

Citizens policing the police an evaluation of citizens recording police officer and wiretapping laws

2013

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CITIZENS POLICING THE POLICE:
AN EVALUATION OF CITIZENS RECORDING POLICE OFFICER AND
WIRETAPPING LAWS

by

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A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in The Burnett Honors College
at the University of Central Florida
Orlando, Florida

Spring Term 2013

Thesis Chair: Dr. Carol Bast

ABSTRACT

The focus of this thesis is to explore the legality, the issues, and the remedy to a controversial statute in the State of Illinois. This thesis will explain how the First Amendment relates to the Illinois statute and its desire of a citizen is right to report information that is not being granted. Moreover, this paper will further go into a recent legislative bill to amend the Illinois statute, its failure, the media surrounding the issue, and the consequences of amending or not amending the statute. It will further review state law in regard to citizens recording police officers, and explain how some states deal with the statute.

ACKNOWLEDGMENTS

I dedicate this paper to my committee members: Brett Meltzer, Eugene A. Paoline III, and especially to Carol M. Bast for her countless hours spent with me. If it was not for the three of you this paper would not be possible.

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Introduction

The term “surveillance” is commonly associated as the act to closely observe another person or location. In most cases, it is instantly perceived as a positive action in order to maintain order in a specific place or local. However, many citizens do not think that sometimes recording can not only be illegal, it can also put them in prison for a very long time.

The first eavesdropping and wiretapping law in Illinois was passed in 1895, it was then amended in the Criminal Code of 1961. However, despite the laws in regards to eavesdropping and wiretapping being over one hundred years old, there are still many questions that remain whether concerning their applicability in criminal trials and civil trials. After reading this research paper, the reader will understand the legal concepts, issues, and consequences surrounding the wiretapping and eavesdropping statutes in regards to citizens recording police officers in all states. Moreover, it will also provide a deep understanding of the history of how the statutes were first introduced and how they changed, when they changed, and how they changed with a specific focus on Illinois due to Illinois being the most controversial. The reader will also understand the consequence of public policy and public response to on-going changes of the law in that area. Readers will also be able to provide a deep understanding of how the First Amendment works, and how it protects its citizens.

I. History

A. The Federal Wiretap Act

The Federal Wiretap Act was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968.¹ Congress enacted the act as an attempt to construct a balance between law enforcement and privacy rights,² as that used to be a rising concern at the time.³

The Federal Wiretap Act under subsection four states the following: “intercept means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” This means that any intentional interception of any type of communication can have a punishment of up to five years in prison, unless an exception can be found. There are many exceptions that can be found in the Act; however, one of the most noteworthy is the one-party consent exception. Among many exceptions, one of the most interesting ones is that if one of the parties gives consent, that is enough in itself to allow the recording to happen without violating the Federal Wiretap Act.⁴ Another exception is that a face-to-face conversation is permitted as an oral communication only if there is an expectation of privacy that is reasonable.⁵

¹ Omnibus Crime Control and Safe Streets Act (Federal Wiretap Act) of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. §2510-22 (2006)).

² *Gelbard v. United States*, 408 U.S. 41, 48 (1972). “[The Federal Wiretap Act] has its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of...communications may be authorized.” *Id.*

³ *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 312 (1972) “There is...a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens.” *Id.*

⁴ Title 18 U.S.C. §2511(2)(d) provides: “It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”

⁵ *Id.*

B. States' Party Consent and the Differences for the Federal Wiretap Act

As of today, there are forty-nine states that have wiretapping statutes that are similar to the Federal Wiretap Act, Vermont being the only state that does not have any statute in regards to anti-wiretapping. The main idea behind these wiretapping statutes, much like the Federal Wiretap Act, is to mirror its predecessor in a way to help combat crime. But it is also focused on attempting to protect individuals' privacy rights.⁶ Thirty-nine of the states have the same one-party consent exception as the Federal Wiretap Act does, while eleven of those states have what is called the all-party or two party consent requirement. The states can be appropriately divided in the two categories:

One Party Consent States:

Alabama	Louisiana	Oregon
Alaska	Maine	Ohio
Arizona	Minnesota	Rhode Island
Arkansas	Mississippi	South Carolina
Colorado	Missouri	South Dakota
District of Columbia	Nebraska	Tennessee
Georgia	Nevada	Texas
Hawaii	New Jersey	Utah

⁶ An example is: Mass. Gen. Laws ch. 272, §99(A) (2008) which provides:

“The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety... 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. The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited.”

Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky

New Mexico
New York
North Carolina
North Dakota
Oklahoma

Vermont
Virginia
West Virginia
Wisconsin
Wyoming

Two or All Party Consent States:

California	Massachusetts	New Hampshire
Connecticut	Maryland	Pennsylvania
Delaware	Michigan	Washington
Florida	Montana	

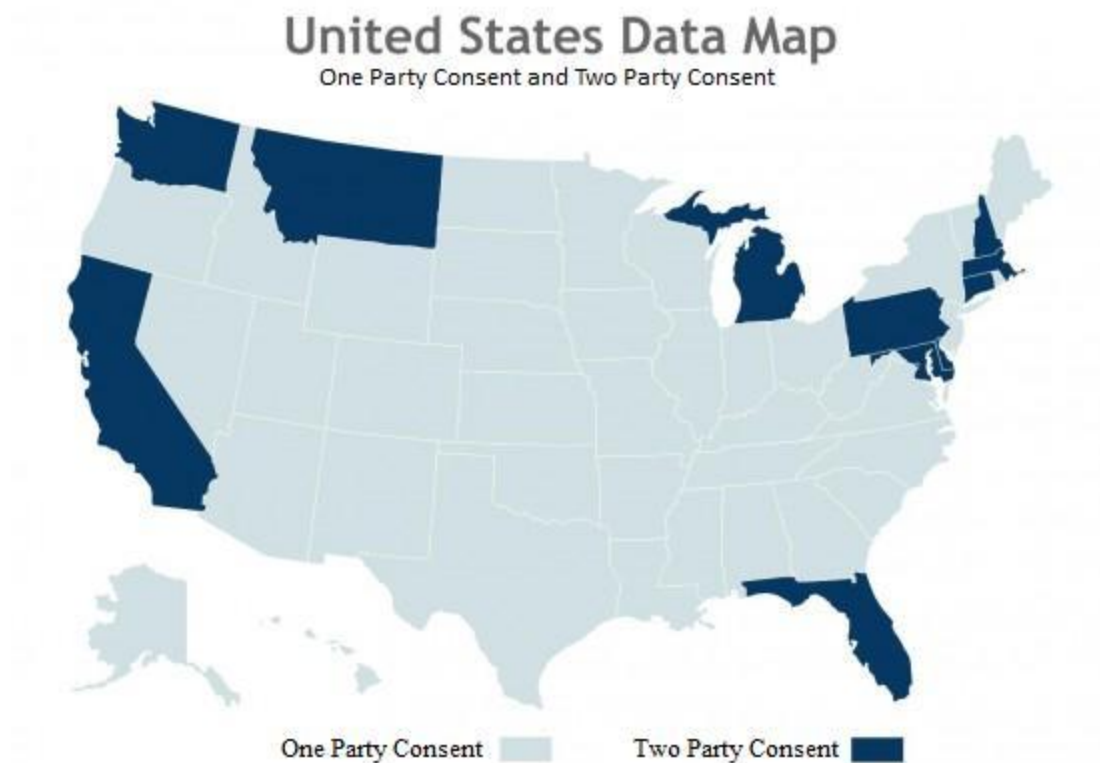


Figure - 1

A typical example of an all-party or two-party consent is that of Pennsylvania, there the statute reads the following: “shall not be unlawful...for a... person, to intercept a wire, electronic

or oral communication, where all parties to the communication have given prior consent to such interception.”⁷ Pennsylvania does have an expectation of privacy provision as does the federal statute.

C. Illinois and Massachusetts

Among the all-party consent states, there are two that are exceptionally strict compared to the others in our nation. The Massachusetts Wiretap Act⁸ and the Illinois Eavesdropping Act. They both, unlike all the other nine all-party consent states, lack the reasonable expectation of privacy provision. The reasonable expectation of privacy provision protects a face-to-face against any recording so long as a party has an expectation of privacy that society would consider reasonable. Illinois and Massachusetts prohibit the recording of a private or non-private conversation without consent of all parties. Illinois is austere in that it bans all recording without consent of all parties. In Illinois, recording a police officer is a class 1 felony that can be punishable by as much as fifteen years in prison.⁹ On the other hand, Massachusetts is a bit less severe, as it only prohibits recording made secretly.

1. One Attempt to Change Illinois Statute

In Illinois, December 29, 2011, Representative Elaine Nekritz filed with the clerk an amendment to the Criminal Code of 1961 to attempt to remove the characterization of recording police officers who are performing their public duties, in a public place as a criminal act. The bill was first read into the House Committee on January 1st, 2012, then a second reading and short

⁷ 18 Pa. Cons. Stat. Ann. §5704(4) (West, Westlaw Through End of the 2012 Regular Session).

⁸ Mass. Gen. Laws ch. 272 §99(B)(4).

⁹ 720 Ill. Comp. Stat. Ann. 5/14-2.

debate took place on February 21st, 2012, and finally a third reading and debate were held in March 21st, 2012, where the bill finally lost.¹⁰ The bill received 45 yeas and 59 nays.¹¹ A bill that fails to pass by failing its third reading is “killed,” meaning that it will not be pursued anymore. However, that is not to say that, despite its failure, the Illinois Eavesdropping Statute will not be changed in the near future. The proposed amendment was the following:

(q) A person who is not a law enforcement officer nor acting at the direction of a law enforcement officer may record the conversation of a law enforcement officer who is performing a public duty in a public place and any other person who is having a conversation with that law enforcement officer if the conversation is at a volume audible to the unassisted ear of the person who is making the recording. For purposes of this subsection (q), "public place" means any place to which the public has access and includes, but is not limited to, streets, sidewalks, parks, and highways (including inside motor vehicles), and the common areas of public and private facilities and buildings.¹²

This amendment did propose a good way to facilitate a citizen to have the right to exercise his First Amendment right to record a police officer.

During the debate, the side attempting to pass the bill argued that the Illinois statute was unconstitutional and that there was a movement to change it.¹³ Furthermore, the bill’s proponents

¹⁰ Illinois Legislation House Bill 3944,
http://www.ilga.gov/legislation/votehistory/97/house/09700HB3944_03212012_017000T.pdf

¹¹ *Id.*

¹² [http://www.ilga.gov/legislation/fulltext.asp?DocName=09700HB3944ham001&GA=97&LegID=62774&SessionId=84&SpecSess=0&DocTypeId=HB&DocNum=3944&GAID=11&Session=.](http://www.ilga.gov/legislation/fulltext.asp?DocName=09700HB3944ham001&GA=97&LegID=62774&SessionId=84&SpecSess=0&DocTypeId=HB&DocNum=3944&GAID=11&Session=)

¹³ Audio Recording from Illinois House Bill 3944 Debate, 2012.

explained how the ongoing advances in technology made the statute outdated and how it was too broad. The other side, however, argued that it was best to wait for the United States Supreme Court to review *ACLU v. Alvarez*, so that a higher authority could decide on what was constitutional and what was not.¹⁴ The Supreme Court chose not to hear the case, and, therefore, the lower court's decision stands.

2. Massachusetts Unusual Requirement

Unlike the majority of other states, the Massachusetts Wiretap Act does not protect a conversation made with a reasonable expectation of privacy. However, only “surreptitious recording” is prohibited. The way the requirement works is that if a recording is made in open view, then there is no liability because it shows that there is implied knowledge of a recording taking place. When recording police in a surreptitious way, one can expect to be liable under the act. A good example is *Graber*,¹⁵ as Graber “did not tell the Troopers he was recording the encounter nor did he seek their permission to do so.” While this may seem like a technicality, that is the difference between an arrest and a lawful recording of an incident in Massachusetts.

While this requirement of having the recording out in plain view does seem to fix the problem of expectation of privacy, there can be cases where the subject who is being recorded, even though the recording is in plain view, may not notice that he is in fact being recorded in a conversation or interaction. The requirement does not actually require consent. There is a difference between presuming that the party is aware of the recording and, therefore, assumes that he is aware that his privacy has diminished, as opposed to a recording that he has given

¹⁴ *Id.*

¹⁵ *Maryland v. Graber*, No. 12-k-10-647 (Md. Cir. Ct., Harford Cnty., Sept. 27, 2010)

consent to and is aware for a fact that he no longer has privacy. In *Glik*,¹⁶ we see that the court sees that any device known to record audio is on its own enough to show the subject's actual knowledge of the recording. Massachusetts' unusual provision tends to be quite different than attempting to say that there is a provision that functions the same way as the exception noted by other states of reasonable expectation of privacy. There are plenty of scenarios where one could have a recording in open view, yet the subject has not actually seen or realized that his expectation of privacy is diminished because of it. Moreover, recent changes in technology could also pose a problem to the Massachusetts Wiretap statute. Because smartphones have several different functions, such as text messaging, mobile web, and more, it may be problematic for an individual to know that his expectation of privacy has been diminished because there is a smartphone in his presence and that he could be recorded. Other situations that could lead to a problem with this provision in Massachusetts are shown through *Glik*,¹⁷ where Glik was recording a police officer in a public place where the police officer had no expectation of privacy, but Glik was arrested nonetheless for recording in a way that was considered surreptitious. Courts in Massachusetts because of this requirement will often have to ask the question of whether a recording was made in secret or not, and that will be the difference between a lawful recording and an unlawful one. Ultimately, this provision leads to a limit being set as to what the First Amendment right to gather and report information imposes.

¹⁶ *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011)

¹⁷ *Id.*

D. Right to Privacy and *Katz*

Most if not all Americans are familiar with their right to privacy. However, when searching in the Constitution for the word “privacy,” one will soon notice that it cannot be found anywhere.¹⁸ When issues of privacy first emerged, it was noted that while the word “privacy” was not in the Constitution; when reading the Constitution as a whole, you could understand that the notion of privacy, while not in words, was there in theory and function.¹⁹ It has been clear that the drafters of the Constitution were always looking for citizens to have a right to privacy when looking at the Amendments as a whole.

1. *Katz v. United States*

The first case to emerge that dealt with the right to privacy was *Katz*.²⁰ Surprisingly at the time, it was held that a person has a reasonable expectation of privacy in phone booth conversations.²¹ The Supreme Court reasoned that the Fourth Amendment “protects people not places”²² and that decision led to the overturn of *Olmstead*.²³ In *Olmstead*, the court held that based on the language of the Fourth Amendment, police tapping telephone wires was not considered a search or seizure.²⁴ This rationale demonstrated that citizens at the time lack expectation of privacy. With *Katz*, a modern test developed to evaluate if someone was or would violate a citizen’s right. The test was divided into a two-pronged approach²⁵ the first

¹⁸ DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1, 2 (2008).

¹⁹ *Id.*

²⁰ *Katz v. United States*, 389 U.S. 347, 353 (1967).

²¹ *Id.*

²² *Id.* at 353.

²³ *Olmstead v. United States*, 277 U.S. 438, 455-70 (1928).

²⁴ *Katz v. United States*, 389 U.S. at 354(1967).

²⁵ *Id.* at 360-63.

prong was that the person alleging the violation must have a subjective expectation of privacy. It is easier to understand this approach after looking at *Smith*,²⁶ where the court held that there was no expectation of privacy when a police officer used a pen to capture numbers dialed into a telephone. The second prong was that the expectation of privacy must be one that society is willing to consider objectively reasonable. Again, looking at *Smith*²⁷ will provide a better understanding of this concept. In *Smith* the court held that it would be unreasonable for the person taping the call to have an expectation of privacy in the number called because the dialed numbers are transmitted to the phone company when a call is connected.

E. First Amendment Right to Receive Information

The First Amendment provides several rights, one of them being free speech. However, there cannot be free speech if it is impossible to gather or receive the information. If one cannot access the speech, that speech is not free at all, at least that is the reasoning that the United States Supreme Court developed in *Martin v. Struthers*²⁸ where it developed a theory that there was in fact a constitutional right under the First Amendment to receive information using the noted reasoning above.

The right to receive information has gone through a lot of changes in the past, and expanded its use to something that was once considered peripheral and much less secure to something much broader. In the past, a common dispute was whether one was allowed to receive information in a library setting. *Board of Education v. Pico*²⁹ was the first Supreme

²⁶ *Smith v. Maryland* - 442 U.S. 735, 745-46 (1979).

²⁷ *Id.* at 742.

²⁸ *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

²⁹ *Board of Education v. Pico*, 57 U.S. 853 (1982).

Court case to consider it a necessary right to receive the information under the First Amendment. However, because the Justices were unable to reach a direct and common consensus, the divided opinions left a fractured jurisprudence.

While *Pico* was a case about school books, it also was a base for later cases on issues of receiving information. The case involved a school board's removal of a book from a public school library. Justice Brennan wrote at the time, "courts should not intervene in the resolution of conflicts which arise in the daily operation of school systems unless basic constitutional values are directly and sharply implicated."³⁰ However, the right to receive information did implicate the students' right under the First Amendment.

The court further reasoned that, "the right to receive information is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them." Furthermore, the Justice concluded and I quote, "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."³¹ The same principle could be applied to videos, recordings, or both. While it is true that the principle of receiving ideas started off with just books, this has evolved so much to the point where the ACLU is argument depended on the notion of receiving information, in that case, of a police officer, to be a right protected under the First Amendment.

³⁰ *Id.* at 856.

³¹ *Id.* at 867.

F. Cases Exploring the Issues with Some All-Party Consent States

There have been quite a few cases that have challenged the all-party states wiretapping laws with regards to citizens recording police officers. Most of the cases, the issue most attorneys pressed was that the statute violates the First Amendment. The argument they make is that as an individual, you are allowed to record police officers acting in their official capacities.³² Citizens are often arrested subsequently after recording police officers; the following cases will illustrate how statutory language facilitated their arrest. They will also show the need for having an exception such as the one provided in the Federal Wiretap Act.

1. *Glik v. Cunniffe*³³

Simon Glik was walking through Boston on an evening in October 1st, 2009. As he walked down the streets he noticed three police officers arresting a man. As Glik was passing by, he heard another person saying “You are hurting him, stop.”³⁴ As soon as Glik heard the man, he took out his cell phone and started recording the encounter, standing about ten feet away. After the police officer placed the subject in handcuffs, one of them turned to Glik and stated, “I think you have taken enough pictures.” In response, Glik said that he was recording audio as well, and that is when he was immediately placed under arrest. Glik was then taken to the police station, without knowing what he had done wrong; later he found out that he was being charged with violating the Massachusetts Wiretap Act³⁵ and also charged with disturbing the peace and aiding

³² *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). “The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Id.*

³³ *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

³⁴ *Id.*

³⁵ Mass. Gen. Laws Ann. ch. 272 §99(C)(1) (West, Westlaw Through End of the 2012 Regular Session).

the escape of a prisoner. His cell phone and computer flash drive were then held as evidence. The Boston Municipal Court dismissed two of the counts, and dropped the charge of aiding in escape before trial. The court noted that there was no probable cause and that the officers were simply unhappy that they were being recorded by Glik.³⁶ Glik then filed a complaint against the arresting officer and the City of Boston, claiming violations of his First and Fourth Amendment rights.³⁷

The First Circuit held in regards to his First Amendment claim, that there was a right to film government officials as long as they were doing their duties in a public place; this included police officers doing their job.³⁸ As the court reasoned, “First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”³⁹ The court addressed some of the factors that have to be taken into account as to any First Amendment issue, the place, time, and manner. Glik’s recording was clearly protected by his constitutional right, as it was a recording in a public park and that he was also acting in a peaceful manner.

As to his Fourth Amendment claim, the court reasoned that there was a lack of probable cause for placing Glik under arrest. The court upon review of Massachusetts’ Wiretap Act, also noted that “conduct fell plainly outside the type of clandestine recording targeted by the wiretap statute” because Glik had his phone out, and was recording in a way that was open and non-secretive. The police officers attempted to argue how having the cell-phone out was different than having a tape recorder, and that, because a cell-phone can have multiple functions, they

³⁶ Daniel Rowinski, POLICE FIGHT CELLPHONE RECORDINGS, BOSTON GLOBE, Jan. 12, 2010 at 12.

³⁷ 655 F.3d at 79.

³⁸ Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir., 2000).

³⁹ Id.

were unable to know that it was in fact recording. The court, however, did not agree with the police officer's argument and said that the other functions of the phone were irrelevant as to whether the recording was being made secretly as is required to be in violation of the Massachusetts Wiretap Act.⁴⁰ That reasoning was the same as it was previously seen under *Commonwealth v. Hyde*.⁴¹ In that case, the court explained that a recording is not secret if the instrument or device for the recording is held in plain sight.

2. *Kelly v. Borough of Carlisle*⁴²

In Pennsylvania 2007, Brian Kelly took a ride from a pick-up truck driver. As they were driving, a police officer stopped them for a traffic stop. As the police officer approached their vehicle, Kelly took out his video camera and put it in his lap set to record the encounter. As the officer was about to leave, he noticed Kelly's video camera recording him.⁴³ The police officer went on to place him under arrest under the assumption that he had violated the Pennsylvania Wiretapping Act and Electronic Surveillance Control Act,⁴⁴ a felony in third degree that can be punishable to up to seven years in prison. As bail was set for \$2,500, and that was too much for Kelly, so stayed locked in jail for twenty-seven hours; after that he was released thanks to his Mother for putting her house up as a security deposit.⁴⁵

Charges against Kelly were dropped a month after, and it was then noted that the Pennsylvania Wiretap Act might have to be reviewed for possible amendments. As District Attorney David Freed stated himself, "When police are audio-and video-recording traffic stops

⁴⁰ Mass. Gen. Laws ch. 272 §99(B)(4)

⁴¹ *Commonwealth v. Hyde* 750 N.E.2d 963 (Mass. 2001)

⁴² *Kelly v. Borough of Carlisle*, 622 F.3d 248, 251 (3d Cir. 2010).

⁴³ *Id.*

⁴⁴ 18 Pa. Cons. Stat. Ann. §5704 (West, Westlaw Through End of the 2012 Regular Session)..

⁴⁵ Matt Miller, WIRETAP CHARGE DROPPED IN POLICE VIDEO CASE, THE PATRIOT NEWS, June 21, 2007, at 23.

without notice to the subjects, similar actions by citizens, even if done in secret, will not result in criminal charges. I intend to communicate this decision to all police agencies so that officers on the street are better-prepared to handle a similar situation should it arise again.” And when asked about the wiretap statute as to what he thought about it, he responded, “It is not the clearest statute that we have on the books, it could need a look, based on how technology has advanced since it was written.”⁴⁶ After Kelly was released, he filed a complaint against the Borough of Carlisle under 42 U.S.C. § 1983. His argument was not surprisingly based on a violation of his First Amendment rights.⁴⁷ However, this case was set before *Glik*, and the court ruled differently. It granted summary judgment in favor of the police officer, and found that videotaping a police officer was not a clearly established right under the First Amendment, at least not on those facts. The court reminded Kelly that the facts in this case, were based on a traffic stop, which can be “an inherently dangerous situation,” and because the First Amendment right is dependent on time, place, and manner restrictions, the right to record was not absolute. Therefore, the court granted the officers qualified immunity and Kelly’s case was then dismissed.

3. *Maryland v. Graber*⁴⁸

In Maryland on March 2010, a man named Graber was riding his motorcycle on the highway, as he was stopped by a police officer in an unmarked vehicle.⁴⁹ The police officer was not wearing his uniform, and his vehicle was a normal sedan; however, as he exited the vehicle, he pulled out his gun and yelled at Graber to get off his bike. He was going to cite Graber for

⁴⁶ *Id.*

⁴⁷ 622 F.3d at 251.

⁴⁸ *Maryland v. Graber*, No. 12-k-10-647 (Md. Cir. Ct., Harford Cnty., Sept. 27, 2010).

⁴⁹ *Id.*

speeding and reckless driving, but during the stop, Graber's helmet camera, one he uses usually record him riding, was also recording this whole encounter.⁵⁰ A video was posted a week after on YouTube, with the whole footage of the encounter. A month after the video was posted, six police officers went to Graber's house where, with a search warrant, they searched Graber's parents' house for 90 minutes; there they confiscated four computers, the camera helmet, external hard drives and thumb drives.⁵¹ Shortly after taking the noted items, Graber was placed under arrest, and was in jail for twenty-six hours. He was charged with violating the Maryland Wiretap Act, a felony punishable by up to five years in prison, a \$10,000 fine, or both.⁵² Soon after he was released, Graber's motion to dismiss was granted after the court reasoned that Graber's conversation with the police officer they had no reasonable expectation of privacy, therefore; the recording did not violate the Maryland Wiretap Act.

4. *Smith v. City of Cumming*⁵³

James Smith filed a suit against the City of Cumming, Georgia alleging that the City police officer had harassed the Smiths, which suit also included a claim that Mr. Smith had not been able to videotape the police officer in violation of Smith's First Amendment rights.⁵⁴ The court reasoned that it did agree that Smith did have a First Amendment right to videotape police conduct as long as reasonable time, manner and place restrictions did apply, and especially the right to do so if the recording would be a matter of public interest. While it was true that the Smiths did have the right to record the police officers, they still had to prove that they were

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Md. Code Ann., Cts. & Jud. Proc. §10-402(a)(1) (West, Westlaw Through End of the 2012 Regular Session).

⁵³ *Smith v. City of Cumming*, 212 F.3d 1332(11th Cir. 2000).

⁵⁴ *Id.*

deprived of such a right. And though, the Smiths did have the right to videotape them, the court could not find enough evidence to find that they were deprived of their right to record the police officer in their encounter.

5. *Robinson v. Fetterman*⁵⁵

In Pennsylvania on June 20, 2000, Robinson was driving by Route 41 when he saw state troopers conducting truck inspections. He believed at the time that the manner in which those inspections were made was not safe. Because of this belief, Robinson gained authorization from a landowner on the northbound side of Route 41 to be able to videotape inspections done by state troopers. From that point on, Robinson began to videotape inspections, one of which was of officer Fetterman and Rigney from roughly 30 feet away. Officers Fetterman and Rigney noticed the recording, and placed Robinson under arrest for harassment.⁵⁶ On August 28, 2000, Robinson was then convicted of harassment, had to pay a fine, and was told to not go near the state troopers while they were performing their duties.

Two years passed by and Robinson's wife as she was driving on Route 41 almost got into an accident, mostly due to the congestion of the state troopers' placement of the truck inspection. Robinson immediately thought the state troopers were conducting these inspections in an unsafe manner, and, because of that, he decided to videotape them. He gained the permission of a farm owner to conduct his recordings, in which he positioned himself about 20 to 30 feet away from the highway. Later that day, as a state trooper was inspecting a truck, he noticed Robinson, and asked him for identification and if he had the permission from the owner to record roadway police officer; Robinson affirmed, and the state trooper continued to

⁵⁵ *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (2005).

⁵⁶ 18 Pa. Cons.Stat. Ann. § 2709 (West, Westlaw Through End of the 2012 Regular Session).

do his duty. That same state trooper then advised his fellow trooper, Fetterman, about Robinson's conduct, and Fetterman remembered Robinson from the past case where Robinson was convicted of harassment.⁵⁷

Later on that same day, Fetterman, Rigney, and the other state trooper entered the farm where Robinson was videotaping the road, and asked him to stop videotaping them, and to leave the area. After Robinson refused to leave or stop videotaping, he was then placed under arrest. He was again charged with harassment⁵⁸ but had his video-camera returned to him by the time he received his citation.⁵⁹ He was later found guilty again of harassment; however, this time he appealed the conviction, alleging a violation of his right to free speech under the First Amendment, pointing out specifically, his right to "videotape state troopers and thus speak out on issues of public concern."⁶⁰ The court reasoned that indeed there was a right under the First Amendment to record the state troopers, as he was doing so to make a visual record of what he believed to be an unsafe manner in which they were performing their duties. The court ruled that there is a free speech right to record police officers while they perform their duties.⁶¹

6. *Illinois v. Allison*⁶²

Allison was openly recording a police officer on his own property, when he was arrested for violating the Illinois Wiretap Act.⁶³ After that, he was then recording his hearing at the Crawford County Courthouse, where he answered Judge Harrell's question as to whether he had

⁵⁷ 378 F. Supp. 2d at 535.

⁵⁸ 18 Pa. Cons. Stat. Ann. § 2709(a)(2) & (3) (West, Westlaw Through End of the 2012 Regular Session).

⁵⁹ 378 F. Supp. 2d at 537.

⁶⁰ First Am. Compl. ¶ 50.

⁶¹ 378 F.Supp.2d at 535.

⁶² *People v. Allison*, No. 2009-CF-50.

⁶³ 720 Ill. Comp. Stat. Ann. 5/14-2 (West, Westlaw Through End of the 2012 Regular Session).

a pocket recorder at his hearing, Judge Harrell then told him that “violated her right to privacy.”⁶⁴ *Allison* was then charged with five counts of wiretapping, each punishable by four to 15 years in prison. Two months later, Allison filed a motion to dismiss due to lack of probable cause.⁶⁵ However, Allison, instead of focusing on his charges, concentrated specifically on the Illinois Wiretap Act, unlike past cases.⁶⁶ The motion focused on the following arguments: vagueness, due process, and the First Amendment. The court did grant Allison’s motion to dismiss, in which Judge Frankland held for the first time that the Illinois Act did violate the First Amendment as it stood as flawed by lack of exceptions and served as a blanket rule as it had no limitations as required by the First Amendment such as time, place, or manner. The court grant Allison is motion to dismiss.⁶⁷

⁶⁴ People v. Allison, No. 2009-CF-50.

⁶⁵ Radley Balko, *The War on Cameras*, Reason, Jan. 2011

⁶⁶ People v. Allison, No. 2009-CF-50.

⁶⁷ *Id.*

7. *ACLU v. Alvarez*⁶⁸

The American Civil Liberties Union (ACLU) filed this complaint against Anita Alvarez in her official capacity as Cook County state's attorney. The ACLU was seeking declaratory and injunctive relief as to the application of the Illinois Wiretap Act.⁶⁹ Its motion was dismissed by the district court, and the ACLU then filed an appeal, arguing the First Amendment provided protection to speech regarding government officials and matters of public concern.

In September 2011, oral arguments were held in the Seventh Circuit Court of Appeals in Illinois. Judge Posner expressed his concern that when recordings are allowed, there will be "a lot more snooping around by reporters and bloggers,"⁷⁰ pointing out as that being a bad thing because it would conflict with their privacy. However, it seems that argument was made with no basis in logic, because police-on-civilian audio recording does not undermine privacy, but civilian-on-police audio recording would.

Several months later, on May 8, 2012, the court reached a decision, finding that the Illinois Wiretapping Act did violate the First Amendment, and granted a preliminary injunction blocking the enforcement of the statute as applied to civilians on police officers recordings.⁷¹ The court reasoned that the wording of the statute as too broad, as it did not include a provision for a reasonable expectation of privacy under statute.

On November 26, 2012, the U.S. Supreme Court denied certiorari, leaving in place the appellate court's injunction against the use of the statute prohibiting civilian recording of police.

⁶⁸ *American Civil Liberties Union v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

⁶⁹ *Id.*

⁷⁰ Timothy B. Lee, *Judge Worries Recording Police Will Lead to Excessive "Snooping Around,"* ARS TECHNICA, Sept. 16, 2011, at 6.

⁷¹ 679 F. 3d at 585.

Thus it, clearly decided that the First Amendment does protect an individual's right to openly record a police officer.⁷²

G. Lower Expectation of Privacy

Unlike other American citizens, courts have often found that police officers have a lower expectation of privacy. For example, in *O'Brian*,⁷³ the court concluded that it was mandatory for the officer to disclose financial records did not violate the police officer's privacy right, because police officers are held to a higher standard of accountability and, because of that, a lessened privacy expectation.⁷⁴

Another concept that also impacts a police officer's expectation of privacy is the open field doctrine. Basically, the doctrine is that a person has no reasonable expectation of privacy if something is left in view of the public, or exposed to the public.⁷⁵ If police officers' conduct their duties exposed to the public, some courts have interestingly thought that officers have lower expectation of privacy.⁷⁶

⁷² Supreme Court Certiorari Summary Disposition - http://www.supremecourt.gov/orders/courtorders/112612zor_f204.pdf.

⁷³ *O'Brian v. DiGrazia*, 544 F.2d 543(1st Cir. 1976).

⁷⁴ 544 F.2d at 544.

⁷⁵ *Florida v. Riley*, 488 U.S. 445, 445 (1989).

⁷⁶ *State v. Flora*, 845 P.2d at 1358 (1992).

II. Analysis

A. Police Misconduct

One of the most critical reasons to amend the statute is so citizens could have a way to check if police officers are acting properly. Citizens have not forgotten the incident with Rodney King. On March 2nd, 1991, Rodney King and two other passengers were in a vehicle driving off Foothill Interstate. Rodney King, the driver at the time, was speeding at about 110 mph. Police officers started to chase his vehicle until he decided to stop. The police officers then, started to beat Rodney King for about fifteen minutes; meanwhile they were being secretly recorded by a citizen.⁷⁷ These are fifteen minutes that may have never been known, if not for a citizen's recording of the police officers. It will be long before citizens forget those recordings, and the prohibition against being able to record police officers could lead citizens to feel as if more events such as the involving Rodney King could go unnoticed.

B. Support For Illinois' Statute

Despite its controversy, there is support for the statute. Some police officers believe the statute allows them to perform their jobs more effectively and efficiently. Others believe the contrary. Sheriff Bennie Vick of Williamson County Illinois articulated, "Someone coming up shoving a camera in your face...I can see how that would endanger lives."⁷⁸ Others argue that informants could be facing higher risks if a citizen decided to record an interaction between an

⁷⁷ Rodney King, *Official Negligence : How Rodney King and the Riots Changed Los Angeles and the LAPD* 120-24 (1999).

⁷⁸ Christen Drew & Randy Livingston, *Illinois' Eavesdropping Law Could Change*, (WSILTV Television Broadcast 2012),

undercover police officer and the informant and that video was later to be found on YouTube. As such, it could cause a police investigation to fail when the investigation is exposed prematurely. While certainly there are many risks, there are also numerous reasons why the Illinois statute should be amended.

C. Civilian Use of New Technology

We have come a long way from the old cellphone that used look like a brick, to the new generation smart phone, a computer in your pocket. Not surprisingly, smart phones can record videos and take pictures, and the power of a citizen to record anything, at any time can lead citizen to be his or her own news reporter. Those recordings can now be easily accessed through social networking websites such as Facebook, Twitter, or YouTube.⁷⁹ It is estimated that 90 percent of cellphones in the United States have a cellphone that accesses the Web.⁸⁰ The use of smart phones and other digital cameras has been growing at a very quick rate. In 2009, 78 percent of U.S. households owned a digital camera.⁸¹ Not only are most households with digital cameras; more than a billion cellphones are equipped with cameras.⁸² In contrast, a cellphone or a digital camera is sold today for a fraction of price that it used to cost in the past.⁸³

While this new technology comes with many benefits, now citizens can record police misconduct at sight whenever needed. That will add pressure on police officers to conduct their

⁷⁹ Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (“A perfect example of how easy it is for citizens to distribute their recordings to other citizens.”).

⁸⁰ *Id.*

⁸¹ Rachel Costello, *Courts Split Over First Amendment Protection for Recording Police Performance of Public Duties*, NEWS MEDIA & THE LAW (2011), at 2.

⁸² *Id.*

⁸³ *Id.*

duties in a civilized and disciplined way. Moreover, police officers that are being falsely accused of bad conduct can be protected through the use of recordings. As the court in *ACLU v. Alvarez*⁸⁴ said, “Civilian recordings of police can help resolve police-civilian factual disputes regarding, for example, threats, verbal abuse, racial harassment, whether an officer Mirandized a civilian before interrogating him, whether police encouraged one civilian to threaten another, and whether force was excessive.” It is unquestionable that a recording of an encounter can provide many benefits to police officers. Usual testimonial problems that are always an issue in court are simply gone as long as the recording is admitted. For example, a police officer’s testimony may fall or the officer is being accused of the testimony falling under any of those categories: (1) Faulty memory; (2) Bias; and (3) Any misstatement as to how the incident took place.

A video recording could fix all of those issues by showing what actually took place, and it would help the jury reach an unbiased decision based on the incident itself; if a photo is worth a thousand words, a recording is worth a million. Recordings like that have already helped numerous officers to be exonerated from allegations of misconduct.⁸⁵ Recordings of police officers can also help educate other police officials on how to deal with specific situations; a recording can show the inexperienced police officer how to properly deal with a unique situation.

While we see how there are many benefits of having better technology, there are also matters that citizens need to be careful of when it comes to new technology. The ACLU has invented an application for smart phones to secretly record police officers. The application called

⁸⁴ *ACLU v. Alvarez*, 679 F. 3d 583, 591 (2012).

⁸⁵ Kim Lanier, *Walmart Tasing Caught on Video; Couple Arrested After Altercation with Foley Officer*, PRESS-REGISTER (2011).

“Police Tape”⁸⁶ can lead to problems with the current laws of today. For example, if a citizen uses the application to record an encounter with a police officer in Massachusetts, that could lead to an arrest⁸⁷ as it is illegal to secretly record a police officer; by the same token, it is legal to record a police officer in an indiscreet way.

D. Police Officer’s Expectation of Privacy

As previously noted in *Katz*, the Fourth Amendment protects citizens against state and federal actors, but the Fourth Amendment does little to protect police officers, and an expectation of privacy provided to citizens, is often not found for police officers.⁸⁸ States such as Massachusetts that do not provide an expectation of privacy exception, might want to consider defining expectation of privacy for both citizens and police officers. That way, with the rising number cases which citizens record police officers, there will not be an issue when those rights are violated.

In *O’Brien v. DiGrazia*⁸⁹, the courts when questioned with the issue of whether police officers’ expectation of privacy or the public interested should outweigh each other found that the public interest was more important than a police officer’s expectation of privacy. It is a known fact that reducing privacy holds police officers more accountable, and that is one of the factors that is necessary to protect the public against illegitimate exercise of power.⁹⁰

Besides the first issue, there is also the concern of what are the circumstances that give

⁸⁶ <http://www.aclu-nj.org/yourrights/the-app-place/>

⁸⁷ Mass. Gen. Laws ch. 272 §99(B)(4)

⁸⁸ Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 Md. L. Rev. 600, 609-10 (2009),

⁸⁹ *O’Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976).

⁹⁰ *State v. Hyde*, 750 N.E.2d at 972 (2001) (Marshall, C.J. dissenting).

rise to this expectation of privacy of police officers and if they in fact should even possess such a right. This focus in changing language to appropriately define to whom the expectation of privacy may be granted should mainly focus in states where there is an all-party consent like Massachusetts.

E. Illinois Lack of Privacy Provision

Illinois is the only state that considers it a crime to record conversations regardless of privacy expectations.⁹¹ Illinois also requires all parties consent to record.⁹² There is no concrete theory of an expectation of privacy in Illinois, as it acts without any subjective or objective expectation of privacy. Unlike Massachusetts, Illinois also disregards whether the recording was made in the secretly or out in the open. All in all, the only possible way to not violate the Illinois Wiretap Act is to have the consent of all parties to the recording, regardless of where you are. This can prove to be a difficult task when conducting recordings in an open park, or places with several people. For example, if someone is at a stadium filled with fans and players, technically, that person would have to gather the consent from every single person that is attending the event, and that is playing. It is clear to see how the Illinois Wiretap Act is problematic, as it is too strict, and at the same time, too broad in its statutory language without providing an expectation of privacy that all citizens deserve. Moreover, the Act misses the point and direction for which the statute was created; while making it a requirement to have all parties consent, it makes it almost impossible in several different occasions to have a lawful recording.⁹³ The Illinois court's intent

⁹¹ 720 Ill. Comp. Stat. Ann. 5/14-2 (West, Westlaw Through End of the 2012 Regular Session).

⁹² *Id.*

⁹³ Korecki, *Judge Casts Doubt on ACLU Challenge to Law Forbidding Audio Recording of Cops*, CHICAGO SUN TIMES, Sept. 13, 2011 at 23.

had at its core the desire to “protect individuals from unwarranted invasions of privacy.... and safeguard citizens from unnecessary governmental surveillance.”⁹⁴ But instead, it is criminalizing as a felony. The action of a number of innocent people whose conduct has no bearing on any privacy expectation.

With the Supreme Court’s decision in *ACLU v. Alvarez* to uphold the lower court’s⁹⁵ decision, it is very likely that we will see a new amendment to the Illinois Wiretap Act, one that serves as it was intended, to protect its citizens from unnecessary governmental surveillance. One good example is in *Graber*, where Graber was recording a police officer in an area that there would be no reasonable expectation of privacy; however, because Illinois is so strict in its consent requirement, it led to an arrest that would have not happened in any other state. Another example, in *Allison*, the incident happened in circumstances in which there would be no expectation of privacy; it was an open recording of police officers on duty on a civilian’s property, and the hearing took place in a busy courthouse.⁹⁶ Again, because Allison never acquired their consent, this conduct was considered a crime that would be lawful in any other state, aside from Massachusetts.

F. The Need for a Privacy Provision

Illinois and Massachusetts Wiretapping statutes are stricter than the wiretapping statutes of any other state. Still, both of those statutes were made with the intent to protect private citizens from state actors and other citizens.⁹⁷ The intent was never to prosecute citizens recording police

⁹⁴ People v. Allison, No. 2009-CF-50.

⁹⁵ *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

⁹⁶ *Id.*

⁹⁷ *Commonwealth v. Thorpe*, 424 N.E.2d 250, 255 (Mass. 1981).

officers.⁹⁸ Both of those states could be accomplishing their original intent for if they provided provision for a conversation made with a reasonable expectation of privacy. In cases like *Graber*, *Allison*, and *Hyde*, to name a few, there would be no violation the police officer recording would not be prohibited because it will not have the been made with a reasonable expectation of privacy – as contained in the Federal Act. The ability to record police officers should be allowed, as the First Amendment allows the ability to gather information, and deliver information. This information that can be crucial in cases such as the one involving Rodney King. A police officer should not be shielded from recordings, as there is an ongoing need to monitor police officers and hold them accountable for their actions. Therefore, by allowing recording when a reasonable expectation of privacy does not exist, citizens will be able to record on-duty officers in public, the recording would not conflict with police officers’ investigations because they would only be recorded in settings where there is not an expectation of privacy.

⁹⁸ *Jean v. Mass. State Police*, 492 F.3d 24, 25 (1st Cir. 2007).

III. Proposal

Consumer technology is always advancing, and the legal issues in states like Massachusetts and Illinois need to be looked at by both legislatures and the courts. There are numerous ways that the statutes from Massachusetts and Illinois that lack of an expectation privacy language can be dealt with to not be unconstitutional.

A clear solution would be to simply amend the statute to protect only those face-to-face conversations made with a reasonable expectation of privacy similar to the Federal Wiretap Act. Including such a provision would be the easiest way to fix any issues surrounding those statutes – as the other states do not have such a problem with those statutes. By doing so, there would no conflict citizens' rights. Police officers would still be able to conduct investigations as they deem necessary without risking premature investigations to be aborted because of unwanted recordings, since all recordings would happen in a public place, where a police officer would not have a reasonable expectation of privacy in the first place. It would also grant citizens the ability to monitor police activity, so that there is a lesser incidence of police misconduct. This would also be beneficial to police officers as they would be able to also use recordings in their advantage when faced with false allegations by citizens. The court system would also benefit from this, as an accurate recording would save court is time, and lead to a fair and correct judgment in cases of which there is a recording.