Saint Louis University Law Journal

Volume 57
Number 4 *Statutory Interpretation (Summer 2013)*

Article 11

2013

When, Where and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and for Revamping Restrictive State Wiretapping Laws

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WHEN, WHERE AND WHY THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECORD POLICE COMMUNICATIONS: A SUBSTANTIAL INTERFERENCE GUIDELINE FOR DETERMINING THE SCOPE OF THE RIGHT TO RECORD AND FOR REVAMPING RESTRICTIVE STATE WIRETAPPING LAWS

INTRODUCTION

To some, if not most, "[w]iretapping sounds like it should involve a man in a headset sitting in a van listening in on your telephone calls."[1] However, the legal definition of wiretapping in some states encompasses much more than this, and even conduct the average individual does not realize is a crime.[2] In some states, it does not take a man sitting in a van with a headset to commit wiretapping. Rather, all it takes is a Blackberry or an iPhone capable of recording audio. The penalty for audio recording the oral communications of a police officer in Illinois in the absence of the officer's permission: a Class 1 felony[3] carrying up to fifteen years in prison.[4] Recording others is a Class 4 felony[5] carrying a maximum sentence of three years in prison.[6] The penalty in Massachusetts for recording the oral communications of an officer in the absence of the officer's permission: up to five years in state prison.[7] In Illinois, it is a crime to record the oral communications of two or more persons regardless of whether the parties intended their conversation to be private unless the recording party has the permission of all the parties to the conversation.[8] In Massachusetts, it is illegal to secretly record any oral communication without the consent of all the parties to the conversation.[9]

To illustrate the problem the Illinois wiretapping law creates, take Tiawanda Moore, age 21, who, with the help of her Blackberry, was charged

1. Rob Arcamona, Jeff Hermes, & Andy Sellars, *Wiretapping, SOPA, Occupy: 2011 Was a Tumultuous Year in Media Law*, PBS (Dec. 23, 2011), http://www.pbs.org/mediashift/2011/12/wiretapping-sopa-occupy-2011-was-a-tumultuous-year-in-media-law357.html (internal quotation marks omitted).

2. *Id.*

3. 720 ILL. COMP. STAT. 5/14-4(b) (2010). Audio recording the oral communications of public officials and judges without consent is also a Class 1 felony. *Id.*

4. 730 ILL. COMP. STAT. 5/5-4.5-30(a).

5. 720 ILL. COMP. STAT. 5/14-4(a).

6. 730 ILL. COMP. STAT. 5/5-4.5-45(a).

7. MASS. GEN. LAWS ch. 272, § 99(C)(1) (2010).

8. 720 ILL. COMP. STAT. 5/14-2(a)(1).

9. MASS. GEN. LAWS ch. 272, §§ 99(B)(4), (C)(1).

with the offense of eavesdropping after she secretly recorded a conversation she had with Internal Affairs police officers who tried to discourage her from filing a formal complaint against a police officer who had groped her.[10] The incident started when an officer responded to a domestic violence call at the apartment Moore and her then-boyfriend shared.[11] As Moore was being interviewed in her bedroom, the police officer allegedly grabbed her breasts and buttocks before suggesting they should "hook up."[12] Moore went to police headquarters to report the incident and when interviewed was met with officers discouraging her from filing a complaint.[13] When the officers left her alone in the interview room, she turned on the recorder function on her cell phone.[14] When the officers became aware that the recorder was running, they arrested Moore for eavesdropping.[15] She spent two weeks in the Cook County Jail.[16] Because Moore recorded the oral communications of the officers without their consent, she faced up to fifteen years in prison.[17] Moore, like most, was not aware the law existed.[18] She fought the charges for a year and was acquitted by a jury last summer.[19]

As evidenced by Ms. Moore's ordeal, wiretapping in Illinois can have grave consequences.[20] The consequences are similar in Massachusetts.[21] However, the recording of police communications is a protected First Amendment newsgathering right subject to reasonable time, place, and manner restrictions.[22] Therefore, complete and absolute bans on audio recording are in conflict with the First Amendment. Furthermore, the laws are outdated. The Illinois and Massachusetts wiretapping laws were written ages ago, before any American carried a mobile device capable of recording audio.[23] Today, not only are these devices readily available, but social media sites such as Facebook, Twitter, and YouTube allow recorders viable media outlets to

10. Andy Grimm, *Woman acquitted in eavesdropping case files lawsuit against Chicago Police*, CHI. TRIB. (Jan. 14, 2012), http://articles.chicagotribune.com/2012-01-14/news/chi-woman-tiawanda-moore-acquitted-in-eavesdropping-case-against-chicago-police-department-files-lawsuit-20120114_1_eavesdropping-moore-claims-lawsuit.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Grimm, *supra* note 10.

16. *Id.*

17. 720 ILL. COMP. STAT. 5/14-4(b) (2010).

18. Grimm, *supra* note 10.

19. *Id.*

20. *See* 720 ILL. COMP. STAT. 5/14-4(b).

21. *See* MASS. GEN. LAWS ch. 272, § 99(C)(1) (2010).

22. Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011).

23. *See* 1961 Ill. Law 1983; 1959 Mass. Acts 400.

express themselves and publish such videos as well.[24] Today, unlike forty years ago, technology allows every person to be a potential reporter or journalist,[25] or even a potential moviemaker.[26]

The purpose of this Note is three-fold. First, it addresses the federal wiretapping law and various states' wiretapping laws, including Massachusetts and Illinois. Illinois and Massachusetts will be specifically addressed because they are among the most restrictive in the nation.[27] Second, this Note will address those courts that have held that the recording of police communications is a protected First Amendment newsgathering right. Recently, the First Circuit, in *Glik v. Cunniffe*, held that the audio recording of police communications enjoys broad First Amendment protection.[28] The Third Circuit, in *Kelly v. Borough of Carlisle*, held similarly, but unlike the *Glik* court, described the First Amendment right narrowly.[29] It should be noted at the outset that this note addresses only those laws that prohibit the interception of a police officer's oral communications and how those laws conform with the protections of the First Amendment. The act of merely video recording the police without intercepting audio will not be addressed.[30] Lastly, based in large part on *Glik* and *Kelly*, this Note proposes a practical guideline both for determining the scope and confines of the First Amendment right to record police communications and for revamping constitutionally defective state wiretapping laws. The guideline provides that the First Amendment protects an individual's right to audio record a uniformed, on duty police officer's oral communications *unless* the recording would "substantially interfere" with the performance of the officer's duties.

I. THE LANDSCAPE OF WIRETAPPING LAW

A. Federal Law

The Federal Wiretap Act was enacted by Congress as part of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").[31] It prohibits any

24. *See* Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 616–17 (2009).

25. *Id.* at 617.

26. 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.

27. *See infra* Part I.B.

28. 655 F.3d at 82, 85.

29. 622 F.3d 248, 262 (3d. Cir. 2010).

30. Videotaping of public officials has been held though to be an exercise of First Amendment liberties. Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999).

31. 18 U.S.C. §§ 2510–22 (2006); Shana K. Rahavy, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. L. 87, 88 (2003).

person from intentionally intercepting any oral communication.[32] The penalty: up to five years in prison.[33] "Intercept," as defined within the statute, means "the aural or other acquisition of the contents of any . . . oral communication through the use of any electronic, mechanical, or other device."[34] "Oral communication" is defined as any communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ."[35] This definition of "oral communication" came in response to the Supreme Court's landmark decision in *Katz v. United States*[36] and was a conscious effort by Congress to strike a balance between the privacy rights of individuals and the legitimate investigatory needs of law enforcement.[37]

In *Katz*, FBI agents attached an electronic recording device to a public telephone booth in order to record Katz's conversations.[38] Based on those conversations, Katz was arrested for illegal betting.[39] The Supreme Court overturned the conviction, holding that Katz was entitled to privacy in his oral communications even though the conversation he was arrested for occurred in a public phone booth.[40] Justice Harlan, in his concurring opinion, established the test for determining when constitutional protection attaches to personal conversations.[41] For constitutional protection to attach to a personal conversation, the speaker must have exhibited an actual expectation that the conversation was intended to be private, and the expectation must be one that society is prepared to recognize as reasonable.[42] The "reasonable expectation of privacy" test established by Justice Harlan has been routinely applied by the Supreme Court when determining the confines of the Fourth Amendment.[43]

Like *Katz*, the Federal Wiretap Act prohibits the interception of an oral communication only when the parties to the conversation have a reasonable expectation that their communications will be private.[44] Furthermore, an

32. 18 U.S.C. § 2511(1)(a) (2006).

33. *Id.* § 2511(4)(a).

34. *Id.* § 2510(4).

35. *Id.* § 2510(2).

36. 389 U.S. 347 (1967), *superceded by statute*, Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510–20, *as recognized in* United States v. Koyomejian, 946 F.2d 1450 (9th Cir. 1991).

37. Rahavy, *supra* note 31, at 88.

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

39. *Id.*

40. *Id.* at 352.

41. *Id.* at 361 (Harlan, J., concurring).

42. *Id.*

43. *See* United States v. Jones, 132 S. Ct. 945, 950 (2012) (referencing several cases applying Justice Harlan's test to Fourth Amendment challenges between 1967 and 2000, and again applying the test to a Fourth Amendment issue in 2011).

44. 18 U.S.C. § 2510(2) (2006).

interception of an oral communication is not prohibited if the recorder of the communication is a party to the communication or if one of the parties to the communication offers prior consent.[45] After enactment of Title III, forty-nine states passed or amended their wiretapping laws.[46] The states were free to enact more restrictive wiretapping laws.[47] Most did not.[48] Forty states,[49] like the federal government, subscribe to the one-party consent approach, where if one party consents to the recording, no interception occurs.[50]

B. Restrictive State Wiretapping Laws

There are at least two state wiretapping laws that are substantially more restrictive than their federal counterpart and the laws of nearly every other state. The analysis focuses on the Massachusetts and Illinois wiretapping laws because they are the most restrictive. However, other states, such as California, Pennsylvania, and Washington, have also enacted strict wiretapping laws.[51]

1. Massachusetts

Under the Massachusetts Anti-Wiretapping Act, anyone who secretly intercepts any oral communication without the consent of all parties is guilty of unlawful interception.[52] Unlike the federal wiretapping law, where only one party must consent to the recording,[53] the Massachusetts law requires every

45. *Id.* § 2511(2)(d).

46. Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 280 (2011).

47. *Id.* at 280–81.

48. *See id.* at 281 n.43 (only eleven states were listed as having enacted more restrictive laws than the federal government as of November 2011).

49. *See* Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 495 (2011) (noting that ten states require all-party consent).

50. *Id.* at 493, 495.

51. *See id.* at 496–500 (explaining that California's wiretapping law "flatly criminalizes the recordation of telephonic, electronic, and other wire communications, without the consent of all parties, whether the recorded party displays a reasonable expectation of privacy or not"; that Pennsylvania's laws track the federal statute word for word with the exception of adding a provision requiring all party consent; and that Washington's laws impose criminal penalties on anyone that intercepts "private conversations" without obtaining consent from all parties).

52. MASS. GEN. LAWS ch. 272, § 99(C)(1) (2010). The statute states in relevant part:

> [A]ny person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years . . . .

Id.

53. 18 U.S.C. § 2511(1)(a) (2006).

party to consent.[54] The term intercept "means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . . ."[55] As seen, the statute draws a distinction based on whether the recording was made secretly or in plain view,[56] not on whether the speaker intended for the conversation to be private. If the recording was made in plain view, the interception is not illegal.[57] However, if the recording is made secretly or covertly and the recorder does not have the consent of the parties, the interception is illegal.[58]

To illustrate the problem posed by a wiretapping statute that does not hinge on whether the speakers intended their conversation to be private, take *Commonwealth v. Hyde*, a heavily criticized 2001 decision by the Supreme Judicial Court of Massachusetts.[59] In that case, the court upheld the conviction of a motorist for wiretapping after he secretly recorded statements made by police officers during a traffic stop.[60] Mr. Hyde was stopped by police officers because his car had a broken taillight and a loud exhaust system.[61] The situation escalated and Hyde accused the officers of stopping him because he had "long hair."[62] Unknown to the officers, Hyde had activated a hand-held tape recorder and recorded the entire encounter.[63] A week after the encounter, he filed an internal complaint with the police department and offered the tape he made of the altercation as proof of harassment.[64] Thereafter, the police department filed criminal charges against Hyde for the illegal interception of an oral communication without the consent of all parties.[65] Hyde argued that like its federal counterpart, the Massachusetts statute was not applicable under the circumstances because the police officers were performing their public duties, and therefore had no reasonable expectation of privacy in their conversations.[66] Without addressing whether police officers have an

54. MASS. GEN. LAWS ch. 272, § 99(B)(4), (C)(1). However, the law did not always require all party consent. Prior to 1968, the law permitted the recording of one's own conversations, or conversations with the prior permission of one party. Commonwealth v. Hyde, 750 N.E.2d 963, 967 (Mass. 2001).

55. MASS. GEN. LAWS ch. 272, § 99(B)(4).

56. *Id.*

57. *Id.*

58. *Id.* § 99(C)(1).

59. 750 N.E.2d 963 (2011).

60. *Id.* at 967.

61. *Id.* at 964.

62. *Id.*

63. *Id.* at 965.

64. *Hyde*, 750 N.E.2d at 965.

65. *Id.*

66. *Id.* at 967.

expectation of privacy in their conversations with members of the public, the court held that Title III was inapplicable because the Massachusetts legislature intended to "create a more restrictive surveillance statute than comparable statutes in other States."[67] Unlike its federal counterpart and the wiretapping laws of many other states, there is no expectation of privacy language in the statute.[68] In upholding Hyde's conviction, the court stated that the statute "prohibit[s] all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge."[69]

The *Hyde* decision has been routinely criticized.[70] It stands for the proposition that one can be criminally prosecuted for the use of an ordinary tape recorder to capture the voice of any unknowing person, regardless of the setting in which the recording is made or regardless of whether the individual being recorded has a reasonable expectation of privacy in their communications.[71] The preamble to the Massachusetts Anti-Wiretapping Act provides support that this is the wrong interpretation of the statute.[72] The preamble states that the statute was enacted for two main purposes: first, to deter the efforts of organized crime by permitting law enforcement officials the use of modern methods of electronic surveillance, under strict judicial supervision, when investigating organized criminal activities, and second, to outlaw the secret use of modern electronic surveillance devices among citizens.[73] Neither reason suggests a basis for restricting an individual's right to use a tape recorder or cell phone to capture the communications that individual is having with law enforcement officers.

Not only has *Hyde* been criticized, but the validity of the statute under which Hyde was convicted has been called into doubt. In *Jean v. Massachusetts State Police*, Jean, a local political activist, maintained a website displaying articles and other information critical of a District Attorney.[74] In October of 2005, a man contacted Jean through her website and explained that eight armed State Police troopers arrested him in his home on a

67. *Id.*

68. *Id.* at 968 n.6.

69. *Hyde*, 750 N.E.2d at 967.

70. *See, e.g.*, *id.* at 974 (Marshall, C.J., dissenting) (concluding that there is no way the legislature intended to outlaw "the secret tape recording of a public exchange between a police officer and a citizen."); Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1011 (2009).

71. Roger Michel, *Criminal Law: Electronic Surveillance—General Laws Chapter 272, Section 99*, 86 MASS. L. REV. 62, 62 (2001).

72. *Id.* at 63.

73. MASS. GEN. LAWS ch. 272, § 99(A) (2010).

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

misdemeanor charge.[75] He met the officers at the front door, where he allowed them to handcuff him.[76] The officers then conducted a warrantless search of his house, which was subsequently audiotaped and videotaped by a "nanny-cam."[77] The man provided Jean a copy of the recording.[78] After she posted the video, Jean was contacted by the Massachusetts State Police, who claimed she had violated the state wiretapping statute by willfully disclosing the recording made without their consent.[79] Instead of removing the video, Jean filed a complaint in federal district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the Massachusetts State Police.[80] Citing her First Amendment right to free speech, Jean sought preclusion from threats of prosecution by the officers or enforcement of the wiretapping statute against her.[81] The district court granted a temporary restraining order preventing the police from interfering with Jean's "disclosure, use, or display, including posting on the internet," of the audio and video recording.[82]

The U.S. Court of Appeals for the First Circuit decided the issue as to whether the First Amendment prevented the police officers from interfering with Jean's internet posting of the audio and visual recording.[83] After finding the government interest in preserving privacy and deterring illegal interceptions to be insufficiently compelling, the court affirmed the district court's order, stating that "Jean's publication of the recording on her website is . . . entitled to . . . First Amendment protection."[84]

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Jean*, 492 F.3d at 25–26. It should be noted that Jean was charged with willfully disclosing an interception. The statute states that an individual who "willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception . . . shall be guilty of a misdemeanor." MASS. GEN. LAWS ch. 272, § 99(C)(3)(a) (2010). Since she was not the one who "intercepted" the oral communication, she could not be charged with "interception" under section 99(C)(1), a felony. However, the court did conclude that the original recording of the search was an illegal "interception" under section 99(C)(1). *Jean*, 492 F.3d at 31.

80. *Jean*, 492 F.3d at 26.

81. *Id.*

82. *Id.*

83. *Id.* at 25.

84. *Id.* at 33.

2. Illinois

Like the Massachusetts wiretapping law, the Illinois Eavesdropping Act prohibits secret audio recordings.[85] However, it also prohibits open recordings regardless of whether the parties intended their conversation to be private.[86] The Act states that "[a] person commits eavesdropping when he . . . [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so with the consent of all of the parties to such conversation."[87] A "conversation" is defined broadly to include "any oral communication between 2 or more persons *regardless* of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that exception."[88] Therefore, in Illinois, any audio recording, whether open or secret, and regardless of whether the parties intended the conversation to be private, is prohibited unless all the parties to the conversation consent to the recording.[89] As seen, the Illinois statue expressly declines to follow the one-party consent approach taken by its federal counterpart.[90]

The definition of "conversation" was added by the Illinois legislature in 1994.[91] By adding the definition, the Illinois legislature "extended the coverage of the eavesdropping statute to all conversations, regardless of whether they were intended to be private."[92] Two cases that preceded the additional definition shed light on why the Illinois legislature added the definition of "conversation" to the statue in 1994 and how the eavesdropping statute was interpreted by courts prior to the addition.[93]

In *People v. Klingenberg*, the defendant was arrested and charged with driving while under the influence of intoxicating liquor.[94] While in police custody, the defendant performed specified physical acts intended to determine the extent to which he was intoxicated.[95] An audiovisual recording was made of the defendant's responses and his performance of the coordination tasks.[96]

85. 720 ILL. COMP. STAT. 5/14-2(a)(1) (2010). Eavesdropping and wiretapping will be used interchangeably throughout this Note and, for the purposes of this Note, consist of the same conduct.

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

87. *Id.* 5/14-2(a)(1).

88. *Id.* 5/14-1(d) (emphasis added).

89. *Id.*

90. 18 U.S.C. § 2510(2) (2006).

91. People v. Nestrock, 735 N.E.2d 1101, 1107 (Ill. App. Ct. 2000).

92. *Id.* (quoting People v. Siwek, 671 N.E.2d 358, 363 (Ill. App. Ct. 1996)) (internal quotation marks omitted).

93. *Id.*

94. 339 N.E.2d 456, 457 (Ill. App. Ct. 1975).

95. *See id.*

96. *Id.*

Upon the defendant's motion, the circuit court suppressed the audio portion of the recording on the theory that it was made in violation of the eavesdropping statute.[97] The appellate court reversed and held that the recording of the defendant's voice during the in-custodial interrogation was not "eavesdropping" within the meaning of the statute.[98] In determining whether the recording of the defendant's responses constituted eavesdropping, the appellate court examined whether the legislature intended to protect this type of communication from interception.[99] The court found in the negative, holding that "the framers of the statute intended the term 'eavesdropping' to refer to the listening to or recording of those oral statements intended by the declarant to be of a private nature."[100] Therefore, the court concluded that "the statute was enacted to protect the individual from the interception of communication intended to be private."[101] Because the defendant was talking directly to deputies, the court ruled the defendant did not intend his conversation to be private and thus had no expectation of privacy in his communications.[102]

In *People v. Beardsley*, Mr. Beardsley was pulled over for speeding.[103] After refusing to surrender his driver's license to officers, he was placed in the back of a squad car.[104] While sitting there, he openly recorded a conversation between the arresting officer and his partner sitting in the front seat.[105] The officers were not aware they were being recorded.[106] The Supreme Court of Illinois held that the primary factor in determining whether Beardsley committed the offense of eavesdropping was not whether all the parties consented to the recording.[107] Rather, the primary factor was "whether the officers/declarants intended their conversation to be of a private nature under circumstances justifying such expectation."[108] The court first noted that if the officers had intended their conversation to be private, they would have left the squad car instead of carrying on the conversation with Beardsley in the back seat.[109] Ultimately, the court held that "[b]ecause there was no surreptitious interception of a communication intended by the declarants to be private,

97. *Id.*
98. *Klingenberg*, 339 N.E.2d at 459.
99. *Id.* at 458.
100. *Id.* at 459.
101. *Id.*
102. *Id.*
103. People v. Beardsley, 503 N.E.2d 346, 347 (Ill. 1986).
104. *Id.*
105. *Id.* at 348.
106. *Id.*
107. *Id.* at 350.
108. *Beardsley*, 503 N.E.2d at 350.
109. *Id.*

secret, or confidential, under circumstances justifying such expectation, there was no violation of the eavesdropping statute."[110]

Today, it is clear that *Klingenberg* and *Beardsley* are superseded by statute and, if they were heard today, would be decided differently.[111] The 1994 addition of the term "conversation" makes it clear that the monitoring of conversations is illegal in Illinois regardless of whether the parties intended their conversation to be of a private nature.[112] Based on the legislative history of the amendment, the primary purpose of the addition was to reverse the *Beardsley* decision.[113]

Also interesting is that the police do not have to play by the same rules in Illinois. Uniformed police may, at their discretion and without a warrant, record their conversations with civilians during "enforcement stops."[114] "Enforcement stops" include, but are not limited to, traffic stops, pedestrian stops, abandoned vehicle contacts, motorist assists, commercial motor vehicle stops, roadside safety checks, requests for identification, and responses to requests for emergency assistance.[115] Police departments across the country now require their officers to record such encounters because there is a growing consensus regarding the need to record major evidentiary events in the criminal process.[116] However, while uniformed police can record virtually all of their conversations with the public,[117] members of the public are precluded from recording those same conversations.[118]

Due to advancements in technology, three things have happened in Illinois. First, because of the prevalence of cell phones equipped with the ability to record audio,[119] arrests for violations of Illinois' Eavesdropping Act have become more common.[120] Second, due to the convenience of the internet,[121] the public is readily aware of such arrests. Third, due to the popularity of social

110. *Id.*

111. 720 ILL. COMP. STAT. 5/14-1 (2010).

112. People v. Nestrock, 735 N.E.2d 1101, 1107 (Ill. App. Ct. 2000).

113. Brief of Plaintiff-Appellant at 5, ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012) (No. 11–1286).

114. 720 ILL. COMP. STAT. 5/14-3(h).

115. *Id.*

116. Alderman, *supra* note 49, at 530–31.

117. Brief of Plaintiff-Appellant, *supra* note 113, at 6.

118. *Id.*

119. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 341 (2011) (noting that in modern America, cell phone ownership is nearly universal and virtually every cell phone has digital image capacity).

120. *See* Brief of Plaintiff-Appellant, *supra* note 113, at 7–8; *c.f.* Radley Balko, *The War on Cameras*, REASON MAG., Jan. 2011 at 24, 25.(discussing individuals being prosecuted in various states for violations of wiretapping statutes).

121. Cohen, *supra* note 26, at 22.

media sites such as YouTube and Twitter,[122] the public has opportunity to voice their concerns with the perceived injustice the law is accomplishing. In regards to arrests, take, for example, Michael H. Allison, a forty-one-year-old backyard mechanic from southeastern Illinois[123] who was charged with the offense of eavesdropping in 2009.[124] Prior to being charged with eavesdropping, Allison received a city ordinance violation over an alleged abandoned vehicle on his premises.[125] After receiving the violation, Allison recorded conversations he had with police, the city attorney, the circuit clerk's office, and the court concerning the ordinance violation.[126] If convicted, Allison would have faced up to seventy-five years in prison; all for an act most people do not realize is a crime.[127] Or, consider Chris Drew, a sixty-one-year-old artist charged with eavesdropping when he, in the midst of being arrested for selling art on a downtown street without a permit, made an audio recording of his encounter with the police.[128]

Like the Massachusetts Anti-Wiretapping Act, the validity of the Illinois Eavesdropping Act has been called into doubt by the U.S. Court of Appeals for the Seventh Circuit.[129] Troubled by documented cases of police misconduct such as Tiawanda Moore's,[130] the American Civil Liberties Union ("ACLU"), a civil rights and liberties activist group, has devised a specific program for monitoring police conduct in Illinois (the "ACLU Program").[131] The ACLU Program would openly audio record police officers "without their consent when (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of the recording is otherwise lawful."[132] The stated purpose of the program is to improve police practices and to detect and deter police misconduct.[133] The ACLU says the audio

122. Kreimer, *supra* note 119, at 341 (noting that social networking sites like Facebook, along with sites like Flickr, YouTube, and TwitPic, have combined with increasingly usable blogging technology to enable any holder of an image to make it instantly available to the world at large).

123. Balko, *supra* note 120.

124. People v. Allison, No. 2009–CF–50 at 2 (Sept. 15, 2011) (order dismissing motion to declare 720 ILCS 5/14 unconstitutional), *available at* http://www.rcfp.org/sites/default/files/docs/20120322_125429_allison_trial_court_decision.pdf.

125. *Id.* at 1.

126. *Id.* at 1–2.

127. Balko, *supra* note 120, at 22.

128. Ryan Haggerty & Jason Meisner, *Illinois' eavesdropping law under attack*, CHICAGO TRIB., Jan. 2, 2012, at C1.

129. ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

130. *See* Grimm, *supra* note 10.

131. *Alvarez*, 679 F.3d at 588.

132. Brief of Plaintiff-Appellant, *supra* note 113, at 9.

133. Complaint at 4, ACLU of Ill. v. Alvarez, 2010 WL 4386868 (N.D. Ill. Aug. 19, 2010) (No. 10 Civ. 5235).

recordings would be open, would occur during expressive events on public forums, and "would not occur when officers are off duty or in private places, and would not interfere with or endanger police or involve trespass."[134] When appropriate, the ACLU would publish the recordings to the general public and use the recordings to petition the government for redress of grievances.[135]

So far, the ACLU has not implemented the program for fear of prosecution under the Illinois Eavesdropping Act.[136] In August of 2010, the ACLU sued Anita Alvarez, in her official capacity as Cook County State's Attorney, seeking declaratory and injunctive relief.[137] Unfortunately, the case was dismissed for a lack of standing before the merits of the case could be reached.[138] However, the ACLU has appealed the ruling and is asking the Seventh Circuit for a preliminary injunction blocking enforcement of the eavesdropping statute as applied to its specified audio recording program.[139] Recently, the Seventh Circuit agreed with the ACLU of Illinois and entered a preliminary injunction preventing the enforcement of the Illinois eavesdropping statute against the ACLU's employees or agents who openly record the oral communications of police officers when the officers are performing in their official duties in public places.[140]

II. THE PROTECTIONS OF THE FIRST AMENDMENT

The debate over the constitutionality of state wiretapping laws like Illinois' and Massachusetts' focuses on the First Amendment. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[141] It applies to the states and their political subdivisions through the Due Process Clause of the Fourteenth Amendment.[142] At first look, the protections of the First Amendment seem limited.[143] "Speech" means "[t]he

134. Brief of Plaintiff-Appellant, *supra* note 113, at 9.

135. *Id.*

136. *Id.* at 10.

137. Complaint, *supra* note 133, at 1.

138. ACLU of Ill. v. Alvarez, No. 10-cv-05235, 2010 WL 4386868 at *2 (N.D. Ill. Oct. 28, 2010), *rev'd*, 679 F.3d 583 (7th Cir. 2012).

139. ACLU of Ill. v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012).

140. *Id.* In granting the injunction, the court reviewed the Illinois eavesdropping law under intermediate scrutiny. While struggling to determine which variation of intermediate scrutiny to apply, the court stated that regardless of which variation to apply, the law was "not closely tailored to the government's interest in protecting conversational privacy." *Id.* at 607. The court went on to state "[i]f protecting privacy is the justification for the law, then the law must be more closely tailored to serve that interest in order to avoid trampling on speech and press rights." *Id.* at 608.

141. U.S. CONST. amend. I.

142. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

143. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249,

expression or communication of thoughts or opinions in spoken words; something spoken or uttered."[144] "Press" has been described as "[t]he news media; print and broadcast news organizations collectively."[145] By those definitions, an individual's recording of police activity fits in neither category. While the spoken words would constitute speech, the recording of those words by an individual (one not a member of a print or broadcast news organization) would not be. Furthermore, a recording would not be considered "press" unless a member of a print or broadcast news organization captured it. However, the Supreme Court has rejected a literal reading of the First Amendment, and it has established that the First Amendment guarantees freedom of expression[146] and protects a range of conduct related to the gathering and dissemination of information.[147] The next two sections illustrate the range of conduct the First Amendment protects, including the right to gather information—and the right to record information.

A. The First Amendment Right to Gather Information and News

As the Supreme Court stated, "the First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw."[148] Originally, the right to gather information and news applied exclusively to the news media. Today, however, the public's right of access to information is coexistent with that of the press,[149] and the right to gather news and information applies equally to news media and the public at large.[150] Changes in technology have made the lines between private citizens and journalists exceedingly difficult to draw.[151] Due to the proliferation of

250 (2004) ("[i]n their most literal form, the Speech and Press Clauses of the First Amendment protect the freedom to speak and the freedom to publish using a printing press.").

144. BLACK'S LAW DICTIONARY 1529 (9th ed. 2009).

145. *Id.* at 1304; *see* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 436 (2002) ("The most famous discussion of the meaning of the Press Clause, a 1974 speech by Justice Stewart, identified its beneficiaries as 'the daily newspapers and other established news media,' or 'newspapers, television networks, and magazines.'").

146. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (phrasing issue as "constitutional right to freedom of speech or expression").

147. Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

148. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is . . . well established that the Constitution protects the right to receive information and ideas.").

149. Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (Stewart, J., concurring) (noting that the Constitution "assure[s] the public and the press equal access once government has opened its doors").

150. Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

151. *Glik*, 655 F.3d at 84.

electronic devices with video-recording capability, news stories are just as likely to be uncovered by a blogger at his or her computer as by a reporter at a major newspaper.[152] Therefore, the newsgathering protections of the First Amendment cannot turn on professional credentials.[153] Instead, the newsgathering protections of the First Amendment turn on who the subject of the recording is and whether the matter is one of public interest.[154]

The right to gather information and news is especially important in the context of information regarding government officials.[155] "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs."[156] The Supreme Court has emphasized "the paramount public interest in a free flow of information to the people concerning public officials."[157] This is because public officials are deemed to be servants of the people.[158] Many benefits are derived from ensuring the public's right to gather information, such as aiding in uncovering abuse by government officials[159] and creating a mechanism by which government operates more effectively.[160] Furthermore, speech on matters of public concern is given heightened protection under the First Amendment.[161] The Supreme Court has held that speech on matters of public concern is "fundamental"[162] to the "heart"[163] of the First Amendment, and a "core" value of the First Amendment.[164]

152. *Id.*

153. *Id.*; *see also* United States v. Hastings, 695 F.2d 1278, 1281 (11th Cir. 1983) (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 609, (1978)) (finding that the press has generally no right to information superior to that of the general public); Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("it is not just news organizations . . . who have First Amendment rights to make and display videotapes of events . . . .").

154. Buller v. Pulitzer Pub. Co., 684 S.W.2d 473, 481 (Mo. Ct. App. 1984).

155. Garrison v. Louisiana, 379 U.S. 64, 77 (1964), *overruled on other grounds by* Curtis Pub. Co. v. Butts, 388 U.S. 130 (1975).

156. *Glik*, 655 F.3d at 82 (internal quotations omitted).

157. *Garrison*, 379 U.S. at 77.

158. *Id.*

159. Gentile v. State Bar of Nev., 501 U.S. 1030, 1034–35 (1991).

160. *See* Press–Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 8 (1986).

161. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values"); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (noting that matters of public concern are at the heart of First Amendment protections).

162. Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

163. *Id.*

164. Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

B. The First Amendment Right to Record Information

While it is clear that the gathering of information enjoys First Amendment protection, courts are mixed as to whether the recording of the same information receives First Amendment protection. Most courts have said yes.[165] However, some have said no.[166] The majority of courts have held that videotaping is a protected First Amendment activity when used to "gather information about what public officials do on public property"[167] and when the recording has a communicative or expressive purpose.[168] One court has gone so far as to hold that videotaping is a protected First Amendment right regardless of the reason for the videotaping.[169] The next section considers those cases that have addressed the right to record police officers and other public officials while in their official capacities.

III. THE FIRST AMENDMENT RIGHT TO AUDIO RECORD POLICE COMMUNICATIONS

A. The Older Cases

Staring in the mid-1990s, courts began to recognize a First Amendment right to record, videotape, and photograph police activity and conduct.[170] The first court to do so was the U.S. Court of Appeals for the Ninth Circuit in *Fordyce v. City of Seattle*.[171] In *Fordyce*, the court held that an individual who

165. *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012) (stating that "[a]udio recording is entitled to First Amendment protection."); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999); Demarest v. Athol/Orange Cmty. Television, Inc., 188 F. Supp. 2d 82, 94–95 (D. Mass. 2002); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972); Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).

166. *See, e.g.*, Potts v. City of Lafayette, 121 F.3d 1106, 1111 (7th Cir. 1997) ("[T]here is nothing in the Constitution which guarantees the right to record a public event."); *see* Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 184 (3d Cir. 1999) (holding that permitted access to Planning Commission meetings did not create a federal constitutional right to videotape the meetings).

167. *Smith*, 212 F.3d at 1333 (stating that "[t]he 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") (emphasis added); *Fordyce*, 55 F.3d at 439 (recognizing a "First Amendment right to film matters of public interest"); *Iacobucci*, 193 F.3d at 25; *Robinson*, 378 F. Supp. 2d at 541 ("Videotaping is a legitimate means of gathering information for public dissemination . . . .").

168. Gilles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005); Larsen v. Fort Wayne Police Dept., 825 F. Supp. 2d 965, 979 (N.D. Ind. 2010).

169. *Robinson*, 378 F. Supp. 2d at 541 (stating that an individual need not assert any particular reason for videotaping).

170. *Fordyce*, 55 F.3d at 439.

171. *Id.* at 436.

filmed a public demonstration on a public street had a "First Amendment right to film matters of public interest."[172] In that case, Mr. Fordyce was videotaping and audio recording people on the streets of Seattle during a public protest.[173] Among his subjects were police officers patrolling the protest.[174] An officer eventually approached him and asked whether his video camera was recording audio.[175] The officer then warned Fordyce that a Washington state privacy statute forbade recording private conversations without the consent of all participants.[176] When he refused to stop recording, he was arrested for violating the statute.[177] After the charges against Fordyce were dismissed, he brought a civil rights action against the officers for interference with his First Amendment right to gather news.[178] On appeal, the court held that Fordyce had a "First Amendment right to film matters of public interest."[179]

In *Robinson v. Fetterman*, a district court held that the arrest of an individual for filming police activity from private property violated the First Amendment.[180] In that case, Robinson videotaped police conducting truck inspections on a local road because he was concerned about the way the police were performing the inspections.[181] He videotaped from an adjacent property approximately twenty to thirty feet from the road and never interfered with police activities.[182] When approached by police, Robinson refused to stop filming and was subsequently arrested for violation of the Pennsylvania's harassment statute.[183] After noting that Robinson had First Amendment rights to receive information and ideas, and to express his concern about the safety of the truck inspections, the court held that "there can be no doubt that the free

172. *Id.* at 439.

173. *Id.*

174. *Id.* at 438.

175. *Fordyce*, 55 F.3d at 439.

176. *Id.* The Washington wiretapping statute provides, in relevant part, that "it shall be unlawful for any individual . . . to intercept, or record any [p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation." WASH. REV. CODE § 9.73.030 (2006).

177. *Fordyce*, 55 F.3d at 439.

178. *Id.* at 438.

179. *Id.* at 439.

180. 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005).

181. *Id.* at 539.

182. *Id.*

183. *Id.* at 539. The Pennsylvania harassment statute provides, in relevant part "A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person: . . . follows the other person in or about a public place or places; [or] engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose." 18 PA. CONS. STAT. § 2709(a)(2)–(3) (2010). The district court's opinion is unclear as to whether Robinson's video recording also included audio recording. If it had, the officers may have charged Robinson with being in violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act. *Id.* §§ 5701–82.

speech clause of the Constitution protected Robinson as he videotaped the defendants."[184]

In *Pomykacz v. Borough of West Wildwood*, a district court held that photographing a police officer in connection with a citizen's political activism was protected by the First Amendment.[185] In that case, Pomykacz, a self-described "citizen-activist," became concerned over an alleged romantic relationship between the mayor of the city and a police officer.[186] In the process of monitoring the parties, Pomykacz began photographing the officer while she was on duty.[187] The officer and the mayor initiated criminal charges against Pomykacz for harassment.[188] In her subsequent civil action, Pomykacz alleged that her arrest violated her First Amendment rights.[189] The court declined to adopt Pomykacz's blanket assertion that "the observation and monitoring of public officials is protected by the [F]irst [A]mendment."[190] However, the court did imply that photography with an expressive or communicative purpose is protected by the First Amendment.[191]

B. The Recent Cases

Two U.S. Courts of Appeals cases, *Glik v. Cunniffe*[192] from the First Circuit, and *Kelly v. Borough of Carlisle*[193] from the Third Circuit, both shed light on the problems restrictive state wiretapping laws create and the ramifications they have on the rights encompassed by the First Amendment.

1. *Glik v. Cunniffe*

The facts of *Glik v. Cunniffe* are rather simple. Police arrested Simon Glik for using his cell phone's digital video camera to film several police officers arresting a young man in the Boston Common.[194] He was charged with violation of Massachusetts' wiretapping statute.[195] Glik was walking past the

184. *Robinson*, 378 F. Supp. 2d at 541.

185. 438 F. Supp. 2d 504, 512–13 (D.N.J. 2006).

186. *Id.* at 506–07.

187. *Id.* at 507.

188. *Id.* at 508.

189. *Pomykacz*, 438 F. Supp. 2d at 512.

190. *Id.* at 513 n.14 (alteration in original).

191. *Id.* (noting language from the Third Circuit indicating that videotaping or recording police *may* be a protected activity).

192. 655 F.3d 78 (1st Cir. 2011).

193. 622 F.3d 248, 248 (3d. Cir. 2010).

194. *Glik*, 655 F.3d at 79.

195. *Id.* The statute states:

> Except as otherwise specifically provided in this section any person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the

Boston Common, a state park, when he witnessed three police officers arresting a young man.[196] While witnessing the encounter, he heard a bystander say something to the effect of, "[y]ou are hurting him, stop."[197] Concerned that the officers were using excessive force, he stopped approximately ten feet away from the incident and began recording video footage of the arrest on his cell phone.[198]

After detaining the suspect, an officer turned to Glik and said, "I think you have taken enough pictures."[199] He replied, "I am recording this. I saw you punch him."[200] An officer then approached him and asked if his cell phone recorded audio.[201] When he affirmed that he was recording audio, the officer placed him in handcuffs and arrested him for unlawful audio recording in violation of the Massachusetts wiretapping statute.[202] He was taken to the South Boston Police Station and, in the course of booking, his cell phone and computer flash drive were confiscated.[203] The charges were eventually dropped because he had used his cell phone openly and in plain view to obtain the video and audio recording.[204] He later filed a civil rights action against the officers and the City of Boston for violations of his First Amendment rights.[205] The district court concluded that he had a First Amendment right to openly audio record the police encounter he witnessed.[206]

On appeal, the First Circuit agreed.[207] First, the court noted that the First Amendment right to openly record a police encounter does not hinge on whether the recorder is a private citizen or a member of the news media.[208] Next, the court found it pertinent that Glik filmed the police officers in the Boston Common, the oldest city park in the United States.[209] The court went

> state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

MASS. GEN. LAWS ch. 272, § 99(C)(1) (2010).

196. *Glik*, 655 F.3d at 79.

197. *Id.*

198. *Id.* at 79–80.

199. *Id.* at 80.

200. *Id.*

201. *Glik*, 655 F.3d at 80.

202. *Id.*

203. *Id.*

204. *Id.* Massachusetts law only prohibits a secret interception of an oral communication. MASS. GEN. LAWS ch. 272, §§ 99(B)(4) & (C)(1) (2010).

205. *Glik*, 655 F.3d at 80. Glik also alleged violations of his Fourth Amendment rights. *Id*. However, those allegations are not addressed in this note.

206. *Id.*

207. *Id.* at 82.

208. *Id.* at 83–84 (holding that "the news-gathering protections of the First Amendment cannot turn on professional credentials or status.").

209. *Id.* at 84.

on to state that "[i]n such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'"[210] Furthermore, the Court found it pertinent that Glik's recording did not interfere with the police officers' performance of their duties.[211] Lastly, the court noted that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."[212]

2. *Kelly v. Borough of Carlisle*

In *Kelly v. Borough of Carlisle*, a truck was pulled over for speeding.[213] A passenger recorded the encounter with a handheld video camera located in his lap.[214] Eventually, the officer noticed that the passenger was filming him and arrested the passenger for violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act.[215] After the arrest, the passenger brought a civil action against the arresting officer, alleging that his First Amendment rights were violated when he was arrested for filming the officer during the traffic stop.[216] The district court held that it was unclear whether the passenger had a right to videotape police performing their duties on public property.[217]

Kelly marked the first time the Third Circuit directly addressed the right to videotape police officers.[218] The Third Circuit had previously hypothesized that "videotaping or photographing the police in the performance of their duties on public property *may* be a protected activity."[219] Relying on caselaw from other courts, the court conceded that this right does exist.[220] But the court framed the right narrowly, concluding that "videotaping without an expressive purpose may not be protected . . . ."[221] Unfortunately, the court did not

210. *Glik*, 655 F.3d at 84 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

211. *Id.*

212. *Id.* (citing City of Houston v. Hill, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.")).

213. 622 F.3d 248, 251 (3d Cir. 2010).

214. *Id.*

215. *Id.* at 251–52. The Act provides that "a person is guilty of a felony of the third degree if he intentionally intercepts . . . any . . . oral communication . . . ." 18 PA. CONS. STAT. § 5703(1) (2010). The statute defines "oral communication" as "[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 5702.

216. *Kelly*, 622 F.3d at 252.

217. Kelly v. Borough of Carlisle, 2009 WL 1230309, at *8 (M.D.Pa. May 4, 2009), *aff'd*, 622 F.3d 248 (3d Cir. 2010).

218. *Kelly*, 622 F.3d at 260.

219. Giles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (emphasis added).

220. *Kelly*, 622 F.3d at 260, 262. The court relied on cases within the Eleventh and Third Circuits to determine whether the right to record police officers exists. *Id.* at 260.

221. *Id.*

elaborate on when a recording would be for an expressive purpose. However, it did cite a case for what constitutes an expressive purpose: *Pomykacz v Borough of West Wildwood*.[222] In *Pomykacz*, a district court implied that videotaping for political activism reasons was a communicative or expressive purpose.[223] Another case has suggested that the selling of photography and videography is an expressive purpose.[224] Without indicating whether or not the recording of a traffic stop was an expressive activity, the court held that "the right to videotape police officers during traffic stops [is] not clearly established".[225] The court based its holding on two main reasons.[226] First, the court noted that caselaw had yet to address recording of police in the context of a traffic stop.[227] Second, the court characterized traffic stops as "inherently dangerous situations,"[228] which demonstrated the court's willingness to limit citizens' First Amendment rights when safety concerns arise.

The previous section addressed those courts which had recognized First Amendment rights to openly record police conduct during a public protest,[229] to openly film police conduct to unravel allegedly unsafe means of carrying out official duties,[230] and to photograph a police officer in connection with a citizen's political activism.[231] After *Glik* and *Kelly*, an individual has a First Amendment right to openly record police conduct in a public park,[232] but does not have an established First Amendment right to openly record officers in the discharge of their duties during a traffic stop.[233]

What is the difference between a police-citizen encounter in the Boston Common and a police-citizen encounter at a traffic stop? For one, the Supreme Court has held that traffic stops are "especially fraught with danger to police officers."[234] In the eyes of the Supreme Court, the risk of harm to both the police and vehicle occupants is minimized "if the officers routinely exercise unquestioned command of the situation."[235] Second, a park, unlike a traffic

222. *Id.* at 261.

223. *See* Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006).

224. *See* Bery v. City of New York, 97 F.3d 689, 695–96 (2d Cir. 1996).

225. *Kelly*, 622 F.3d at 262–63.

226. *Id.*

227. *Id.* at 262.

228. *Id.* at 262–63.

229. Fordyce v. City of Seattle, 55 F.3d 436, 438–39 (9th Cir. 1995).

230. Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005).

231. *See Pomykacz*, 438 F. Supp. 2d at 513 n.14 (D.N.J. 2006).

232. Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011).

233. Kelly v. Borough of Carlisle, 622 F.3d 248, 262–63 (3d Cir. 2010).

234. Michigan v. Long, 463 U.S. 1032, 1047 (1983).

235. Arizona v. Johnson, 555 U.S. 323, 330 (2009). For this purpose, the Supreme Court has held that during a traffic stop, the officer effectively seizes everyone in the vehicle including all passengers. *Id*. at 327.

stop, is a traditional "public space"[236] where citizens are afforded heightened First Amendment protections. However, both encounters do have some similarities. To illustrate, the *Glik* court relied on the fact that Mr. Glik filmed the encounter from a safe distance and neither spoke to nor disturbed the officers in any way.[237] The same is true in *Kelly*.[238] The passenger, while he may have been closer to the officers, merely held the video camera in his lap without disturbing the officers.

As seen by the foregoing caselaw, courts agree that recording police conduct and communications is, to some extent, a First Amendment right. The next section will examine the extent and contours of the First Amendment right to record.

IV. A SUBSTANTIAL INTERFERENCE GUIDELINE FOR INTERPRETING THE SCOPE AND LIMITATIONS OF THE FIRST AMENDMENT RIGHT TO RECORD POLICE COMMUNICATIONS

The *Glik* and *Kelly* courts both held that the right to record is not absolute, but is subject to reasonable time, place, and manner restrictions.[239] This language comes from the Supreme Court which has stated that the government may impose reasonable restrictions on the "time, place, or manner" of exercising First Amendment rights "provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[240] The *Glik* court stated, "[w]e have no occasion to explore those limitations . . . ."[241] In this section, I will explore some of those limitations by suggesting the following guideline in determining the contours of the First Amendment right to record police communications: the First Amendment protects an individual's right to audio record a uniformed, on duty police officer's oral communications *unless* the recording would substantially interfere with the performance of the officer's duties.

The "substantial interference" guideline has two main parts. First, the officer must be on duty and uniformed. When I say uniformed, I am referring to officers who are in uniform, *i.e.*, it is clearly apparent from their clothing that they are police officers acting in their official capacity at the time of the recording. The guideline is limited to communications of on duty, uniformed police officers because "[c]ommunications of this sort lack any reasonable

236. United States v. Grace, 461 U.S. 171, 180 (1983).
237. *Glik*, 655 F.3d at 84.
238. *Kelly*, 622 F.3d at 262.
239. *Glik*, 655 F.3d at 84; *Kelly*, 622 F.3d at 262.
240. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal quotations omitted).
241. *Glik*, 655 F.3d at 84.

expectation of privacy . . . ."[242] Because conversations uttered in the open are not protected from being overheard, an expectation of privacy cannot attach to the conversation.[243] Furthermore, when I say public communications, I mean only those communications with members of the public. For instance, a right of privacy would be given to a communication between two officers sitting alone in a squad car talking between themselves because those are private, not public, communications.

Second, the guideline provides that the recording must not substantially interfere with the performance of the officer's duties. I take the substantial interference aspect of the guideline directly from *Glik*. Recall that in *Glik*, Mr. Glik filmed the police-citizen encounter from approximately ten feet away.[244] He never verbally or physically interacted with the citizen or the arresting officers.[245] The court specifically stated two things that provide support for a guideline that hinges on a substantial interference standard. First, the court noted that "[s]uch peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation."[246] The indication here is that if the recording were to interfere with the officers' performance of their duties, the recording would be subject to limitation. Second, the court went on to note that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."[247] Based on the above two statements by the *Glik* court, a substantial interference standard properly balances the needs of effective law enforcement while ensuring that the interference must cross a high threshold before it is subject to limitation.

Additionally, the guideline I have proposed does not hinge on who the recorder is. The recorder could be an individual talking directly to an officer, an individual not talking directly to an officer, but one in very close proximity such as the passenger in *Kelly*, or a bystander to the communication such as Mr. Glik. Support for declining to make a distinction among recorders also comes directly from *Glik*.[248] Under the proposed guideline, the only pertinent and relevant issue is whether or not the recording would substantially interfere with the performance of the officer's duties. On the plus side, the guideline strikes a balance between the First Amendment right to record and the practical

242. ACLU of Ill. v. Alvarez, 679 F.3d 583, 606 (7th Cir. 2012) (citing Katz v. United States, 389 U.S. 347, 351 (1967)) (internal quotations omitted).

243. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

244. *Glik*, 655 F.3d at 80.

245. *Id.*

246. *Id.* at 84.

247. *Id.*

248. *Id.* (noting that the development in technology makes clear why the newsgathering protections of the First Amendment are given to the public at large and not solely to those in the news media).

needs of law enforcement. This is primarily accomplished in three ways. First, the officer must be uniformed. Second, the officer must be on duty. Third, the interference must be substantial before the First Amendment right to record is subject to limitation.

Furthermore, while at this juncture it is unclear under what circumstances a recording would substantially interfere with the performance of an officer's duties, the Supreme Court has endorsed a case-by-case standard for substantial interference in restricting First Amendment rights.[249] In the context of the free speech rights afforded to public school children, the Court has held that that public schools may restrict the First Amendment speech rights of students only when necessary to "avoid . . . substantial interference with schoolwork or discipline."[250] A similar restraint-based approach is applicable to police officers. Like public school officials, police officers are public servants[251] and are accordingly "expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."[252]

For instance, does the recording done by the passenger in *Kelly* substantially interfere?[253] I think not. The passenger, who was the person recording, was not even involved in the stop, and was not the one being questioned by the officer.[254] The recording may have interfered minimally, but even so, as stated in *Glik*, the officer was expected to "endure significant burdens caused by citizens' exercise of their First Amendment rights."[255] In a similar vein, it is clear that in *Commonwealth v. Hyde*, Mr. Hyde's recording did not substantially interfere with the officers' performance of their duties, as it was unknown to the officers that Hyde was recording.[256] Under my guideline, secret recordings would nearly always be permissible because they are just that: secret. Officers would not be aware that a recording is occurring and thus there would be no chance for interference, let alone substantial interference. However, if officers were physically prevented from reaching the scene of an accident or arresting an individual due to or due in large part to a recording, that would likely constitute a substantial interference. Lastly, what if Mr. Glik had recorded the encounter from five feet away instead of ten feet? It seems logical to concede that the closer the recorder is to the police encounter, the higher the chance of substantial interference with the officer's duties.

249. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
250. *Id.*
251. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1034–35 (1991).
252. *See Glik*, 655 F.3d at 84.
253. Kelly v. Borough of Carlisle, 622 F.3d 248, 251 (3d Cir. 2010).
254. *Id.*
255. *Glik*, 655 F.3d at 84.
256. 750 N.E.2d 963, 965 (Mass. 2001).

However, it is equally conceivable that a substantial interference, under certain circumstances, could occur from two feet away or from twenty feet away.

One commentator has suggested a federal statutory solution for remedying defective state wiretapping laws.[257] This commentator suggests a rebuttable presumption that an on duty officer's oral communications, if uttered in the public sphere, are subject to recording.[258] The presumption is rebutted only if the recording would "create or significantly exacerbate a substantial risk of imminent harm to the police officer, other persons, or national security."[259]

My guideline differs in two basic ways. First, instead of a federal statutory solution, the states are free to amend their own wiretapping laws. As noted in Part I, the validity of both the Massachusetts Anti-Wiretapping Act and the Illinois Eavesdropping Act has been called into doubt.[260] An Illinois lawmaker has already proposed changes to the Illinois Eavesdropping Act that would allow individuals to audio record a police officer working in public without the officer's consent.[261] While the proposed amendment does not strike the balance my guideline seeks, it shows that state lawmakers are aware that restrictive wiretapping laws need to be amended. Second, my guideline, instead of hinging on safety, hinges on whether the recording would substantially interfere with the performance of the officer's duties. A substantial interference standard is a better approach for two reasons. First, the Supreme Court has already endorsed this approach in restricting First Amendment rights, albeit in other contexts.[262] Second, the standard strikes a better balance between the needs of law enforcement and the right to record under the First Amendment. For instance, under the safety of the officer standard,[263] it is predictable that a court would rule that drivers and passengers could not record their communications with police officers during a traffic stop since the Supreme Court has held that traffic stops are "especially fraught with danger to police officers."[264] Under my proposed guideline, the recording would be permitted unless it would substantially interfere with the officer's performance of their duties, allowing a greater exercise of individuals' First Amendment rights.

257. Kies, *supra* note 42, at 307 (proposing amendment to federal law to balance the First Amendment right to record police communications with police officers' privacy interests).

258. *Id.* at 308.

259. *Id.*

260. *See supra* text accompanying notes 194–212, 130–40.

261. H.B. 3944, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

262. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

263. *See supra* note 234 and accompanying text.

264. Arizona v. Johnson, 555 U.S. 323, 330 (2009) (citing Michigan v. Long, 463 U.S. 1032, 1047 (1983)).

CONCLUSION

As evidenced by Ms. Moore's arrest and subsequent prosecution, violation of state wiretapping laws can have grave consequences.[265] However, courts, for the most part, are in agreement that the recording of police conduct and communications, to some extent, is a First Amendment newsgathering right.[266] The standard that I have proposed, one that hinges on a substantial interference in the performance of the officer's duties, accomplishes two goals. First, it offers a guideline for determining the scope and contours of the First Amendment right to record police communications. Second, it provides states like Illinois and Massachusetts a guideline for revamping their constitutionally defective wiretapping laws.

The ACLU's proposed program for monitoring police conduct[267] fits squarely within the parameters of my proposed guideline. As stated by the ACLU, the recordings would be limited to on duty officers while in public and would not interfere with the performance of the officer's duties.[268] In a time when nearly every American owns a cell phone capable of recording audio, the protections of the First Amendment demand change to restrictive state wiretapping statutes.

JUSTIN WELPLY*

265. *See supra* text accompanying notes 10–17.

266. *See supra* Part III.A–B.

267. *See supra* text accompanying notes 129–35.

268. Brief of Plaintiff-Appellant, *supra* note 113, at 9.

* J.D., 2012. I would like to thank Professor Chad Flanders for his extremely helpful comments and suggestions. I would also like to thank my family for their constant support.