding wife guilty for secretly recording her husband's conversations with his grandson, holding "that a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded").
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