LIGHTS, CAMERA, ARREST: THE STAGE IS SET FOR A FEDERAL RESOLUTION OF A CITIZEN'S RIGHT TO RECORD THE POLICE IN PUBLIC

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For who would bear the whips and scorns of time,
The oppressor's wrong, the proud man's contumely,
The pangs of despised love, the law's delay . . .[1]

ACT I: INTRODUCTION

Grab your cellphone, press the record button, and amaze your friends! No advertisement like this exists in real life, of course, because the action is al-

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[1] WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act 3, sc. 1.

ready universally automatic—it needs no encouragement or instruction.[2] At the same time, however, the action is often made without any consideration of legal consequences. Perhaps it is the speed with which one can start recording. Perhaps it is the prevalence of cameras in our everyday lives. Or perhaps it is the fact that few people are even aware that recording could be illegal in certain situations, in certain states.[3] Jon Surmacz, a webmaster at Boston University, was shocked when he was arrested for filming the police breaking up a holiday party he was attending in 2008: "One of the reasons I got my phone out [to film] . . . was from going to YouTube where there are dozens of videos of things like this."[4] What is the law where you live? Odds are, you have no idea.[5]

Most of the time, recordings[6] are completely harmless or even beneficial, as

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[2] *See generally* Ric Simmons, *Why 2007 is Not Like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. CRIM. L. & CRIMINOLOGY 531 (2007) (noting that Orwell's famous novel, 1984, predicted the ubiquity of video cameras in our everyday lives).

[3] *See, e.g.*, Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (convicting Michael J. Hyde of criminal wiretapping after he voluntarily turned over a tape recording of his traffic stop to substantiate a formal complaint against the police department); Don Terry, *Eavesdropping Laws Mean That Turning On an Audio Recorder Could Send You to Prison*, N.Y. TIMES, Jan. 23, 2011, at A29B, *available at* http://www.nytimes.com/2011/01/23/us/23cnceavesdropping.html (providing an interview with Tiawanda Moore, a woman who was ultimately acquitted of criminal eavesdropping in August 2011, where she stated "[b]efore they arrested me for it . . . I didn't even know there was a law about eavesdropping").

[4] Daniel Rowinski, *Police Fight Cellphone Recordings*, BOSTON.COM (Jan. 12, 2010), http://www.boston.com/news/local/Massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/. It took five months for Surmacz and the ACLU to get the charges of illegal wiretapping and disorderly conduct dismissed, yet Surmacz says he would still do it again (internal quotations omitted). *Id.*

[5] To demonstrate, *compare* Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010) (affirming, among other things, summary judgment in favor of the Borough of Carlisle for wiretapping charges brought against Brian Kelly for recording a police officer during a traffic stop), *with* 2007 Manheim Township Police Dep't Policy Manual 1, AELE LAW ENFORCEMENT LEGAL CTR, http://www.aele.org/law/2009all05/manheim.pdf:

> It is the policy of the Manheim Township Police Department to recognize the legal standing of members of the public to make video/audio recordings of police officers and civilian employees who are carrying out their official police duties in an area open to the public, and by citizens who have a legal right to be in an area where police are operating, such as a person's home or business. However, this right does not prevent officers from taking measures to ensure that such activity and recording does not interfere or impeded [sic] with the officer's law enforcement and public safety purpose.

Id. Despite the diametrically opposed laws and enforcement procedures, the jurisdictions of Carlisle and Manheim Township are separated by only a mere one-hour drive. *See* GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "Carlisle, PA" and search "B" for "Manheim, PA"; then follow "Get Directions" hyperlink) (providing driving directions from Carlisle, PA to Manhaim, PA).

[6] This article will use the term "recordings" to signify any type of recording that contains

when catching a hit and run driver fleeing the scene. If you aim your camera at the police, however, you could be arrested and face up to fifteen years in prison[7] just for recording the police in public speaking at volumes audible to any unassisted ear.[8] While the majority of states treat recordings with tolerance, it is clear that other states vigorously object.[9] The resulting inconsistency necessarily hinders the average citizen from predicting the legal consequences, if any, for performing an act that is effortless, prevalent, and generally considered to be perfectly lawful—pressing record on your cellphone's video camera. As such, this article argues for the creation and implementation of a federal rule to address the issue of citizens recording police in public. The line between ordinary citizen and journalist is permanently blurred, and state action through legislative reform would undoubtedly be ineffective in light of the stark circuit split on this issue.[10] Therefore, Congress or the Supreme Court must be the one to step into the spotlight and deliver a resolution.

This article begins with a description of the citizen journalist[11] revolution and a brief summary of how police have responded to this trend. Thereafter, it examines the development of wiretapping laws and identifies how some of those laws have been used to prosecute citizens for recording the police. Recent cases from four circuits will then be analyzed with a particular focus on the range of inconsistent opinions. After clarifying the need for a uniform rule and

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audio. That is, audio recordings or video recordings that also record audio. Where it is necessary to make a distinction between these recording and those without audio, the distinction will be clear. *See* J. Peter Bodri, *Tapping into Police Conduct: The Improper Use of Wiretapping Laws to Prosecute Citizens Who Record On-Duty Police*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1328, 1334–35 (2011) ("In most jurisdictions, video recording alone will not trigger the application of these wiretapping statutes, as it is the audio recording that is illegal. However, with the progression of technology, nearly every video recording device (from cell phones to point-and-shoot digital cameras) has an audio component.") (citing Commonwealth v. Wright, 814 N.E.2d 741, 742 n.1 (Mass. App. Ct. 2004)).

[7] *See* Terry, *supra* note 3 (providing examples of two citizens, Christopher Drew and Tiawanda Moore, who were charged with criminal eavesdropping and faced possible sentences of up to fifteen years, "one step below attempted murder").

[8] *See* Johnson v. City of Rock Island, 2012 WL 5425605, at *2–3 (C.D. Ill. 2012) ("The Illinois eavesdropping statute makes it a class 4 felony to audio-record 'all or any part of any conversation' unless all parties to the conversation consent to such recording. And doing so will become a class 1 felony if one of the parties is a law enforcement officer who is performing her official duties." (internal citations omitted)) (citing 720 ILL. COMP. STAT. § 5/14-1 *et seq.*).

[9] *See infra* Parts III.B, IV.A-D.

[10] *See infra* Part IV.

[11] *See* Martin H. Bosworth, *Blogger, Journalist, Citizen: Which is Which?*, CONSUMER AFFAIRS (Jun. 4, 2007), http://www.consumeraffairs.com/news04/2007/06/citizen_blogger.html ("The phrase 'citizen journalist' is often cast about to describe this new wave of reporters and investigators, using innovative new tools to hunt down stories that escape the notice of large media outlets, often while holding down full-time jobs and raising families.").

defending the federal government's reach into this field, the Note concludes by urging Congress or the Supreme Court to provide a clear resolution. A federal solution is the most effective answer to this national problem because it can lead to uniformity, predictability, and accountability. However, before we begin, please consider a brief hypothetical:

Sitting at a small table on the patio of your favorite restaurant, you observe a police cruiser initiate a traffic stop on the street directly in front of you. After witnessing the initial, uneventful discussion from a distance too far to overhear, you return to your meal. Suddenly, you hear shouting from the car's general direction, and you look up to see the police officer struggling with the driver. Then, the police officer starts to physically extract the driver from the vehicle as the driver screams out, "Stop! You are hurting me! Someone help!" Instinctively, you grab your cellphone to begin recording the incident. You are not sure who is to blame for the altercation, but the scene is certainly dramatic. The waitress is recording with her phone too. A minute after the conclusion of the incident, you have effortlessly published the video to your Facebook, Twitter, and YouTube accounts for anyone to see. Can you be arrested? If so, can you be successfully prosecuted? If the arrest turns out to be improper, will you prevail on a 1983 claim?[12] The answers, as we shall see, are far from simple.

ACT II: BACKGROUND INFORMATION

Scene 1: *The Rise of the Citizen Journalist*

Awakened by sirens on the night of March 3, 1991, George Holliday used a Sony Handycam to videotape arguably the most famous amateur video of all time—the police beating of Rodney King.[13] Yet, the video was not uploaded to the Internet, not transferred to Holliday's computer, and not emailed or sent by text message to anyone. Instead, Holliday made several efforts to find out about King's condition and, when he failed to do so, he delivered his videocassette to a Los Angeles TV station several days later.[14] Although the dissemination of his video seems antiquated by today's standards, Holliday was unknowingly defining the role of the modern citizen journalist. The effect of Holliday's efforts was so strong, in fact, that many amateur videographers documented the subsequent rioting in Los Angeles after the police officers involved in King's beating were acquitted, "including one [video that] immortalized the beating of

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[12] A claim brought under 42 U.S.C. § 1983 (2012).

[13] *See* 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 (identifying Holliday's use of a Handycam to record Rodney King's beating); Andrew John Goldsmith, *Policing's New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 918 (2010) (referring to the Rodney King incident as a "threshold event").

[14] Deggans, *supra* note 13.

white truck driver Reginald Denny by black rioters."[15] In an instant, the citizen journalist had morphed into more than just a form of police oversight—he was reporting the good old-fashioned news. Today, whether the purpose of a recording is to galvanize support for a cause or just to create a few laughs, the resulting product is undeniably popular—for every minute in real time, there are twenty-four hours of video uploaded onto YouTube.[16] That translates into nearly 35,000 hours of video uploaded each day. There is not only an endless demand for these recordings, but the citizen journalist can also record and disseminate essentially at no cost and without hassle.[17]

Correspondingly, with the growth of technology and the proliferation of cellphones, one can transform from an ordinary citizen into a citizen journalist in a matter of seconds. Bulky video cameras have been replaced with cellphones the size and weight of a deck of playing cards; cassette tapes have been replaced by abstract memory space; and detachable batteries that used to provide only hours of power have been replaced with fixed, internal ones capable of sustaining a device for days. Moreover, video and audio recordings can be disseminated to thousands (perhaps millions) of people in a matter of seconds. Internet postings, multimedia text messages, emails, and group cloud storage represent just a fraction of the ways one can quickly share recordings with friends and the public alike. And yet, for even more exposure, citizen journalists can upload their recordings to national news websites, such as CNN's iReport or Fox News Channel's uReport, which have the resources to broadcast images and sounds worldwide.[18] The fact that some independent news websites like The Third Report are supported entirely by submissions from citizen journalists underscores the ubiquity and importance of citizen journalism.[19]

In effect, the news is no longer monopolized by mustached men with deep

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[15] *Id.* (citing Steve Myers from the Poynter Institute).

[16] *See YouTube Facts & Figures*, WEBSITE MONITORING BLOG (May 17, 2010), http://www.website-monitoring.com/blog/2010/05/17/youtube-facts-and-figures-history-statistics/. YouTube also has more than two billion views each day, and Facebook has more than 140,000 photos uploaded each minute. *Id.*

[17] *See* Tal Kopan, *Judge Enters Permanent Order Allowing Recording of Police*, POLITICO (Dec. 21, 2012, 5:12 PM), http://www.politico.com/blogs/under-the-radar/2012/12/judge-enters-permanent-order-allowing-recording-of-152651.html (quoting Harvey Grossman, Legal Director of the ACLU of Illinois) ("In an age when almost everyone carries or has access to a smartphone, the recording and dissemination of pictures and sound is inexpensive, efficient and easy to accomplish. In short, the technology makes almost anyone a citizen journalist, deserving of protection under the First Amendment.").

[18] *See CNN iReport*, http://iReport.cnn.com, CNN (last visited Sept. 24, 2013); *Fox News uReport*, http://uReport.foxnews.com, FOX NEWS (last visited Sept. 24, 2013).

[19] *See* Anthony Edward Borelli, *The Third Report Launches Platform for Citizen Journalism*, THE THIRD REPORT (Feb. 28, 2010, 6:29 PM), http://www.thirdreport.com/about.asp ("With so many media outlets abandoning the principals of journalism in favor of promoting

somber voices, but rather is delivered by all types of people reporting on a litany of subjects without any formal training or certification.[20] Indeed, websites like The Third Report recognize the rise of the citizen journalist as a contributor, not just a mere cameraman on a lucky day. The mesmerizing yet tragic film of John F. Kennedy's assassination, which was captured, by pure chance, by Dallas businessman Abraham Zapruder,[21] has been replaced by pictures and videos captured with purpose: Andrew Meyer screaming "Don't tase me, bro!" from a dozen angles,[22] police officers indiscriminately pepper-spraying peaceful Occupy Wall Street protestors,[23] and a Bay Area Rapid Transit officer shooting an unarmed suspect from close range in front of a subway car full of citizen journalists.[24] These three examples, which were epic moments in citizen journalism, have one additional thing in common—citizens recording police officers and questioning the officers' conduct.

Scene 2: *Police Reaction*

As the citizen journalist movement gained steam, police departments responded aggressively. Numerous citizen journalists have been threatened or intimidated into ceasing or surrendering their material, leading one prominent journalist to launch his own website to document what he calls "an epidemic crackdown against citizens with cameras."[25] Those citizens courageous enough

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an agenda, the Third Report aims to restore the journalistic tradition of the Third Man by giving a voice to citizen journalists everywhere.").

[20] *See, e.g.*, *CNN iReport*, *supra* note 18, at "*Terms of Use*." The only requirement to register at CNN's iReport is that the user be at least thirteen years old. *Id.*

[21] *See* Debbie Denmon, *'Luck' Led Journalist to Exclusive on JFK Assassination Film*, WFAA (Nov. 20, 2011, 11:54 PM), http://www.wfaa.com/news/local/Luck-led-journalist-to-exclusive-on-JFK-assassination-film-134222078.html. Life Magazine Bureau Chief Dick Stolley "secured the only eyewitness film of the JFK assassination" by paying Zapruder $150,000 for the film before other newspaper reporters and television networks could get to him first. *Id.* Stolley just happened to be in the same hotel as Zapruder when he got word of the film. He later recalled that "it was luck . . . ône lucky thing." *Id.*

[22] *See, e.g.*, *University of Florida Student Tasered at Kerry Forum*, YOUTUBE http://www.YouTube.com/watch?v=6bVa6jn4rpE (last visited Sept 24, 2013); *University of Florida Taser Incident*, WIKIPEDIA, http://en.wikipedia.org/wiki/University_of_Florida_Taser_incident (last visited Sept. 24, 2013).

[23] *See, e.g.*, *Outrage Over Police Pepper-Spraying Students*, CBS (Nov. 20, 2011, 7:51 AM), http://www.cbsnews.com/8301-201_162-57328289/outrage-over-police-pepper-spraying-students.

[24] *See, e.g.*, *Elinor Mills, Web Videos of Oakland Shooting Fuel Protests*, CNET (Jan. 9, 2009, 1:23 PM), http://news.cnet.com/web-videos-of-oakland-shooting-fuel-protests/ (providing links to various videos of the incident).

[25] PINAC, www.photographyisnotacrime.com/about/ (last visited Sept. 24, 2013); *see also* Louise Boyle, *White House 'Blocks Use of Pictures of Malia and Sasha Obama on the Beach' After They Were Photographed on Hawaii Vacation*, DAILY MAIL (Jan. 7, 2013, 7:32 PM), http://www.dailymail.co.uk/news/article-2258702/Malia-Sasha-Obama-photographed-

to withstand the initial barrage of police intimidation are often arrested, and some are charged with felonies carrying a possible prison term similar to manslaughter.[26] Others are charged with obstruction of justice, interference, failure to obey an officer, harassment, and even imaginary laws.[27]

To support their position, opponents of public police recording claim broad protections under the umbrellas of privacy and safety.[28] First, opponents claim there is a need to protect the privacy of the individual officers and any sensitive information that may be unearthed during the investigatory process.[29] If a citizen could capture this type of information through recording, they say, the preservation of evidence could be jeopardized and criminal defendants could target potential witnesses before trial.[30] With regard to safety, opponents contend that the presence of a camera may cause officers to hesitate when making life-or-

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paparazzi-Hawaiian-beach-White-House-stop-published.html. The White House threatened a celebrity photographer who stumbled upon and took pictures of President Obama's daughters in Hawaii while waiting to capture footage of Jessica Simpson. *Id.* After taking the pictures, the photographer was approached by the Secret Service and required to give identification; he was allowed to keep his camera after agents gave him a stern warning to stop taking pictures. *Id.* Later, when the photographer sold the images to a third party, the White House issued a warning letter demanding that he stop selling the images so as to protect the privacy of the first daughters. *Id. The Daily Mail* further suggests there is an unofficial agreement between the White House and media outlets to restrict photographs of the girls to only appearances in an official capacity. *Id.*

[26] *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (Nov. 26, 2012). *Compare* 720 ILL. COMP. STAT. § 5/14-2(a)(1), *with* 720 ILL. COMP. STAT. § 5/9-3(a-f).

[27] *See Cell Phone Picture Called Obstruction of Justice: Man Arrested for Shooting Photo of Police Activity*, L.A. INDEP. MEDIA CTR., http://la.indymedia.org/news/2006/07/171228_comment.php (last visited Sept. 24, 2013) (providing an example of prosecution using obstruction and imaginary laws); *Dueling Protesters Disrupts Carnahan Forum on Aging Six Arrested as People on Both Sides of Health Care Debate Square Off*, ST. LOUIS POST-DISPATCH, Aug. 7, 2009, at A1 (providing an example of prosecution using interference); Heather Schmelzlen, *Photographer Receives Misdemeanor Charges*, DAILY COLLEGIAN (Nov. 7, 2008, 12:00 AM), http://www.collegian.psu.edu/archive/2008/11/07/photographer_receives_misdemea.aspx (providing an example of prosecution using failure to obey); *see also* Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (providing an example of prosecution using harassment).

[28] *See, e.g.*, *ACLU of Ill.*, 679 F.3d at 608–14 (Posner, J., dissenting).

[29] *See* N. Stewart Hanley, *A Dangerous Trend: Arresting Citizens for Recording Law Enforcement*, 34 AM. J. TRIAL ADVOC. 645, 652 (2011) ("Opponents [of recording police in public] also point to the need to safeguard the privacy of the investigation process and other sensitive information as a justification for their position."); *see also* Dina Mishra, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1556 (2007) (describing countervailing factors to be considered in giving citizens the right to record police in public, which included privacy interests).

[30] *See* Mishra, *supra* note 29.

death choices for fear of post hoc scrutiny.[31] Recordings have already shown the power to instigate deadly riots.[32] Moreover, opponents fear that recordings may stunt efforts to recruit new officers[33] and could jeopardize the safety of both officers and citizens at the scene.[34] To be fair, a citizen holding a cellphone out in front of her while recording could look similar to someone holding a gun, literally[35] and figuratively.[36] And it is not hard to imagine how a citizen could interfere with a police officer by attempting to record a clearly inappropriate situation—like a citizen trying to record an active hostage negotiation from mere feet away. Conceivable, opponents may further complain that, if citizens could freely record the police, some videos could be intentionally taken out of context or even doctored to distort the actual events. After all, the police have been caught doing this themselves.[37]

In response, citizens claim a First Amendment right to record public officials performing their duties in public since "electric light is the most efficient policeman" in preventing police misconduct.[38] Former Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court recently criticized the way wiretapping laws were being used to punish "citizen watchdogs and [to allow] police officers to conceal possible misconduct behind a 'cloak of priva-

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[31] *See* Kevin Johnson, *For Cops, Citizen Videos Bring Increased Scrutiny,* USA TODAY (Oct. 18, 2010, 12:10 PM), http://usatoday30.usatoday.com/news/nation/2010-10-15-1Avideocops15_CV_N.htm.

[32] *See* Deggans, *supra* note 13 ("First, the film led to widespread disgust at the way police treated an unarmed black man. Later, when several officers were acquitted by a jury that included no black people, five days of rioting tore through Los Angeles' black neighborhoods.").

[33] *See* Mishra, *supra* note 29; *see generally* Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600 (2009).

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

[35] *See* Steve Silverman, *7 Rules for Recording Police*, REASON (Apr. 5, 2012), http://reason.com/archives/2012/04/05/7-rules-for-recording-police ("Rule #7: Don't Point your Camera like a gun . . . . [T]ry to be in control of your camera before an officer approaches. You want to avoid suddenly grasping for it. If a cop thinks you're reaching for a gun, you could get shot.").

[36] *See* Wendy McElroy, *Are Cameras the New Guns?*, GIZMODO (Jun. 2, 2010, 5:00 PM), http://gizmodo.com/5553765/are-cameras-the-new-guns ("When the police act as though cameras were the equivalent of guns pointed at them, there is a sense in which they are correct. Cameras have become the most effective weapon that ordinary people have to protect against and to expose police abuse. And the police want it to stop.").

[37] *See* Radley Balko, *When Police Videos Go Missing*, REASON (Aug. 12, 2010, 5:06 PM), http://reason.com/blog/2010/08/12/when-police-videos-go-missing.

[38] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1914).

cy.'"[39] Many are convinced that the police must have something to hide if they do not want to be recorded while on duty.[40] Others suggest that if the government wishes to preserve the legitimacy of the police and likewise encourage citizens to obey the law, then the government's actions must be transparent and subject to accountability.[41] As Justice Brandies noted in his oft-cited dissent from *Olmstead v. United States*, "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[42] Police misconduct is not a dying issue, and despite vast technological and societal change since the time of Rodney King's beating, society continues to record the police in public as a form of oversight—especially when citizens die at the hands of the police.[43] In fact, computer programmers have created applications specifically designed for citizens to evade police detection while recording,[44] and groups like the NAACP have explicitly encouraged its members to videotape their interactions with police officers in

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[39] Rowinski, *supra* note 4.

[40] *See, e.g.*, Timothy Williams, *Recorded on a Suspect's Hidden MP3 Player, a Bronx Detective Faces 12 Perjury Charges*, N.Y. TIMES (Dec. 7, 2007), http://www.nytimes.com/2007/12/07/nyregion/07cop.html. A veteran New York City police detective was charged with twelve counts of perjury stemming from an interrogation of Erik Crespo, a minor, who he arrested for attempted murder, criminal possession of a weapon, and other charges. *Id.* Mr. Crespo had received an MP3 player as a Christmas present a few days before being arrested, and he turned the device on when the detective began to question him because he did not trust the police. *Id.* When his mother arrived, Mr. Crespo was allowed to hand over his personal effects, which included the MP3 player, before being taken to jail. *Id.* At trial and under oath, the detective adamantly denied that he had interrogated Mr. Crespo. *Id.* When Mr. Crespo's attorney disclosed the tape to the Bronx District Attorney's office, which included over an hour of interrogation by the detective, the attempted murder charge was dropped. *Id.* Mr. Crespo eventually reached a plea deal for weapons possession charge. *Id.*

[41] *See* Marianne F. Kies, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 303 (2011).

[42] Olmstead v. United States, 227 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also* David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 171–72 (1999) (arguing that the belief that the criminal justice system is unfair does in fact contribute to law-breaking).

[43] *See* Christine Hauser & Christopher Drew, *3 Police Officers Deny Battery Charges After Videotaped Beating in New Orleans*, N.Y. TIMES (Oct. 11, 2005), http://www.nytimes.com/2005/10/11/national/11video.html (reporting on Robert Davis, whose death was also videotaped); *see also* Brenna R. Kelly, *Man Dies After Brawl with City Police Officers*, CINCINNATI ENQUIRER (Dec. 1, 2003), http://www.enquirer.com/editions/2003/12/01/loc_loc1a.html (reporting on Nathaniel Jones whose death was videotaped).

[44] *See, e.g.*, Silverman, *supra* note 35 (providing information on how to set passcodes on your cellphone in case they are confiscated by police, links to applications that provide offsite uploading of videos to prevent deletion, and instructions on how to "black out" your phone to trick cops into thinking you are not recording them).

spite of the law and to submit those videos to the group's website.[45] The fact that both sides have attempted to thwart the efforts of the other demonstrates the need for a uniform and effective solution. In the meantime, wiretapping laws are the primary method to punish citizen journalists—who refuse to stop recording—which many "civil libertarians call a troubling misuse of the law to stifle the kind of street-level oversight that cellphone and video technology make possible."[46]

ACT III: INCONSISTENT LAWS

Scene 1: *Federal Wiretapping Laws*

In an effort to safeguard the public's privacy in wire and oral communications, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act in 1968 to control the conditions under which communications could be lawfully intercepted by both state actors and private parties.[47] While the original purpose of the Act was to prohibit audio recording, all wiretapping laws naturally extend to videotaping since videotaping inherently includes audio recording.[48] At the time of the Act, Congress was specifically interested in helping police investigate the then-growing problem of organized crime,[49] the operations of which was difficult to infiltrate without the use of inconspicuous wiretapping.[50] While keeping the Supreme Court's limitations on electronic

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[45] See Cohen, *supra* note 34.

[46] Rowinski, *supra* note 4; *see* Gemma Atkinson and Fred Grace, *Act of Terror: Arrested for Filming Police Officers*, GUARDIAN (Apr. 29, 2013), http://www.guardian.co.uk/commentisfree/video/2013/apr/29/act-terror-arrest-filming-police-video (using a video to describe one British citizen's ordeal after recording the police with her cellphone and winning an out of court settlement).

[47] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197, 213–25 (1968). Title III of this Act has been codified at 18 U.S.C. § 2510–20 (2012) (hereinafter "Act" or "Title III").

[48] *See* Bodri, *supra* note 6.

[49] *See* United States v. Phillips, 540 F.2d 319, 324 (8th Cir. 1976) (noting that the Federal Wiretap Act "sets forth a comprehensive legislative scheme . . . [to] preserv[e] . . . law enforcement tools needed to fight organized crime."); Kristin M. Finklea, CONG. RESEARCH SERV., R40525, *Organized Crime in the United States: Trends and Issues for Congress* (2010) (identifying the purpose for enacting the Act as a tool to battle organized crime).

[50] *See, e.g.*, MASS. GEN. LAWS ch. 272, § 99 (2010), http://www.malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section99: The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities. *Id.*

surveillance in mind,[51] Congress essentially created a general prohibition against intentional wiretapping save for a few enumerated exceptions.

These exceptions include (1) the one-party consent exception, meaning at least one party engaged in the communication agrees to the recording;[52] (2) the reasonable expectation of privacy exception, meaning one party has no reasonable expectation of privacy that the communication will not be recorded;[53] and (3) the warrant exception for law enforcement.[54] While the breadth of these exceptions may appear to swallow the rule upon first glance, the Act's main purpose was to protect the public from unlawful wiretapping by the hands of the snooping detective.[55] But, because Congress felt the "cherished privacy of law-abiding citizens"[56] was best left to the states, the Act created only a de facto minimum to be honored by the states in forming their own wiretapping laws.[57] As expected, a wide variety of state wiretapping laws emerged, creating

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[51] *See* Bodri, *supra* note 6, at 1333 ("The careful drafting of Tittle III by Congress was to insure compliance with the previous holdings by the Supreme Court on electronic surveillance, which included cases like *Olmstead* and *Katz*.").

[52] *See* 18 U.S.C. § 2511(2)(d) ("It shall not be unlawful under this chapter 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 [consented] to such interception.").

[53] *See id.* § 2510(2) ("[O]ral communication means any oral communication uttered by a person exhibiting an expectation that such communications is not subject to interception under circumstances justifying such expectation"). This "expectation of non-interception" has been interpreted to mean "reasonable expectation of privacy." *See* In re John Doe Trader Number One, 894 F.2d 240, 242 (7th Cir. 1990) ("According to the legislative history of [the Federal Wiretap Act], [the] definition was intended to parallel the 'reasonable expectation of privacy' test created by the Supreme Court in Katz v. United States." (citation omitted)). To determine whether a reasonable expectation of privacy exists, courts utilized the two-prong test set forth by Justice Harlan in his concurrence requiring an "actual (subjective) expectation of privacy" and society is prepared to recognize that expectation as reasonable. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[54] *See* 18 U.S.C. § 2518 (describing the warrant procedure); 18 U.S.C. § 251(2)(a)(ii)(A) (setting forth the warrant exception).

[55] *See* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 840–41 (1998) ("Private individuals and law enforcement officers, at both the federal and the state levels, made extensive use of wiretapping and electronic surveillance during the 1920s, 1930s, 1940s, 1950s, and most of the 1960s until Congress passed legislations curtailing the practices in 1968." (citation omitted)).

[56] Dalia v. United States, 441 U.S. 238, 250 n.9 (1979).

[57] *See* S. REP. NO. 90-1097, at 98 (1968) *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187 (stating that the legislative intent for Title III was that "[s]tates would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation); 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.").

inevitable confusion and complication.[58] Because of the growth of the warrant exception vis-à-vis modern Fourth Amendment interpretation, the citizen is ultimately the one punished for the added protection. To be sure, the strictest states have actually turned what was once a citizen's protection against the government into the government's protection against the citizen.

Scene 2: *The States*

Of the three aforementioned exceptions to the federal wiretapping statute, the level of consent is the primary element that distinguishes lenient from stringent state wiretapping laws. In short, the distinction rests on whether one party or all parties to a conversation must consent to being recorded in order for the recording to be lawful.[59] A majority of states have generally crafted their wiretapping laws similarly to Title III, which embodies the more lenient standard that requires only one party to consent to the recording.[60] Thus, a person can record his or her conversations or a conversation where one of the conversing parties has previously given consent.[61] For example, it is a felony in Texas to record any "wire, oral, or electronic communication" without the consent of at least

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[58] *See, e.g.*, *About Us*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/about (last visited on Jan. 24, 2012) ("For more than 40 years, the Reporters Committee for Freedom of the Press has provided free legal advice, resources, support and advocacy to protect the First Amendment . . . rights of journalists working in areas where U.S. law applies, regardless of the medium in which their work appears.").

[59] *See* People v. Ceja, 789 N.E.2d 1228, 1240 (Ill. 2003) ("Consent exists [for the purposes of wiretapping consent] where a person's behavior manifests acquiescence or comparable voluntary diminution of his or her otherwise protected rights," and such diminution can be express or implied.); State v. Townsend, 57 P.3d 255, 260 (Wash. 2002) ("[A] communicating party will be deemed to have consented to having his or her communication record when the party knows that the messages will be recorded.").

[60] *See Issues and Research, Electronic Surveillance Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/telecom/electronic-surveillance-laws.aspx (last visited Jan. 23, 2012). The majority includes Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

[61] *See* 18 U.S.C. § 2511(2)(d) (2012) (allowing a person "not acting under color of law" to record a conversation if that person is a party to the conversation); Clifford S. Fishman & Anne T. McKenna, WIRETAPPING & EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE § 5:102, § 5:151 (3d ed. 2007) (noting that under the federal statutes "it is legally permissible . . . [for a] private citizen not acting in cooperation with any government agent or agency . . . to intercept his or her own conversations); *but cf.* 18 U.S.C. § 2511(2)(d) (permitting a person to record with the consent of one party, except where the recording is "for the purpose of committing any criminal or tortious act"). For a definition of "criminal or tortious purpose," see *id.* at § 5:104.

one party to the conversation.[62] Furthermore, Texas' reasonable expectation of privacy exception allows citizens to record their own conversation occurring in public with no consent,[63] and Texas also makes it possible for an injured party to bring a civil suit against an unlawful recorder.[64]

In contrast to the majority, the few other states[65] require consent from all parties to a conversation in order to lawfully record it, and it is within these state laws that we find the most complexity and confusion. Eleven of these thirteen states have general two-party statutes. Maryland, for example, provides that a person can record wire, oral, or electronic communication only if that person is a party to the conversation, has received consent *from all of the other parties*, and interception is not intended to be used to commit a crime or tortious act.[66] The original purpose of the all-party distinction was to prevent "unwarranted spying and intrusions" on someone's privacy,[67] but, like most of these states' laws, Maryland's modern wiretapping law was enacted before the creation of cellphones, miniature audio-video cameras, and handheld voice recorders.[68] As such, these laws could not have accounted for cameras hidden in plain sight, like those "attached to helmets or embedded in cellphones."[69] Thus, the concept of protecting private communication continues to be eroded by today's ever-changing technological world. As a critical example, the Patriot Act has threatened almost any reasonable expectation of privacy in electronic communication due to the voluntary exposure of such communication to third par-

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[62] *Texas Recording Law*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/legal-guide/texas-recording-law (last visited Jan. 23, 2012) (citing TEX. PENAL CODE ANN. § 16.02 (West. 2011)).

[63] *Id.*

[64] *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 123.00 (West. 2011)).

[65] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 60. The minority includes California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington State. *Id.*

[66] *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(1)-(3) (West 2011) (emphasis added).

[67] Marianne B. Davis & Laurie R. Bortz, *Legislation, The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 8 U. BALT. L. REV. 374, 384 (1978) (quoting 1973 MD. CODE ANN. § 1924-25). *See also* Rowinski, *supra* note 4 ("The [Massachusetts wiretapping] law, intended to protect the privacy of individuals, appears to have been triggered by a series of high-profile cases involving private detectives who were recording people without their consent.").

[68] *See id.* (noting that Maryland's law was enacted in 1973); Katie Rucke, *Supreme Court Rules Illinois Anti-Eavesdropping Law Violates Free Speech*, MINT PRESS NEWS, http://www.mintpress.net/supreme-court-rules-illinois-anti-eavesdropping-law-violates-free-speech (last visited Jan. 20, 2012) (noting that Illinois' law was enacted in 1961).

[69] Annys Shin, *From YouTube to Your Local Court: Video of Traffic Stop Sparks Debate on Whether Police Are Twisting Md. Wiretap Laws*, WASH. POST, June 16, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/15/AR2010061505556.html.

ties, such as Internet service providers.[70] This erosion not only weakens the scope of private communication, but it also leaves the concept subject to inconsistent interpretation under various state laws. To make matters worse, Massachusetts and Illinois have only tightened the Gordian knot.

First, Massachusetts focuses on the two-party consent requirement and includes a prohibition on secret recording irrespective of any privacy expectations.[71] The preamble of the current statute reasons that "the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the Commonwealth, [and thus] the secret use of such devices by private individuals must be prohibited."[72] When one considers the advances of technology, however, the open-surreptitious inquiry is just as precarious as a privacy interpretation because there is often nothing to distinguish an inactive cellphone from one that is secretly recording in plain sight. Moreover, the open-surreptitious determination is prone to manipulation—someone displeased with being recorded could simply claim that she never saw the microphone or cellphone, the recording transforms from open to surreptitious, from legal to illegal.[73]

Similarly, Illinois' wiretapping law provides that all parties to a communication must consent to any type of recording for it to be lawful—there is no inquiry into a party's reasonable expectation of privacy as to the communication.[74] Illinois has no concern with surreptitious recordings; rather, the state simply requires everyone's consent. However, the statute provides a special affirmative defense for police officers acting within the scope of their duties,[75] while the statute ironically provides harsher punishments to citizens who record the police.[76] Accordingly, a citizen who records a police officer in public in Illinois receives a punishment automatically elevated from a Class 4 felony to a Class 1 felony with a possible prison term of up to fifteen years.[77] While the constitutionality of this law recently has been called into question in *ACLU of*

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[70] *See generally* Patrick P. Garlinger, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105 (2009).

[71] *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.").

[72] *See* MASS. GEN. LAWS ch. 272, § 99(a) (West 2010).

[73] *See, e.g.*, Rowinski, *supra* note 4. Jeffrey Manzelli was arrested and convicted of illegal wiretapping for recording the police at an anti-war rally. *Id.* Though Manzelli claimed he was openly recording the officer, he was convicted because he had a microphone hidden in the sleeve of his jacket. *Id.*

[74] 720 ILL. COMP. STAT. § 5/14-2(a)(1) (2010).

[75] *Id.* § 5/14-2(b)(1-4).

[76] *Id.* § 5/14-2(a)(1).

[77] *Id.* § 5/14-4(b).

Illinois v. Alvarez,[78] the resolution there is myopic and the fact remains that the variety of state laws and the interpretations of those laws have become a problem, which has been manifested by the stark circuit split.

ACT IV: INCONSISTENT INTERPRETATION

Scene 1: Smith v. City of Cummings

In 1995, James and Barbara Smith operated a small electronics repair shop in the city of Cumming, Georgia, which they had owned for about eight years.[79] After some dramatic developments,[80] the girlfriend of a part-time employee at the Smiths' shop enlisted a man to "shoot up the Smith home while the Smiths were in the house."[81] The man informed Mr. Smith of the plot, and the two men collectively reported the incident to the police.[82] Because all of the records of this incident were subsequently lost by the Cumming Police Department without explanation, what happened after the men filed the report is hotly in dispute.[83] Needless to say, the Smiths grew increasingly adverse to the Cumming Police Department, culminating with Mrs. Smith being pulled over late one night by a police officer for no apparent reason.[84] Believing the police were improperly stopping vehicles in order to merely increase ticket revenue, Mr. Smith began utilizing a police scanner to track police cruisers and videotape random traffic stops from public property without interfering.[85] Displeased, the police eventually obtained an arrest warrant for Mr. Smith and burst into the

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[78] 679 F.3d 583 (7th Cir. 2012); *see infra* VI.4.

[79] *See* Brief for Appellant at 3, Smith v. Cumming, 212 F.3d 1332 (11th Cir. 2000) (No. 99-8190-J), 1999 WL 33618060, at *3.

[80] *Id.* Vaughn Pendley, a part-time employee for the Smiths, had a girlfriend name Sarah Miles. *Id.* Miles allegedly became angry at the Smiths when she discovered that they asked Pendley to serve as a sperm donor for the artificial insemination of Mrs. Smith. *Id.* Miles first made threats against the Smiths, and then approached Jason Lingerfelt and asked him to shoot up the Smith's house, while they were home, in exchange for $100 and sexual relations. *Id.*

[81] *Id.* (citing Depo. Smith, p. 126, 11. 1-25; p. 127, 11.1-14).

[82] *Id.* at *4.

[83] *Id.* According to Police Chief Jones, Smith and Lingerfelt succeeded in getting Sarah Miles to solicit Lingerfelt for the murder-for-hire on tape. However, Miles was never charged with any crime; she merely talked with Jones. Jones then employed Lingerfelt to try and buy marijuana from the Smiths at their store, even though Jones knew that Lingerfelt was "slow." Lingerfelt was unsuccessful in his drug buy and Jones claimed that there was "no further attempt to prove or disprove that the Smiths were drug dealers." However, the Smiths contend that there were numerous occasions where total strangers would enter the Smiths' store and attempt to purchase drugs. The Smiths then began to receive word from their friends that the police were spreading rumors to that the Smiths were drug dealers. *Id.* at *4–8.

[84] *Id.* at *10.

[85] *Id.* at *11.

Smiths' electronics shop to effectuate the arrest.[86] At the hearing, the court threatened Mr. Smith, stating that he would be jailed and held without bond if he continued to videotape the police performing their job—his case was dismissed.[87]

The Smiths subsequently filed a § 1983 complaint on June 18, 1997 alleging violations of rights that stem from federal law.[88] The district court disposed their complaint on summary judgment.[89] The Smiths then appealed to the Eleventh Circuit, which concluded that the Smiths had not offered sufficient evidence to prove the actions of the police rose to the level of a § 1983 claim.[90] However, the court took time to specifically note that the Smiths indeed had a First Amendment right to videotape the police in public because "the First Amendment protects the right to gather information about what public officials do on public property."[91] The court clarified that this right was not absolute but subject to "reasonable time, manner and place restrictions . . . [when] photograph[ing] and videotap[ing] police conduct."[92] The court went on to cite numerous cases within the jurisdiction affirming this right, and noted that "the press generally has no right to information superior to that of the general public."[93] If we think about the hypothetical in the introduction, it would appear you have a First Amendment right to record the police in the Eleventh Circuit so long as you abide by any reasonable time, place, and manner restrictions. So far, so good. However, whether you have a claim against the police for being improperly arrested is far more complicated.

Scene 2: Kelly v. Borough of Carlisle

In the decade that followed the *Smith* decision, only two federal appellate cases cited it, both in the Third Circuit.[94] On May 24, 2007, Brian Kelly was riding in his friend's truck through Carlisle, Pennsylvania when Officer Rogers observed the vehicle speeding and initiated a traffic stop.[95] At some point dur-

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[86] *Id.* at *11 ("Appellee Singletary then proceeded to intimidate and embarrass [the Smiths] by openly charging in to the [Smiths'] place of business accompanied by multiple police officers and openly stating that [Mr. Smith] had to appear in court to answer these charges.").

[87] *Id.* at *11–12. This threat was made "[e]ven though it is undisputed that Appellant committed no criminal act.

[88] *Id.* at *2.

[89] *Id.*

[90] Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

[91] *Id.*

[92] *Id.*

[93] *Id.* (citing United States v. Hastings, 695 F.2d 1278,1281 (11th Cir. 1983)).

[94] *See* Gilles v. Davis, 427 F.3d 197, 212 (3d Cir. 2005); Kelly v. Borough of Carlisle (*Kelly II*), 622 F.3d 248, 260 (3d Cir. 2010).

[95] Kelly v. Borough of Carlisle (*Kelly I*), 2009 WL 1230309, at *1 (M.D. Penn. 2009), *aff'd in part, vacated in part, remanded by Kelly II*, 622 F.3d 248 (2010).

ing the encounter, Kelly turned on his hand-held video camera and placed it in his lap.[96] After processing the driver's paperwork in his patrol car, Officer Rogers returned to the truck and first noticed that Kelly was recording the incident with a video camera from the passenger seat.[97] Officer Rogers dispossessed Kelly of the camera and called the District Attorney's office to determine whether Kelly had violated the Wiretapping and Electronic Surveillance Control Act of Pennsylvania ("Wiretap Act") for secretly recording him without his consent.[98] After getting an Assistant District Attorney's approval, Officer Rodgers arrested Kelly for violating the Wiretap Act and, despite the Officer's recommendation for Kelly's release on his own recognizance, the judge required bail for Kelly's release.[99] Unable to make bail, Kelly spent the night in jail and was released the next day when the District Attorney eventually dropped the charges.[100] Kelly subsequently brought a § 1983 claim and other claims against the police department as a result of the incident, but his claims were eliminated via summary judgment on May 4, 2009 due to the qualified immunity defense.[101]

Kelly appealed a number of issues to the Third Circuit, including whether he had a clearly established right to videotape a police officer during a traffic stop as a passenger in the vehicle.[102] According to qualified immunity law, a state actor must violate a clearly established right in order to lose qualified immunity protection—a tough sell for any citizen bringing a § 1983 claim. In his argument, Kelly cited a number of cases to substantiate his claim that the right to record the police was clearly established and that a reasonable officer should have been on fair notice of the First Amendment implications.[103] However, the court concluded there was "insufficient case law" to support a clearly established right to record the police and thus affirmed the officer's qualified immunity defense.[104] The court reasoned that because some cases announced a broad right while others suggested a narrower interpretation, the case law did "not

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[96] *Kelly II*, 622 F.3d at 251. ("Kelly testified that he began recording Rodgers 'after [he] saw how [Rodgers] was acting,' which conduct allegedly included Rodgers yelling at [the driver].").

[97] *Kelly I*, 2009 WL 1230309, at *1. As was customary, Officer Rodger also informed the men in the truck that he was recording the incident. *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Kelly II*, 622 F.3d at 252.

[102] *Id.* at 263.

[103] *See, e.g.*, Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); Pomykacz v. Borough of West Wildwood, 438 F. Supp. 2d 504, 513 (D.N.J. 2006).

[104] *Kelly II*, 622 F.3d at 253 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) ("[The] doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

provide a clear rule regarding First Amendment rights to obtain information by videotaping under the circumstances presented."[105] As such, even though Kelly lost, the court implicitly acknowledged that a uniform rule would have been helpful to clear up the confusion. Moving our hypothetical into the Third Circuit, one could very well be arrested for recording the police during a traffic stop and left with no recourse once the charges are dropped, despite having already spent a day in jail and having paid for a lawyer. Not only does this not make sense, but it also prevents a large number of people from even understanding the contours of the law—it even can victimize a lawyer.

Scene 3: Glik v. Cunniffe

On the night of October 1, 2007, attorney Simon Glik was walking in the Boston Common when he witnessed several police officers arresting a young man in what he considered to be an overly forceful manner.[106] Standing on the public sidewalk by Tremont Street from a distance of about ten feet, Glik recorded the rest of the arrest with his cellphone.[107] The police acknowledged Glik was recording them because they told him that he had taken enough pictures.[108] After Glik confessed that his phone was actually videotaping (and told one of the officers he captured him punch the suspect), he claimed the officers huddled together before informing him that he was under arrest for violating the Massachusetts wiretapping law that prohibits secret audio recording.[109] Glik was also briefly charged with aiding the escape of a prisoner, but the charge was quickly dismissed for a hilarious lack of probable cause.[110] After Glik was booked in a South Boston police station for violating the state's wiretapping law, he filed a motion to dismiss, which the Boston Municipal Court granted.[111] The court specifically noted that there was no probable cause to support the wiretapping charge because the state law only prohibited secret recording and Glik had openly used his cellphone given the fact that his recording device was in plain view.[112] While the officers eventually argued that Glik's use of a cell

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[105] *Kelly II*, 622 F.3d at 262.

[106] *See* Harvey Silvergate & James Tierney, *Echoes of Rodney King*, BOSTON PHOENIX (Feb. 21, 2008), http://thephoenix.com/boston/news/56680-echoes-of-rodney-king/.

[107] *See* Michael Potere, Comment, *Who Will Watch the Watchmen?: Citizens recording Police Conduct*, 106 Nw. U. L. REV. 273 (2012). For footage of the film Glik took before being arrested, *see* Tony Waterman, *Boston Court Ruling Affirms Citizens' Right to Record Officials*, WGBH BOSTON (Sept. 23, 2012), http://www.wgbh.org/articles/Boston-Court-Ruling-Affirms-Citizens-Right-To-Record-Officials-4342.

[108] *See* Potere, *supra* note 107, at 289–90.

[109] Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011); *see also* Waterman, *supra* note 107.

[110] *Id.*; *see also* Waterman, *supra* note 107 (Glik was charged with disturbing the peace, but that charge was also dismissed for a lack of probable cause).

[111] *Glik*, 655 F.3d at 80.

[112] *Id.*; *see also* Commonwealth v. Hyde, 750 N.E.2d 963, 971 (Mass. 2001) (holding that a recording would not be secret within the meaning of the wiretapping statute if a defen-

phone was "insufficient to put them on notice of the recording" based on a cellphone's numerous other functions, the court rejected this theory because a cell phone's other functions are irrelevant to the secrecy inquiry.[113]

Glik then filed an internal affairs complaint with the police department, to no avail, before filing a civil rights claim in District Court in February 2010.[114] The police department moved to dismiss Glik's complaint for failure to state a claim, and the court heard oral arguments on the motion.[115] After argument, the Court denied the police department's motion and concluded that the "First Amendment right publicly to record the activities of police officers on public business is established."[116] On appeal to the First Circuit, the police officers asserted a qualified immunity defense, but the court rejected the defense after cataloguing "the decisions of numerous circuits and district courts" that recognize the clearly established First Amendment right to film government officials in public spaces.[117] Moreover, the court noted that police officers are already expected to endure "significant amount[s] of verbal criticism and challenge,"[118] so the same restraint must be similarly expected from police officers when they are being videotaped in a lawful manner.[119] In the end, Glik was awarded almost $200,000 in a civil settlement with the City of Boston.[120]

If we now place the hypothetical in the First Circuit, it appears the act of recording is legal so long as one does so completely in the open. Yet, this case illustrates the complexities embodied by wiretapping laws due to the undefined and malleable standard of "secret" recording. Much as in *Kelly*, the factual question as to whether a small, sleek cellphone was openly or surreptitiously recording is open to manipulation notwithstanding the First Circuit's rejection of the officers' claim of lack of notice. While *Glik* seems to suggest a move-

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dant simply "held the tape recorder in plain sight"); *see also Glik*, 655 F.3d at 87 ("The unmistakable logic of *Hyde* . . . is that the secrecy inquiry turns on notice, i.e., whether, based on objective indicators, such as the presence of a recording device in plain view, one can infer that the subject was aware that she might be recorded.").

[113] The [officers'] argument suffers from factual as well as legal flaws. The allegations of the complaint indicated that the officers were cognizant of Glik's surveillance, knew that Glik was using his phone to record them in some fashion, and were aware, based on their asking Glik whether he was recording audio, that cell phones may have sound recording capabilities. The fact that a cell phone may have other functions is thus irrelevant to the question of whether Glik's recording was "secret."

Id. at 87–88

[114] *Id.* at 80.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 83–84.

[118] *Glik*, 655 F.3d at 84 (citing City of Houston v. Hill, 482 U.S. 451, 461 (1987)).

[119] *Id.* ("Such peaceful recording of an arrest in a public space that does not interfere with the police officer's performance of their duties is not reasonably subject to limitation.").

[120] *See City of Boston Settles Landmark Case for $170,000*, ACLU OF MASS., http://www.aclum.org/news_3.27.12 (last visited Jan. 20, 2012).

ment toward recognizing the clearly established right to record the police under certain reasonable limitations, the next case demonstrates that bitter dissention still exists.

Scene 4: ACLU of Illinois v. Alvarez

In early 2010, the American Civil Liberties Union of Illinois (ACLU) designed a program to audio-visually record Illinois police officers with the intention of publishing those recordings across all forms of media to detect and deter police misconduct.[121] According to the group's stated purpose, the ACLU wanted to

> record police officers, without the consent of the officers, when (a) the officers are performing their public duties, (b) the officers are in public places, (c) the officers are speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful.[122]

While the ACLU has always been known "to defend and expand certain rights under [the] law,"[123] the ACLU takes a special interest in monitoring police conduct.[124] In Illinois, police officers and state's attorneys regularly arrest and prosecute citizens for violating the Illinois Eavesdropping Act when those citizens make audio recordings of police officers performing their duties in public.[125] Accordingly, the ACLU sought declaratory and injunctive relief with respect to the Illinois Wiretap Act before implementing their program.[126]

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[121] *See* ACLU of Ill. v. Alvarez (*ACLU I*), No. 10 C 5235, 2010 WL 4386868 (N.D. Ill. Oct. 28, 2010), *rev'd*, ACLU of Ill. v. Alvarez (*ACLU III*), 679 F.3d 583 (7th Cir. 2012); *see also* ACLU of Ill. v. Alvarez (*ACLU IV*), No. 10 C 5235, 2012 WL 6680341 (N.D. Ill. Dec. 18, 2012).

[122] ACLU of Ill. v. Alvarez (*ACLU II*), 2011 WL 66030, at *1 (Jan. 10, 2011), *rev'd*, *ACLU III*, 679 F.3d 583 (7th Cir. 2012).

[123] *ACLU I*, 2010 WL 4386868 at *1.

[124] *Id.*

[125] *See, e.g.*, People v. Drew, No. 10-CR-4601 (Cook Cnty. Cir. Ct. Ill. 2010). Drew, a Chicago street artist was arrested for selling his art on the street without the proper permit. *Id.* During his arrest, Drew used a concealed recording device to record his conversation with the police officers. *Id.* When the police discovered the recording device in his pocket, Drew was charged with felony eavesdropping under the Illinois Eavesdropping Act. *Id.* Cook County Criminal Courts Judge Stanley Sacks found the statute too broad, which could improperly criminalize "wholly innocent conduct" like a parent recording their child's soccer game and inadvertently capturing a conversation between two bystanders. *Id.*

[126] *See* Reply Brief of Plaintiff-Appellant at 26, *ACLU III*, 679 F.3d 583 (7th Cir. 2012) (No. 10 Civ. 5235), 2011 WL 3892663, at *26. The ACLU sought declaratory judgment as to the Illinois eavesdropping statute, alleging it was unconstitutional, and also sought an injunction against Anita Alvarez, the State's Attorney General, for prosecuting individuals for violating the act. *Id.* The ACLU had planned to record two specific events: a police container search program on June 10, 2010, and a protest schedule for November 8, 2010. *ACLU II*, 2011 WL 66030 at *1.

On appeal to the Seventh Circuit, the court found that the government's interest in protecting conversational privacy was not implicated when police officers were performing their duties in public and speaking at volumes audible to the unassisted ear of a bystander.[127] Because the law as written restricted far more speech than was "necessary to protect legitimate privacy interests,"[128] the court granted the ACLU a preliminary injunction enjoining the State's Attorney from using the Illinois Wiretap Act to prosecute ACLU employees acting under the ACLU program.[129] On remand, the District Court entered a permanent injunction against the State's Attorney and granted the ACLU's motion for summary judgment because the "eavesdropping statute as applied to the ACLU program . . . violates the First Amendment."[130] While the ruling technically only applies to the ACLU and its employees or agents,[131] it firmly establishes a connection between the First Amendment and a citizen journalist's right to record the police performing their duties in public. What this ruling does not do, however, is address the law applied to surreptitious recording of police. Indeed, the Seventh Circuit's opinion noted it was "not suggesting that the First Amendment protects only open recording. The distinction between open and concealed recording, however, may make a difference . . . because surreptitious recording brings stronger privacy interests into play."[132] The Supreme Court ultimately denied certiorari,[133] and the issue remains unresolved on a national scale.

In dissent at the Seventh Circuit, Judge Posner furiously chastised the majority for allowing "'civil liberties people' [to tell] police officers how to do their jobs" and ignoring blatant privacy and public safety interests.[134] While conced-

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[127] *See* Eugene Volokh, *Seventh Circuit: Ban on Audio Recording of Police Officers Likely Unconstitutional*, VOLOKH CONSPIRACY (May 8, 2012, 12:35 PM), http://www.volokh.com/2012/05/08/seventh-circuit-ban-on-audio-recording-of-police-officers-likely-unconstitutional.

[128] Jason Meisner, *Judge Declares Illinois' Eavesdropping Law*, CHICAGO TRIBUNE (Mar. 3, 2012), http://articles.chicagotribune.com/2012-03-03/news/ct-met-eavesdropping-law-ruling-0303-20120303_1_eavesdropping-statute-police-internal-affairs-investigators-innocent-conduct.

[129] *ACLU III*, 679 F.3d at 608. The court also allowed the ACLU to file an amended complaint that was previous rejected by the lower courts. *Id.* The case was remanded to the district court to determine whether to issue a permanent injunction. *Id.*

[130] *ACLU IV*, 2012 WL 6680341 at *3.

[131] *See* Kopan, *supra* note 17.

[132] *See* Volokh, *supra* note 127, at "Update *ACLU IV* 1" (italicization in original) (citation omitted).

[133] Alvarez v. ACLU, 133 S. Ct. 651 (Nov. 26, 2012) (denying certiorari).

[134] Steven A. Lautt, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 367 (2012) (citing Oral Argument at 7:25, ACLU v. Alvarez (7th Cir. 2012) (No. 11-1286), *available at* http://www.ca7.uscourts.gov/fdocs/docs/fwx (enter "11-1286" in "Case Number" field, click on "List Case(s)," click on "11-1286," and click on "Oral Argument.")).

ing the police likely have no right to privacy when performing their duties in public, Judge Posner instead pointed to the privacy of the civilians that the police interact with—suspects, bystanders, nosy bloggers, legitimate media personnel, crime victims, citizens looking for directions, and witnesses reporting a crime.[135] Furthermore, Judge Posner argued for protection of the social value of public safety, which he believed would be compromised if police officers started hesitating upon seeing a recording device in the hands of a stranger.[136] On balance, the dissent symbolizes the continuous and unresolved disagreement between jurists and jurisdictions on the issue of recording the police in public.[137] Yet, if this case is any indication, it would appear that eventually one could record the police under the circumstances illustrated by the introductory hypothetical if located in the Seventh Circuit—so long as Judge Posner has not gained the upper hand by then.

ACT V: A FEDERAL SOLUTION

Scene 1: *The Need*

There can be no doubt that a citizen's decision to record police in public implicates the First Amendment, and it should come as no surprise that state wiretapping laws that prohibit such recordings have been found to be unconstitutional. After all, wiretapping laws are rarely used the way they were originally intended—to protect the privacy of the citizen from a snooping detective. Instead, the roles have been reversed and state prosecutors are now brandishing punishments wholly disproportionate to the severity of a citizen's crime. Public compliance with a law, however, is closely connected to what acts a community believes should be punished: "the more the law is in line with such community norms, the more likely it is that community members will voluntarily comply with the law."[138] Baltimore criminal defense attorney Steven D. Silverman concurs that wiretapping laws are being used improperly when they criminalize the act of recording the police because the laws are "more [about] 'contempt of cop' than the violation of the wiretapping law."[139] Even if the charges are ultimately dropped, the expense and humiliation of being arrested coupled with the low probability of succeeding on a civil rights claim against the police serves as a chilling effect on otherwise free speech. At its core, many police officers

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[135] *ACLU III*, 679 F.3d at 611 (Posner J., dissenting).

[136] *Id.* at 611–12 (Posner J., dissenting).

[137] *See* Lautt, *supra* note 134, at 367.

[138] I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 839 (2008); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 25 (1968) ("[M]aintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.").

[139] McElroy, *supra* note 36 and accompanying text.

simply are not ready to cede power to the citizen in the form of the video recorder, yet citizens have been awarded substantial settlements resulting from wrongful arrests for recording the police.[140]

Thus, the stage is set for a federal solution. A uniform rule not only solves the inconsistency of different state laws, but it also educates the police, citizens, and prosecutors about the contours of the law ahead of time to ensure proper application. While states generally control the application of their own police powers,[141] electronic communication has been regulated by the federal government for decades, dating at least as far back as the implementation of Title III itself. And while it is controversial when federal law preempts conflicting state law, Title III has already set the precedent to do so and "the federal government's occupation of the field of regulating electronic communications is so pervasive" as to justify continued preemption.[142] Before crafting a unified answer, however, safety and privacy interests of the officer and the citizen must be considered.

Scene 2: *Safety Concerns*

First, the mere presence of another person—the citizen journalist—at a dangerous situation involving a police officer and a suspect inherently creates safety risks for everyone involved. It is undeniable that police officers have the right to maintain a zone of safety around them during the normal course of their duties, including when they secure a crime or accident scenes.[143] But, the citizen might intrude in a better camera shot, or the citizen may just be in the wrong place at the right time.[144] By encroaching into the officer's safety perimeter, deliberately or inadvertently, the citizen journalist ends up threatening someone who has been trained to protect himself with deadly force.[145] Thus, the nature of the police officer's job necessarily requires that the officer be afforded a threshold level of safety from physical invasion.

Second, officers might hesitate in dangerous situations if they are consumed by the idea that all of their actions will be recorded, disseminated around the world, and subject to post hoc criticism.[146] Ultimately, this hesitation could

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[140] *See supra* Part IV.3; ACLU OF MASS., *supra* note 120.

[141] *See* 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 . . . is a power originally and always belonging to the States.").

[142] James A. Paulter, 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).

[143] Hanley, *supra* note 29, at 654.

[144] Mishra, *supra* note 29, at 1556.

[145] *Id.*

[146] *See ACLU III*, 679 F.3d at 611 (7th Cir. 2012) (Posner, J. dissenting) ("[T]he ubiquity of recording devices will increase security concerns by distracting the police").

harm both the officers and citizens.[147] According to Jim Pasco, director of the Fraternal Order of Police, recording devices have had "a chilling effect on some officers who are afraid to act for fear of retribution by video."[148] Such a concern may seem justified, given the events that unfolded after the airing of the Rodney King video, but the actions of the police there were reprehensible and hopefully an outlying example. Officers acting properly should be able to overcome hesitating during emergency situations once they have grown accustomed to having their actions recorded and criticized, just as they have adapted to being recorded during some searches and custodial interrogations. In fact, many police departments already utilize dashboard cameras to record traffic stops, and those videos have benefited the police in a number of ways.[149] The city of Albuquerque goes so far as to equip their uniform officers with lapel cameras.[150] Some of these videos have been instrumental in providing exculpatory evidence for wrongly accused officers,[151] and others have provided clear evidence of wrongdoing to aid the investigation of officer misconduct.[152] These videos also have the potential to serve as training videos or performance reviews. Finally, there is also evidence that the presence of a recording device deters criminal activity and de-escalates potentially dangerous situations; police have long recognized that dash cameras have "aided in calming tense situations during traffic stops."[153] Why should the effect of the camera not work both ways to deter citizen violence and police misconduct alike? "If the police officers are subject to the lens of a camera (and all of the 'intimidations' that come along with it), it should not matter who is standing behind it."[154] After all, police officers are not the only ones whose safety is important in these dangerous situations.

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[147] *Id.*

[148] Johnson, *supra* note 31 (quoting Jim Pasco, director of the Fraternal Order of Police).

[149] INT'L ASSOC. OF CHIEFS OF POLICE [IACP], THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING: RESEARCH AND BEST PRACTICES FROM THE IACP STUDY ON IN-CAR CAMERAS (2004), at 15–27, *available at* http://www.cops.usdoj.gov/Publications/video_evidence.pdf. Recordings have the ability to aid in "agency liability and internal control, training, community perception, and officer performance and professionalism." *Id.* (citing Hanley, *supra* note 29, at 649 n.114). At the same time, however, these videos have also been "lost" in discomforting ways. *See, e.g.*, Balko, *supra* note 37.

[150] *Albuquerque Police Get New Lapel Cameras*, KOAT (Mar. 22, 2013), http://www.koat.com/news/Albuquerque-police-get-new-lapel-cameras/-/17421734/19435286/-/bssg9s/-/index.html.

[151] *See, e.g.*, Scott v. Harris, 440 U.S. 372, 378 n.5 (2007) (where the majority opinion linked to video of a high-speed chase to support its conclusion that the officer did not use excessive force to end the chase by intentionally crashing into the fleeing vehicle).

[152] The Rodney King video is an obvious example.

[153] *See* Hanley, *supra* note 29, at 652 (quoting IACP CENTER, *supra* note 149, at 13).

[154] Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 390, 414 (2013).

Advocates of a citizen's right to record point to the voluminous record of police abuse against citizens and contend that recordings have forced meaningful changes as to how the police use their power when interacting with citizens. John Burris, a civil rights lawyer, believes that recordings have also narrowed the "credibility gap" between police and their accusers; police officers are often afforded the benefit of the doubt when squared off against a citizen accusing the officer of abuse in court.[155] Burris believes the recordings can level the playing field: "The camera, increasingly, is offering a shock to the consciousness."[156] To be sure, the Rodney King video proved to be a crucial piece of evidence in the federal investigation of the officers responsible for King's beating because the officers involved fabricated the official report.[157] King's testimony would have been no match against numerous police officers echoing a single, consistent story. This so-called "Blue Code of Silence" protects officer misconduct because other officers will refuse to report it in an effort to promote loyalty and brotherhood.[158] In fact, "contemporary police culture often demands that officers lie or conceal the truth to protect their own . . . [because] the police 'Blue Code of Silence' is an 'embedded feature of police culture.'"[159] Other commentators have identified the practice in the courtroom setting as "testilying" and discovered the practice is not only widespread but also widely known.[160] Consequently, the countervailing interest of the citizen's safety against the abuse of the police officer coupled with the near ubiquitous use of recording devices by the police reasonably supports extending the right to record to the citizen.

Scene 3: *Privacy Implications*

In addition to safety concerns, however, there are legitimate privacy interests at stake if citizen journalists are granted the right to record the police performing their official duties in public. Certainly the citizen journalist should not be granted power to record police officers in private settings or when officers are

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[155] Johnson, *supra* note 31.

[156] *Id.* (quoting Jim Pasco, director of the Fraternal Order of Police). Pasco also adds "this has become a serious safety issue. I'm afraid something terrible will happen." *Id.*

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

[158] *See* Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 420 (2008) (quoting Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RES. 7, 7 (2002)).

[159] Skolnick, *supra* note 158.

[160] *See* Capers, *supra* note 138, at 868. Capers conducted a survey of judges, prosecutors, and defense attorneys and found that those surveyed believed that police perjury occurred in nearly twenty percent of cases, and two-thirds of those survived also believed "officers shade the facts to establish probable cause." *Id.*

not on duty, but there is no reason officers should expect privacy when working in public. In defining the limits of a citizen's expectation of privacy from governmental searches under the Fourth Amendment, Justice Harlan in his concurrence in *Katz* created a two-prong test to determine whether a right to privacy has been violated: did the person have a subjective expectation of privacy, and, if so, is this expectation of privacy one that society is willing to recognize as reasonable?[161] Furthermore, the Supreme Court has held that there is no privacy protection for information a person "knowingly exposes to the public."[162] While this doctrine refers to a citizen's protection against the government and this article largely addresses the converse situation, Fourth Amendment privacy principles represent the minimum level of protection one receives from the government. Some state and appellate courts have found that police officers have a reduced expectation of privacy due to the nature of their public occupation[163] and "the public's interest in monitoring police for abuses of power."[164] Therefore, if the citizen's right to record the police in public survives the doctrinal hurdles imposed against the government, then surely such a right can withstand lesser scrutiny imposed against the citizen.

Likewise, given the advances and prevalence of technology, it should not be a surprise that someone may be recording activity in public. As mentioned above, police have been able to record their encounters with citizens through dash cameras for some time, but cameras are also located in a wide variety of public spaces.[165] Because so many other professions are subjected to video surveillance to prevent misconduct, police officers should reasonably expect modern technology to make them more subject to scrutiny and accountability.[166] The Supreme Court noted this fact in *Kyllo v. United States*,[167] where the Court held that as intrusive technology becomes more common, there is a reduction in the reasonable expectation that the new technology will not infringe upon Fourth Amendment-protected privacy.[168] Again, while these Fourth Amendment concepts concern a citizen's privacy from governmental intrusion, there is

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[161] *See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan J., concurring).

[162] *Id.* at 351; *see also* Florida v. Riley, 488 U.S. 445, 451 (1989) (holding there was not a reasonable expectation of privacy for the defendant's trailer where the contents were visible from the exterior with aerial observation).

[163] *See* State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (holding a police officer lacked an expectation of privacy as to a conversation occurring during an arrest because the arrest took place in public where someone could have overheard the conversation); *see also* O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976) (holding a police officer has a lessened privacy expectation because police are held to a higher standard of accountability due to the nature of their position).

[164] Mishra, *supra* note 29, at 1555.

[165] *See* IACP CENTER, *supra* note 149, at 5–6.

[166] Hanley, *supra* note 29, at 652.

[167] 533 U.S. 27 (2001).

[168] *See, e.g.*, United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007) ("[T]he Supreme

no reason why these privacy principles should not apply equally to police officers performing their duties as public officials in public spaces.

The Framers' purpose behind the Fourth Amendment was to combat the dangers of tyranny and to provide a check on central authority, and there is no better way to ensure those protections than through citizen recording of officer conduct. In the 1763 case of *Wilkes v. Wood*,[169] a case that encapsulates the primary motivations behind the Fourth Amendment,[170] Chief Justice Pratt criticized a series of general warrants that were aimed at seizing citizens responsible for creating pamphlets that derided government officials and their governmental policies.[171] While the full reasoning behind that opinion is beyond the scope of this article, Chief Justice Pratt concluded that power to issue such general warrants was "'totally subversive of the liberty of the subject.'"[172] News of *Wilkes* and other general warrant cases spread quickly through the American colonies as the colonial press fueled the popular belief that such warrants were oppressive.[173] By the time the Fourth Amendment was finally ratified, however, the Framers were concerned with more than just general warrants. At bottom, they sought an objective rubric to regulate law enforcement. Here, the practice of recording the police in public is completely consistent with the Framer's intent behind the Fourth Amendment because citizens are more likely to be secure from unlawful searches and seizures when they are afforded the opportunity to monitor and record the activities of law enforcement. As such, banning the practice is utterly inconsistent with the Fourth Amendment.[174]

A question does remain, however, as to the privacy interests of a citizen whose interaction with a police officer is recorded. As noted by Judge Posner, "[p]olice may have no right to privacy in carrying out official duties in public. But the civilians they interact with do."[175] He added, "the person conversing with the police officer may be very averse to the conversation's being

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Court has insisted, ever since [Katz], that the meaning of a Fourth Amendment search must change to keep pace with the march of science.") (internal citation omitted).

[169] (1763) 98 Eng. Rep. 489 (K.B.).

[170] *See, e.g.*, Stanford v. Texas, 379 U.S. 476, 484 (1965) (describing *Wilkes* as the "wellspring of the rights now protected by the Fourth Amendment"); *see also* Boyd v. United States, 116 U.S. 616, 626–27 (1886) (finding that it can be "confidently asserted" that *Wilkes* was "in the minds of those who framed the Fourth Amendment").

[171] Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1006–07 (2011).

[172] *Id.* (quoting *Wilkes*, 98 Eng. Rep. at 498).

[173] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 562–65 (1999) (summarizing newspaper accounts in the colonies about the general warrant cases).

[174] The author wishes to thank Professor Arthur LeFrancois of Oklahoma City University School of Law for his observation and articulation of this point.

[175] *ACLU III*, 679 F.3d at 613 (Posner J., dissenting).

broadcast on the evening news or blogged throughout the world."[176] These arguments are not without merit, but a citizen seeking out an officer for a private conversation can often ensure that the conversation takes place in a private location, such as in the police officer's squad car or in another room.[177] Moreover, the policy considerations for allowing a citizen to record the police in public arguably overrides any incidental effects on another citizen who happens to interact with the police in public; the core purpose of the right to record is to protect the citizen and tort law already exists to protect citizens from each other. As for those citizens who have no choice but to interact with a police officer when they are arrested in public, their privacy considerations are automatically reduced because "an arrest is not a 'private' event."[178] "An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record. To speak of an arrest as a private occurrence seems . . . to stretch even the broadest definitions of the idea of privacy beyond the breaking point."[179] The ubiquity of recording devices today simply makes it unreasonable for police officers or citizens to expect that their actions will never be recorded. The question now is how to create and implement a consistent and unified rule.

Scene 4: *The Federal Legislature*

Just as Title III set a minimum level of protection that the states had to honor when creating their own wiretapping laws,[180] the federal legislature could provide an amendment to Title III that provides a minimum level of protection for the citizen journalist and clarifies the citizen's First Amendment right to record the police in public. After the initial implementation of Title III, those states

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[176] *Id.* at 611 (Posner J., dissenting). Posner also notes such recording could violate the tort right of privacy, a conventional exception to freedom of speech. *Id.*

[177] *But cf. id.* at 611 (Posner J., dissenting):

> I disagree with the majority that 'anyone who wishes to speak to police officers in confidence can do so,' and 'police discussions about matters of national and local security do not take place in public where bystanders are within earshot. Forget national security; the people who most need police assistance and who most want their conversations kept private are often the people least able to delay their conversation until they reach a private place. If a person has been shot or raped or mugged or badly injured in a car accident or has witnessed any of these things happening to someone else, and seeks out a police officer for aid, what sense would it make to tell him he's welcome to trot off to the nearest police station for a cozy private conversation, but that otherwise the First Amendment gives passersby the right to memorize and publish (on Facebook on Twitter, on YouTube, on a blog) his agonized plea for help? And as our informant example, many of the persons whom police want to talk to do not want to be seen visiting police stations.

Id.

[178] William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 8 (1974).

[179] *Id.*

[180] *See* supra Part III.1; 18 U.S.C. § 2510–20 (2012)

that enacted further limitations (such as the two-party consent rule) were interested in providing citizens with more protection than the federal government had mandated.[181] Likewise, after the implementation of this proposed amendment, states will be free to provide citizens with greater rights regarding recording the police—more opportunities to film. Specifically, there should be a "Police in Public" exception. Such an exception could read as follows:

> A person may record and disseminate audio/video recordings of police officers who are executing their official duties in public or in private, provided that the person is lawfully on the premises. Such recording is subject to tort law.[182]

This language not only recognizes that a citizen must not unlawfully interfere with an officer's performance of her duty, but it also continues the privacy protections of any citizens that interact with the officer through current tort law. While tort law discourages some opportunities to record and disseminate information, it does so only in extreme circumstances where the seizing of private information would be highly offensive to a reasonable person.[183] Relevant to our issue here, the Second Restatement of Torts specifically notes that there is no liability when a person publicizes something that "the plaintiff himself leaves open to the public eye."[184] Moreover, even if intimate private details are published and they are highly offensive to an ordinary and reasonable man, the publisher can still avoid tort liability if the matter is a legitimate public interest.[185] Dissemination of public police activity is undoubtedly a legitimate public interest and thus the proposed amendment remains consistent to the purpose and scope of common law privacy. While the aforementioned amendment to Title III would be an effective solution to the citizen's right to record, the process of approving and implementing it casts doubts on the efficiency of its execution.

First, a federal legislative solution will be difficult to implement because it will require a majority vote during a time of bitter disagreement along party lines. David Wessel from the *Wall Street Journal* notes that Congressional representatives consistently put their political parties' interests "above all else and vote accordingly," partly because cable television and websites "mak[e] it easier for voters to find information that confirms their [political] views."[186] In

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[181] *See* 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.").

[182] *See* 2007 Manheim Police Policy Manual, *supra* note 5, at 1.

[183] *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977). For a historical discussion on the right to privacy, see Samantha Barbas, *Saving Privacy From History*, 6 DEPAUL L. REV. 973 (2012).

[184] Second Restatement, *supra* note 183, at cmt. b.

[185] Second Restatement, *supra* note 183, at cmt. b.

[186] David Wessel, Editorial, *An Untested Model of Democratic Governance*, WALL ST. J.,

short, members of Congress are aware how powerful the news media can be relative to their reelection campaigns while paradoxically remaining insensitive to the contributions of citizen journalists. Even still, some state legislators have embarked on their own efforts to resolve the issue.

Connecticut was the first state to consider legislation that would guarantee the right of the citizen to record police activity in public.[187] Specifically, the proposed state bill would have created civil liability for police officers who interfered with a citizen's efforts to record police officers performing their official duties in public.[188] The bill's sponsor, Senate Majority Leader Martin Looney, put forth the bill because he was concerned about several local cases in which citizens were being criminally prosecuted for recording police activity from lawful locations.[189] While the original bill was narrowly written to impose civil liability on police officers who interfered with a citizen's efforts to record them, the bill was eventually diluted with broad exceptions for the police.[190] Yet, even though the proposed amendment provided ample exceptions for public safety, privacy interests of the police and crime victims, and crime scene integrity, the Connecticut Police Chiefs Association (among others) still aggressively opposed the bill.[191] While the bill passed the state Senate, it nevertheless failed to pass the House in the 2011 general session; Senator Looney pointed to time constraints rather than the bill's merits as the reason for its failure. In any event, it was still evidently clear that the police in Connecticut directly opposed the measure and were willing to voice their disapproval in the political forum.

Likewise, a second reason that a federal solution would be difficult to implement is that the police are a powerful lobby in the United States political pro-

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Jan. 5, 2012, at A2, *available at* http://online.wsj.com/article/SB10001424052970204331304577140643884292400.html.

[187] *See* John Ryan, *Bill Guards Right to Record Police*, YALE DAILY NEWS (Apr. 20, 2011), http://www.yaledailynews.com/news/2011/apr/20/bill-guards-right-record-police/; *see* also Kacey Dreamer, *Connecticut bill would recognize right to record police*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Apr. 11, 2011), http://www.rcfp.org/node/98244.

[188] *See* Dreamer, *supra* note 187.

[189] *See, e.g., Police Conduct Questioned After Raid on Mores-Stiles Screw*, YALE DAILY NEWS (Oct. 2, 2010), http://yaledailynews.com/blog/2010/10/02/police-conduct-questioned-after-raid-on-morse-stiles-screw/. New Haven police officers' arrival officers arrived at a local club to conduct a planned raid as part of "Operation Nightlight," an initiative to "curb violence in the downtown entertainment district." Several Yale University students began taping the raid with their cellphones, and two students were arrested after they refused to put away their phones; the charges were ultimately dismissed.). *Id.*

[190] *Compare* S.B. No. 1206, 2011 Gen. Sess. (Conn. 2011), *with* Substitute S.B. No. 1206, 2011 Gen. Sess. (Conn. 2011).

[191] *See* S. JUDICIARY COMM., JOINT FAVORABLE REPORT, SB 237-645, *available at* http://www.cga.ct.gov/2013/JFR/S/2013SB-00237-R00JUD-JFR.htm (Conn. 2012)

cess, and they have the power to jeopardize a politician's reelection campaign.[192] While very few federal legislators would voluntarily risk being labeled as someone who is against the police, one remains undeterred. United States Representative Edolphus Towns from New York attempted to introduce a concurrent resolution in the House of Representatives in 2010 that would have given "members of the public . . . a right to . . . make video or sound recordings of the police during the discharge of their public duties . . . ."[193] While concurrent resolutions do not have the force of law,[194] the efforts by Representative Towns demonstrate a willingness on the part of at least one legislator to address the unjustified arrests and prosecutions of citizen journalists. Although the police lobby did not explicitly oppose Representative Towns' bill (likely because it lacked any force of law), it only makes sense to assume it would aggressively object, thereby contributing to the legislation's delay or demise. Without any practical legislative solution, the Supreme Court is the most efficient and effective method to impact a citizen's right to record the police in public.

Scene 5: *The Supreme Court of the United States*

Obviously, the initial problem with hoping for a Supreme Court ruling is that the Court can only issue rulings based on the cases that are submitted to it. Dating all the way back to *Marbury v. Madison*, the Supreme Court has been prohibited from issuing advisory opinions and can only issue opinions for actual cases and controversies.[195] While the Court hears less than one hundred cases each year through the process of granting certiorari, and has repeatedly refused to hear cases involving a citizen's right to record the police,[196] appeals continue to pour in. In 1989 in *Florida Star v. BJF*,[197] the Court explained its choice to avoid resolving such contests between First Amendment rights and the right to privacy: "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."[198] In other words, the Court wanted to

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[192] Balko, *supra* note 37 ("[There has been] little activity in state legislatures to prevent [arrests of citizen journalists] because any policy that makes recording cops an explicitly legal endeavor is likely to encounter strong opposition from law enforcement organizations.").

[193] H.R. Con. Res. 298, 111th Cong. (2010).

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

[195] 5 U.S. 137 (1803).

[196] *See, e.g.*, *ACLU III*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (Nov. 26, 2012)

[197] 491 U.S. 524 (1989).

[198] *Id.* at 533.

refrain from issuing broad rules that reconciled the battle between the First Amendment and privacy.

But, Fourth Amendment privacy and First Amendment free speech are supporting a citizen's right to record the police in public together—they are no longer opponents but allies. Indeed, the citizen journalist's First Amendment right to gather and disseminate information is bolstered by Fourth Amendment's prohibition against unlawful searches and seizures.[199] When police officers arrest an individual merely for recording them and confiscate that individual's recording device, the police are quintessentially searching and seizing the citizen in conflict with the Fourth Amendment. While this article concedes that the right to record the police may not be currently clarified to justify damages under a 1983 claim,[200] there is ample precedent to justify a recognition of Fourth Amendment protection for the citizen journalist coupled with the right to free speech under the First Amendment.[201] Moreover, vast changes to technology and social underpinnings have occurred over the past twenty-plus years. Those changes should compel the Court to think about taking a second look at the narrow issue of a citizen's right to record, a national issue which has fractured the circuits and individual courts. The Court will have plenty of opportunities to grant certiorari in the coming years, and this article urges the Court to address the issue sooner rather than later.

ACT VI: CONCLUSION

There would be a profound advantage to having "a consistent law . . . that applies uniformly across all fifty states."[202] If unresolved, though, the question of a citizen's right to record the police in public will be an enduring problem because cellphone cameras have reached almost worldwide ubiquity. A federally mandated rule that clarifies the contours and limitations of the right to record will not only spare the courts from contentious litigation about qualified immunity or open-surreptitious inquiries, but it will also educate all of the necessary actors in hopes of ensuring the law's proper application. When citizens are arrested for recording the police only to be subsequently released when the charges are dropped, serious incidental effects take place—the citizen is forced to endure an improper arrest and detainment; police officers expend limited resources by arresting, transporting, and booking innocent people; and courts and prosecutors waste time reviewing worthless cases before inevitably disposing of them. Moreover, the ambiguity of a citizen's right to record the police casts a growing shadow on the legitimacy of government. Distrust of the police is bad policy, and the low cost and minimal effort required to record the police means the ability to record will only continue to grow. Furthermore, the unified

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[199] *See supra* Part V.3.

[200] *See, e.g.*, *Kelly II*, 622 F.3d 248, 260 (3d Cir. 2010).

[201] *See Glik*, 655 F.3d 78 (1st Cir. 2011).

[202] Paulter, *supra* note 142, at 238.

support of the First and Fourth Amendment demonstrates there is simply no reasonable explanation for denying a citizen the right to record the police in public other than the law's delay.[203] Because change on a state-by-state basis or through Congress is likely to be neither efficient nor adequate, the Supreme Court should be the one to act.

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[203] WILLIAM SHAKESPEARE, *supra* note 1.