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Walking a Thin Blue Line: Balancing the Citizen's Right to Record Police Officers Against Officer Privacy

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I. INTRODUCTION

One bystander with a cell phone can change an individual's encounter with law enforcement from an unprovable allegation of abuse to a media sensation. Audio and video recording, a capability in nearly every American's pocket, has changed the way that citizens interact with police officers. Today, the technology that immortalized the police beating of Rodney King exposes excessive force used on the Occupy Wall Street protestors,[1] monitors the actions of officers making arrests,[2] and allows individuals to memorialize their conversations with investigators.[3] Recordings of law enforcement activity create not only clear evidentiary accounts that benefit victims and innocent police officers, but also strengthen incentives for law enforcement to use only reasonable force or risk being exposed to the media, facing professional discipline, or even prosecution. Compelled by these public policy considerations, most states have enacted statutes to protect the recording rights of citizens. However, many recorders find out too late that they have recorded a police officer in the wrong state and, when they attempt to use their recordings to expose questionable behavior, are arrested themselves.

Federal and state anti-wiretapping and anti-eavesdropping statutes are primarily designed to protect the privacy rights of those whose conversations might be recorded without their knowledge. However, these same statutes can often have consequences that reach far beyond this well-meaning goal. In many instances, law enforcement officers can utilize these statutes to arrest citizens that are

1. Ginia Bellafante, *Every Action Produces Overreaction*, N.Y. TIMES, Oct. 2, 2011, at MB1; Jennifer Medina, *California's Campus Movements Dig In Their Heels*, N.Y. TIMES, Nov. 22, 2011, at A17.

2. Don Terry, *Eavesdropping Laws Mean That Turning On an Audio Recorder Could Send You to Prison*, N.Y. TIMES, Jan. 23, 2011, at A29B (describing a street artist who recorded his arrest for selling art without a permit).

3. *Id.* (describing a woman who recorded her interactions with police investigators while filing a sexual harassment complaint against another police officer).

recording the officers' interactions with the public. The ostensible purpose of this application is to protect the safety and privacy of the police officers.

When statutes are interpreted in this way, they spill beyond the bounds of individual privacy and begin to invade the First Amendment speech rights of the public. As written, many state recording statutes demonstrably violate the First Amendment. Others can be applied to violate those rights. This Comment argues that in order to strike an appropriate balance between First Amendment speech rights and the strong public interest in protecting police safety and privacy, state legislatures should amend these eavesdropping statutes to include a strong rebuttable presumption in favor of the citizen recorder. Underlying this rebuttable presumption is the argument that when police officers act in their official capacity, the public policy reasons behind protecting an individual's privacy are diminished and ultimately outweighed by the incentives to encourage free speech. The presumption against the officer would not be absolute: in cases where the interest in officer privacy and protection are very strong and outweigh free speech concerns, the officer may have the opportunity to rebut the presumption in court.

Part II of this Comment will review the relevant state statutory and case law that has led to inconsistent rules and has resulted in free speech violations. Part III will address the tension between protecting First Amendment rights and the value of protecting police officers and will explain when it is appropriate for each to be impaired for the sake of the other. Part IV will explain the need for and benefits of a rebuttable presumption against police privacy. Part V concludes.

II. BACKGROUND

An individual's right to record an encounter with a police officer depends largely on the state recording statute where the encounter occurs, the state case law interpreting the recording statute, and the constitutional rules adopted by the applicable circuit court. The combination of these legal rules often leads to ambiguity. This Part will explain the varying rules that have been adopted by states as well as recount the major statutory interpretations of the laws by both state and federal courts.

A. Variation in State Statutory Law

Recording statutes, generally characterized as prohibitions on wiretapping or eavesdropping, vary widely across states, with some more likely to favor the citizen and some more likely to favor the police officer. Within this variation, the statutes tend to fall into a few distinct categories.[4] The majority of state statutes, as well as the federal recording statute, fall into the first category, which permits recorded conversations where at least one of the parties to the conversation agrees to the recording.[5] These "one-party consent" statutes

4. For a detailed explanation of the differences between the federal and state privacy statutes, 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, 489–511 (2011).

5. 18 U.S.C. § 2510–2511 (2012) (it is not unlawful to intercept a communication "where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception"); ALA. CODE § 13A-11-30 (2011) ("eavesdropping" is recording "without the consent of at least one of the persons engaged in the communication"); ALASKA STAT. § 42.20.310 (2011) (prohibiting recording "without the consent of a party to the conversation"); ARIZ. REV. STAT. ANN. § 13-3005 (2011) (felonious to intercept a conversation "without the consent of a party to such conversation or discussion"); ARK. CODE ANN. § 5-60-120 (2011) (unlawful to intercept "unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent"); COLO. REV. STAT. § 18-9-304 (2011) (eavesdropping is recording "without the consent of at least one of the principal parties thereto"); CONN. GEN. STAT. § 53a-187 (2011) ("wiretapping" is recording without the consent of at least one party); DEL. CODE ANN. tit. 11, § 2402 (2011) (lawful to intercept a communication "where one of the parties . . . has given prior consent"); HAW. REV. STAT. § 803-42 (2011) (not unlawful to record "when the person is a party . . . or when one of the parties . . . has given prior consent"); IDAHO CODE ANN. § 18-6702 (2011) (lawful to intercept when "when one (1) of the parties . . . has given prior consent"); 2012 Ind. Acts 1781 ("interception" is a recording by someone "other than a sender or receiver" or "without the consent of the sender or receiver"); IOWA CODE § 727.8 (2011) ("the sender or recipient of a message or one who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication"); KAN. STAT. ANN. § 21-6101 (2011) (breach of privacy is intercepting a communication "without the consent of the sender or receiver"); KY. REV. STAT. ANN. § 526.010 (West 2011) (defining eavesdropping as recording "without the consent of at least one (1) party thereto"); LA. REV. STAT. ANN. § 15:1303 (2011) (not unlawful when "such person is a party to the communication or where one of the parties . . . has given prior consent"); ME. REV. STAT. tit. 17-A, § 511 (2011) (using a recording device "without the consent of the person or persons entitled to privacy" is a violation of privacy); MINN. STAT. § 626A.02 (2011) (not unlawful when "such person is a party to the communication or where one of the parties . . . has given prior consent"); MISS. CODE ANN. § 41-29-531 (2011) (actor is immune from civil liability if "the person is a party to the communication, or if one (1) of the parties . . . has given prior consent"); MO. REV. STAT. § 542.402 (2011) (not unlawful when "such person is a party to the communication or where one of the parties . . . has given prior consent"); NEB. REV. STAT. § 86-290 (2011) (not unlawful when "such person is a party to the communication or when one of the parties . . . has given prior consent"); NEV. REV. STAT. § 200.620 (2011) (unlawful unless "the interception or attempted interception is made with the

are unlikely to be used to arrest the recorder because the recorder is often one of the parties to the conversation and is therefore specifically protected by the statutes.[6]

Several states, however, have statutes that only permit recordings of oral conversations if all parties to the conversation consent to the recording.[7] Among these "two-party consent" statutes, there are varying methods to determine which conversations are protected. In some states, the anti-recording statute only applies to conversations

prior consent of one of the parties to the communication"); N.J. STAT. ANN. § 2A:156A-4 (West 2011) (not unlawful when "such person is a party to the communication or one of the parties . . . has given prior consent); N.M. STAT. ANN. § 30-12-1 (2011) (interference with communications includes recording "without the consent of a sender or intended recipient thereof"); N.Y. PENAL LAW § 250.00 (McKinney 2011) (defining "wiretapping," "mechanical overhearing," and "intercepting or accessing of an electronic communication" in terms of an absence of the consent of at least one party); N.C. GEN. STAT. § 15A-287 (2011) (recording "without the consent of at least one party to the communication" constitutes a felony); OHIO REV. CODE ANN. § 2933.52 (West 2011) (statute doesn't apply when the "person is a party to the communication or if one of the parties . . . has given the person prior consent"); OKLA. STAT. tit. 13, §176.4 (2011) (not unlawful when "such person is a party to the communication or when one of the parties . . . has given prior consent"); OR. REV. STAT. § 165.540 (2011) (may not record "unless consent is given by at least one participant"); R.I. GEN. LAWS § 11-35-21 (2011) (not unlawful when "the person is a party to the communication, or one of the parties . . . has given prior consent"); S.C. CODE ANN. § 17-30-30 (2011) (lawful when "the person is a party to the communication or where one of the parties . . . has given prior consent"); S.D. CODIFIED LAWS § 23A-35A-20 (2011) (person who is "[n]ot a sender or receiver" and records a conversation "without the consent of either a sender or receiver" is guilty of a felony); TENN. CODE ANN. § 39-13-601 (2011) (lawful where "the person is a party to the communication or one of the parties . . . has given prior consent"); TEX. PENAL CODE ANN. § 16.02 (West 2011) (a person who records has an affirmative defense where "the person is a party to the communication; or one of the parties . . . has given prior consent"); UTAH CODE ANN. § 77-23a-4 (West 2011) (may record when "one of the parties . . . has given prior consent"); VA. CODE ANN. § 19.2-62 (2011) (not an offense where "such person is a party to the communication or one of the parties . . . has given prior consent"); W. VA. CODE § 62-1D-3 (2011) (lawful to record where not unlawful when "the person is a party to the communication or where one of the parties . . . has given prior consent"); WIS. STAT. § 968.31 (2011) (not unlawful when "the person is a party to the communication or where one of the parties . . . has given prior consent"); WYO. STAT. ANN. § 7-3-702 (2011) (does not prohibit recording "where one (1) of the parties to the communication has given prior consent to the interception").

6. It is important to note, however, that under these statutes many valuable recordings could not be made by bystanders witnessing police abuse, such as the video of the Rodney King beating. In *Glik v. Cunniffe*, 655 F.3d 78, 79–80 (1st Cir. 2011), a case that will be explained in more detail, Simon Glik recorded a police interaction as a bystander and was arrested for it. Recently, activists in New York City have begun systematically recording police officers engaging in controversial "stop-and-frisk" practices in order to attract attention to alleged police misconduct. *See, e.g.*, Kia Gregory, *A Watcher of the Police Says He is Now a Target*, N.Y. TIMES, Sept. 10, 2012, at A21.

7. *See, e.g.*, GA. CODE ANN. § 16-11-62 (2011) (unlawful to record "without the consent of all persons observed").

where the participants have a reasonable expectation of privacy.[8] The Massachusetts[9] and Montana[10] legislatures have determined that instead of using a reasonable expectation of privacy standard, the line between protected and unprotected communications is drawn by determining whether the recording is made surreptitiously or openly.[11] Washington requires both privacy *and* secrecy before the recording will be prohibited.[12] The two-party recording statute in Illinois is unique, and undoubtedly the harshest in the country. Containing no explicit expectation of privacy or secrecy requirement, the Illinois re-

8. CAL. PENAL CODE § 632 (West 2011) (protects "confidential communications," which are defined as those communications "carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in . . . circumstances in which the parties to the communication may reasonably expect that the communication may be overheard or recorded"); FLA. STAT. § 934.02 (2011) ("oral communication" is "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"); MD. CODE ANN., CTS. & JUD. PROC. § 10-401 (West 2011) ("'oral communication' means any conversation or words spoken to or by any person in private conversation"); MICH. COMP. LAWS ANN. § 750.539c (West 2011) (protects "private conversation[s]"); N.H. REV. STAT. ANN. § 570-A:1 (2011) (protects oral communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"); N.D. CENT. CODE § 12.1-15-04 (2011) (protects oral communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"); 18 PA. CONS. STAT. ANN. § 5702 (West 2011) (oral communication only protected if the person uttering it possesses an expectation that the communication is not subject to interception under circumstances justifying such expectation); WASH. REV. CODE ANN. § 9.73.030 (West 2011) (protects "private communication" and "private conversation").

9. MASS. GEN. LAWS. ANN. ch. 272, § 99 (West 2011) ("interception" means to "secretly hear, secretly record, or aid another to secretly hear or secretly record").

10. MONT. CODE ANN. § 45-8-213 (2011) (statute applies to a person who "records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation").

11. This statutory scheme does not necessarily reject the reasonable expectation of privacy theory. It follows that if a party to the conversation can see that his confidant is holding a recording device, his subjective expectation of privacy, if he continues to have the expectation, is unlikely to be a "reasonable" expectation. However, by identifying the lack of privacy as the visibility of the recording device, the statutes curtail other factors that may destroy an expectation of privacy. For example, if two people are having an audible conversation on an open street or in a crowded room but do not see a recording device, their conversation cannot be recorded, even though they have clearly forfeited their right to privacy in other Constitutional contexts. *See* Katz v. U.S., 389 U.S. 347, 351–52 (1967) (for purposes of Fourth Amendment privacy from government intrusion, "[w]hat a person knowingly exposes to the public, even in his own home or office," is not protected by privacy, "[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

12. WASH. REV. CODE ANN. § 9.73.030 (West 2011) (consent is considered to have been obtained when one party has announced to all other parties that the conversation is about to be recorded).

cording statute requires the consent of all parties and protects absolutely all conversations.[13] In *People v. Beardsley*, the Illinois Supreme Court interpreted the recording statute to include a reasonable expectation of privacy requirement when an arrestee was convicted after recording the officers in the front seat while he was in the back of the squad car.[14] The court believed that the statute must have been "based on the assumption that if the parties to a conversation act under circumstances which entitle them to believe that the conversation is private and cannot be heard by others who are acting in a lawful manner, then they should be protected in their privacy."[15] The Illinois legislature then amended the statute to make it clear that no expectation of privacy analysis should be used, and overruled *Beardsley*. It defined a "conversation" as "any oral communication between 2 or more persons *regardless* of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."[16]

The next section will explain the consequences of these statutes. In most states, the state manages to promote its interest in officer safety without burdening speech rights more than is necessary. However, the outliers, Massachusetts and Illinois, which have bright-line rules with no reasonable expectation of privacy requirement, have proven themselves too ripe for potential police abuse to comfortably fall within constitutional confines.

B. Variations in State Case Law

State recording statutes have been applied in a number of varying factual situations. Some are situations where it is clear that the public has no compelling interest in protecting the officers, while in others the case is a much closer call. Between the various state statutes and their interpretive cases, many inconsistencies have developed that result in a body of case law that is unlikely to be helpful to citizens in understanding their rights.

13. 720 ILL. COMP. STAT. 5/14-2 (2011) ("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 . . . .").

14. 503 N.E.2d 346, 347–49 (Ill. 1986).

15. *Id.* at 349–50.

16. 720 ILL. COMP. STAT. 5/14-1(d) (emphasis added).

1. Difficulty defining "reasonable expectation of privacy"

The factual circumstances of the recorded conversation play an integral part in determining if a party has a reasonable expectation of privacy. For example, a recording of a police officer's conversation did not violate the state's wire-tapping statute in *Commonwealth v. Henlen* because of the non-private nature of the conversation.[17] In this case out of Pennsylvania, a state in which recording is allowed unless the officer has a reasonable expectation of privacy, a state trooper interviewed a prison guard who secretly recorded an interview and was subsequently charged.[18] However, because police generally record such interviews, and because the trooper took notes during the interview in question and allowed a third party to be present, the court concluded that the trooper did not have a reasonable expectation of privacy.[19]

In applying a reasonable expectation of privacy standard, the court determines on a case-by-case basis whether the police officer could have expected the conversation to be kept private. Because this analysis is fact specific, as the facts of cases become less clear, determining which conversations are private becomes more complicated. In another case, in which it was clear that the police officers did not have a reasonable expectation of privacy,[20] the court acknowledged that there are some "close case[s]." The court suggested that protecting law enforcement agents may justify the arrest of a citizen that is recording police activity in situations where the police have to make "split-second decisions . . . in the heat of dangerous or potentially dangerous confrontation."[21] This suggestion by Pennsylvania courts is troubling, because the dangerousness of the situation likely has little correlation to the level of privacy that an officer can reasonably expect. This leaves open two possible situations where police can arrest citizen recorders: (1) when the confrontation occurs in a place where the police officer has a stronger expectation of pri-

17. 564 A.2d 905 (Pa. 1989).

18. *Id.* at 905.

19. *Id.* at 906.

20. Robinson v. Fetterman, 378 F. Supp. 2d 534, 539 (E.D. Pa. 2005). The arrestee in this case videotaped state police as they performed truck inspections on a public highway because he was concerned the inspections were being conducted in an unsafe manner. He was "some 20 to 30 feet back from the highway at all relevant times and never interfered with the activities of the troopers." *Id.*

21. *Id.* at 545.

vacy than he would in a police-recorded interview or during police action on a public highway (although it is unclear how much stronger the expectation must be) and (2) where an ill-defined "dangerous situation" justifies the arrest.[22]

In contrast to Pennsylvania, courts in Washington have interpreted their reasonable expectation of privacy requirement more definitively.[23] For example, in *Washington v. Flora*, a man claimed that he had been "handled roughly" and had been the subject of racial slurs during his arrest.[24] During a subsequent encounter with the police, he recorded the conversation with a small tape recorder hidden among a stack of papers, because "he feared the deputies would assault him and use racial slurs as they had done in the past."[25] The officers discovered the recording device and arrested him for violating Washington's recording statute.[26] In ruling for the arrestee, the court reasoned that the statute only protected "private conversations," holding that statements made while effectuating arrests are per se not private.[27] The officers had no reasonable expectation that the conversation was private because the arrest was on a public street, within the presence of third parties, and within earshot of passersby.[28] The court explicitly stated an intention to keep the statute from becoming a tool of police abuse, declaring, "We decline the State's invitation to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity."[29]

While *Flora* only analyzed conversations made during the course of an arrest, a subsequent case made it clear that the rule from *Flora* should be applied more expansively.[30] In *Johnson v. Hawe*, a teenager videotaped a police officer speaking on a radio with his window down in a parking lot.[31] The recording in *Johnson*, unlike the record-

22. *Id.* at 539, 545 (acknowledging that in a "close case" where the police officer would have to make a "split second decision . . . in the heat of a dangerous or potentially dangerous confrontation," it may be appropriate to prohibit citizen recorders).

23. *See* State v. Flora, 845 P.2d 1355 (Wash. Ct. App. 1992).

24. *Id.* at 1355.

25. *Id.* at 1356.

26. *Id.*

27. *Id.* at 1357–58.

28. *Id.* at 1357.

29. *Id.* at 1358.

30. *See* Johnson v. Hawe, 388 F.3d 676 (9th Cir. 2004).

31. *Id.* at 679–80.

ing in *Flora*, was not of a conversation between the teenager and the officer, but rather between the officer and a third party.[32] Nevertheless, the Ninth Circuit said that the language from *Flora* "does not exclude any conduct other than an actual arrest, but encompasses other conduct that is public and official."[33]

The Washington interpretive scheme is likely the best at protecting both the free speech rights of civilians and the privacy rights of police when an expectation of privacy is justified. However, the rule still depends on whether the conduct was "public and official."[34] While this standard may be generally easy to apply, police often engage in conduct that is somewhere in between clearly official or unofficial. This gray area of police conduct may lead to uncertainty, which likely continues to be the source of unnecessary litigation and chills citizens from exercising their free speech rights.

2. Drawing a line between "hidden" and "open" recording

The Massachusetts wiretap statute, which prohibits recordings when they are made in "secret,"[35] has spawned a series of highly controversial cases that raise logistical and constitutional concerns. In 1998, Michael Hyde was stopped by officers, who ordered him out of his car, frisked him, examined some of the contents of the car, and asked him if he was carrying drugs.[36] The stop quickly became confrontational.[37] Six days later, Hyde went to the police station to file a complaint against the officers.[38] To substantiate his claim, he produced a tape recording he had surreptitiously made with a recorder in his pocket.[39] Rather than investigating his claim, authorities charged Hyde with wiretapping.[40] The Supreme Judicial Court of Massachusetts interpreted the privacy statute as unambiguous, and noted that there is "no exception for a private individual who secretly records the oral communications of public officials."[41] The court expressly de-

32. *Id.*
33. *Id.*at 683.
34. *Id.*
35. MASS. GEN. LAWS. ch. 292, § 99(C)(1) (2011).
36. Commonwealth v. Hyde, 750 N.E.2d 963, 964 (Mass. 2001).
37. *Id.*
38. *Id.* at 965.
39. *Id.*
40. *Id.*
41. *Id.* at 966.

clined to interpret the statute with any regard for whether the police officers had a reasonable expectation of privacy, reasoning that the plain language of the statute turned on whether or not the interception was made secretly.[42] Hyde was "not prosecuted for making the recording; he was prosecuted for doing so secretly."[43]

Several years later, Simon Glik was on Boston Common and saw several police officers arresting a young man.[44] Glik was "[c]oncerned that the officers were employing excessive force to effect the arrest," so he used the camera on his cell phone to record the exchange.[45] An officer asked him if he was recording audio, Glik said that he was, and he was arrested for violating the wiretapping statute.[46] The charges were eventually dismissed because "the law requires a *secret* recording and the officers admitted that Glik had used his cell phone openly and in plain view."[47]

3. Enforcing a citizen's right to record

After his charges were dropped, Simon Glik brought a claim against the officers and the city of Boston under 42 U.S.C. § 1983.[48] Section 1983 provides an action for civil damages when an officer acting under the color of state law deprives a citizen of a constitutional right.[49] In order for an officer to be personally liable in the suit, it must have been "clearly established" by the case law at the time that the officer's conduct was a violation of the citizen's constitutional rights.[50] The First Circuit ultimately determined that the officers had violated Glik's clearly established Fourth Amendment rights to be free from unreasonable seizure as well as his First Amendment rights to film police officers.[51] The seizure of his person and camera was unreasonable, because Glik did not fall within the ambit of the statute, as his recording was open and not secret.[52]

42. *Id.* at 967–68.
43. *Id.* at 969.
44. Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).
45. *Id.* at 79–80.
46. *Id.* at 80.
47. *Id.* (emphasis added).
48. *Id.*
49. 42 U.S.C. § 1983 (2006).
50. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
51. *Glik*, 655 F.3d at 79.
52. *Id.* at 86–87.

Glik's First Amendment rights, however, did not depend on whether the recording was open or secret. Instead, the court affirmed that there is "a constitutionally protected right to videotape police carrying out their duties in public"[53] and that Glik "fell well within the bounds of the Constitution's protections."[54] The court did not comment on whether Glik would still have been within these constitutional bounds if, like Hyde, his cell phone had been concealed. The court suggested, without analysis, that there may be situations where a right exists, but a "time, place, and manner" restriction would be appropriate.[55] This analysis from the First Circuit was important in establishing that there is a clear constitutional right to record police. However, the fact that the court had "no occasion to explore [the] limitations"[56] of the rule leaves the state of the law somewhat confused.[57] It is unclear whether the constitutional right reaches defendants like Hyde, who do fall within the statutory scheme. Additionally, the court suggested that the rule might not apply in other encounters with the police, specifically traffic stops,[58] where the encounter could be characterized as an "inherently dangerous situation."[59] This suggests that the reasoning in the *Robinson* case from Pennsylvania, which grants an exception in dangerous situations, may have some undefined role in the constitutional calculus.

Although the constitutional rule is clear, its application in situations that are factually distinct from *Glik* is too unpredictable for it to help inform citizens of their rights to record police officers.

Whether the law is "clearly established" for a § 1983 claim also depends on the law of the particular circuit court and the facts of the police encounter. In *Kelly v. Borough of Carlisle*, a passenger in a truck that was stopped by a police officer recorded the encounter and was arrested.[60] The court acknowledged that in the Third Circuit, there was enough case law to clearly establish that a police officer has no

53. *Id.* at 82.

54. *Id.* at 84.

55. *Id.*

56. *Id.*

57. *See generally* Caycee Hampton, Note, *Confirmation of a Catch-22:* Glik v. Cunniffe *and the Paradox of Citizen Recording*, 63 FLA. L. REV. 1549 (2011).

58. *Glik*, 655 F.3d at 85 (distinguishing *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010) that determined that the right to film is not clearly established in the context of a traffic stop because "a traffic stop is worlds apart from an arrest on the Boston Common").

59. *Id.* (quoting *Kelly*, 622 F.3d at 262) (internal quotation marks omitted).

60. 622 F.3d at 251–52.

"reasonable expectation of privacy when recording conversations with suspects."[61] However, the arrestee in this case could not recover for the violation of his free speech rights, because "there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping the police during the stop would violate the First Amendment."[62] The court reasoned that the decision was "further supported" by the fact that traffic stops have been recognized as "inherently dangerous situations," suggesting that even where there is a clearly established right, police officers can violate those rights if the situation is sufficiently dangerous.[63]

Although several cases proclaim the First Amendment right to record a police officer while he is carrying out his public duties, the case law is too inconsistent and the fact patterns too narrow for a citizen to be able to confidently record police without fear of criminal prosecution. Striking a balance between a citizen's right to free speech and a police officer's right to safety and privacy further complicates the situation.

III. CONSTITUTIONAL TENSIONS

Recording statutes present a unique constitutional conundrum with a tug-of-war between free speech and legitimate state interests in police privacy and safety. The First Amendment likely protects the right of the citizen to record police officers. On the other hand, a police officer's quasi-constitutional right to privacy, which is regularly analyzed in a similar way to Fourth Amendment rights to privacy, is given great weight by the court. If the court believes that the police officer was in a dangerous situation, free speech concerns are given even less weight. This is essentially a zero-sum analysis—the more the statute protects the First Amendment, the less likely it is to protect the police officer, and vice versa. Legitimate, although narrow, concerns of safety and privacy make it difficult to place a balance where each will be appropriately protected. As shown in Part II, state statutes vary significantly on the balance between these competing constitutional concerns. Statutes that are "privacy centered" are

61. *Id.* at 258.
62. *Id.* at 262.
63. *Id.*

more likely to fall on the side of upholding recording statutes that protect the privacy of any non-consenting parties, but they also run the danger of being applied in violation of a citizen's free speech rights.

Although it might be argued that police should never have a right to privacy while performing their public duties, this approach would have many of the same problems as privacy centered statutes—free speech would be completely protected, but it would unnecessarily impede the state from pursuing a legitimate governmental interest. Cases where the value of a citizen's speech is weak or de minimus and the argument for police privacy is strong would unnecessary suffer under this scheme. Instead, First Amendment requirements can be met and the state can adequately protect its officers if legislatures carefully strike a balance between these two competing interests. This Part will discuss the tension between the competing concerns, and finally argue that the best legislative schemes would place the balance in the form of a rebuttable presumption, which would effectively protect speech rights while allowing room to protect officer privacy in appropriate cases.

A. The First Amendment Right to Record

Although the text of the First Amendment only specifically prohibits the government from "abridging the freedom of speech, or of the press,"[64] the free speech right derived from the First Amendment has been expanded to protect conduct beyond pure speech and media outlets.[65] The gathering and dissemination of information is implicitly included in the right to free speech.[66] This right is particularly important, because the free flow of information about public officials is vital to the workings of a free democracy.[67] In order to protect the background principle of allowing for a "free discussion of governmental affairs," citizens, whether they are members of the formal media or not, must have a right incidental to the freedom of speech to record governmental officials engaged in their public du-

64. U.S. CONST. amend. I.

65. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 82–83 (1st Cir. 2011).

66. *See* Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972); *Glick*, 655 F.3d at 82–83.

67. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (pioneering the theory that speech is essential to representative government and democratic decision making).

ties.[68] If the information is "about what public officials do on public property," and it is a "matter[] of public interest," the gathering of that information is protected.[69]

The public's power to gather information about governmental officials not only is constitutional, but also serves a vital practical purpose by checking the power of government.[70] Vincent Blasi argues that this checking value is of paramount importance because "the abuse of official power is an especially serious evil—more serious than the abuse of private power."[71] These considerations are especially prevalent in the abuse of police power. First, "the potential impact of government on the lives of individuals is unique because of its capacity to employ legitimized violence," and second, "public officials control the resources which, if misused, can do the maximum amount of harm."[72] Police officers are the public officials that are most likely to interact with the public, are the primary enforcers of governmentally legitimized violence, and have little oversight combined with great discretion.[73]

The more connected the speech is to matters of public interest, especially political interest, the more likely it is that the speech will be protected by the First Amendment. For example, in *New York Times Co. v. Sullivan*, [74] the Supreme Court held that an individual's ability to be sued for libel decreased significantly if the subject of the speech was a public official.[75] Although the right of every person to be insulated against libel is important, the Court in this case found that the right was outweighed by the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[76] The greater the risk of chilling important pub-

68. *Glik*, 655 F.3d at 83 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)) (internal quotation marks omitted).

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

70. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

71. *Id.* at 538.

72. *Id.*

73. *See infra* notes 133–37 and accompanying text.

74. 376 U.S. 254 (1964).

75. *Id.* at 271.

76. *Id.* at 270.

lic discourse, the more likely it is that First Amendment rights will take precedent over other important personal rights, such as the right to privacy.

The Supreme Court has performed a similar analysis regarding recording statutes. In *Bartnicki v. Vopper*,[77] an illegally obtained recording of a phone call between a union president and a union negotiator regarding a matter of public concern was distributed to media outlets, which then published the recording.[78] Both the federal recording statute and Pennsylvania's recording statute provide that the mere disclosure of illegally obtained information is punishable along with making the initial recording.[79] The Supreme Court acknowledged that the decision was a difficult one because of the tension between privacy and free speech.[80] The Court held that because the publisher had obtained the information lawfully, the publishing of that information was protected under the First Amendment because the information was of public importance.[81] The Court reasoned that in this case, having information about a public issue discussed in the public sphere was an important enough interest to justify the loss of privacy: "[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance. One of the costs associated with participation in public affairs is an attendant loss of privacy."[82]

Bartnicki protected the publisher of lawfully obtained illegal recordings, but the holding was narrow—the protection did not cover the original maker of the recordings.[83] Although the Court decided that it was worth the loss of privacy to have the recordings be part of the public discussion, if the person who originally made the recording was found, he or she could be prosecuted for violating wiretapping statutes. The First Circuit dealt with a similar issue concerning the Massachusetts recording statute in *Jean v. Massachusetts State Po-*

77. 532 U.S. 514 (2001).

78. *Id.* at 514.

79. *Id.* at 520 n.3.

80. *Id.* at 533 ("[T]here are important interests to be considered on *both* sides of the constitutional calculus.").

81. *Id.* at 534–35.

82. *Id.* at 534.

83. *Id.* at 534–35. The question is "both novel and narrow," applying only to those that disclose the contents of an illegally intercepted communication. *Id.* at 517.

lice.[84] In *Jean*, a nanny cam illegally recorded state police officers as they arrested Paul Pechonis in his home and then conducted a warrantless search of his home.[85] Pechonis provided a copy of the recording to Mary T. Jean, who posted it on her website.[86] The First Circuit applied a similar reasoning as the Supreme Court in *Bartnicki* and held that a court could reasonably conclude that the First Amendment protected the posting of Pechonis's arrest.[87] Unlike the recording in the *Bartnicki* case, which dealt with the privacy of two private citizens, the privacy interest of the officers in *Jean* was considered "virtually irrelevant" because the recording involved "a search by police officers of a private citizen's home in front of that individual, his wife, other members of the family, and at least eight law enforcement officers."[88] The parties conceded that the "warrantless and potentially unlawful search of a private residence [] is a matter of public concern."[89] In *Bartnicki*, the access to public information outweighed the privacy rights of two citizens. Therefore, in a situation like *Jean*, which dealt with the privacy rights of a law enforcement agency, the scales easily tipped in the direction of public information, because the facts of the case showed that the privacy rights of the police were negligible in that instance.[90]

Both *Bartnicki* and *Jean* focused only on the distributors, not the people who originally made the recordings. In fact, the Court in *Bartnicki* explicitly assumed that the statute was constitutionally permissible as to the recorders.[91] This conclusion was assumed without analysis and was not related to the case or controversy before the court, and is therefore clearly dicta. The Court's own reasoning utilized in *Bartnicki* and *Jean*—balancing the benefit to the public against the interests in protecting the privacy of the recorded party—actually suggest that in the context of police recordings, many wiretapping statutes should be held constitutionally impermissible. The

84. 492 F.3d 24 (1st Cir. 2007).

85. *Id.* at 25.

86. *Id.*

87. *Id.*

88. *Id.* at 30.

89. *Id.*

90. *Id.*

91. Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) ("We assume that those [substantial governmental interests] adequately justify the prohibition in § 2511(1)(d) against the interceptor's own use of information that he or she acquired.").

value to the public remains unchanged whether the recorder or the distributor is prosecuted, so therefore the First Amendment side of the calculus is just as strong. The *Jean* court made it clear that the governmental interest in protecting the privacy rights of police during the course of an arrest is not significant enough to impair speech rights, so therefore the privacy side of the calculus is weak.[92] The reasoning of *Bartnicki* and *Jean*, although not squarely about recorders, strongly suggests that recorders of police activity could not be constitutionally restrained.

B. The Right to Privacy

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[93] In *Katz v. United States*,[94] Justice Stewart explained that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion."[95] The Court specifically denied that this privacy is attached to a "constitutionally protected area," but instead held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[96] After Justice Stewart clarified the right derived from the Amendment, the concurrence written by Justice Harlan elucidated his understanding of the majority rule.[97] Justice Harlan explained that the rule for when something is protected as private by the Fourth Amendment is a "twofold requirement, first that a person have exhibited an actual

92. It should be remembered that in *Bartnicki*, the governmental interest at stake was to protect the privacy of entirely private citizens engaging in what they thought was a private telephone call, and so the Court's assumption that the recorder could be constitutionally protected was based on entirely different "significant governmental interests" than the interests in police recording contexts. The Court found that the interests served by the statute were "the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted." *Id.* at 529. These interests are significantly weaker when the parties the government is aiming to protect are law enforcement personnel engaging with the public.

93. U.S. CONST. amend. IV.

94. 389 U.S. 347 (1967).

95. *Id.* at 350.

96. *Id.* at 351–52 (citations omitted).

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

(subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[98] Where a man exposes "objects, activities, or statements . . . to the 'plain view' of outsiders" exhibiting "no intention to keep them to himself," there is likely no expectation of privacy.[99]

The Fourth Amendment protects the right to privacy from governmental intrusion. However, the rationale behind the Fourth Amendment extends to encounters beyond those with the government, resulting in a strong public policy against violating the privacy of individuals, even when the privacy is violated by other individuals. These privacy rights are usually established by statute, as evidenced by the many state wiretapping statutes that protect conversations conducted with a reasonable expectation of privacy,[100] and common law torts such as libel and violations of publicity. Although it is not clearly a constitutional violation when a conversation is recorded by a non-governmental entity, privacy concerns, as developed in Fourth Amendment jurisprudence, are repeatedly analyzed in wiretapping cases, suggesting that they are important enough to weigh heavily against First Amendment rights in many instances.

Where there is a reasonable expectation of privacy that meets Justice Harlan's two-fold test in *Katz* (that the individual manifest an expectation of privacy and that the expectation is reasonable), it is important to understand under what circumstances this privacy right impedes on First Amendment speech rights. In this case, the government is regulating conduct that it is generally within the police powers to regulate (how individuals interact with law enforcement), but this conduct regulation incidentally burdens free speech. According to First Amendment jurisprudence, governments may only incidentally impede speech rights, by means such as recording laws, if it can show that the regulation (1) is within the power of the Government; (2) furthers an important or substantial governmental interest; and (3) the incidental restriction on First Amendment freedoms "is no greater than is essential to the furtherance of that interest."[101] Here, wiretapping statutes are undoubtedly within the police power

98. *Id.*
99. *Id.*
100. *See supra* Part II.A.
101. U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

of the government, and the "substantial government interest"[102] the states mean to further is the privacy rights of citizens, and in cases involving police officers, the privacy rights and safety of the officers. Therefore, the first two elements of this test are likely met. However, in order for a conduct-based statute that incidentally burdens speech to be constitutional, it must not burden speech any more than is "essential" to protect police officers. This Comment argues that many of these statutes are unconstitutional, because they fail this element and prohibit far more speech than is necessary to protect either the safety or the privacy of police officers.

These two important rights are in opposition in the case of citizens recording police officers. When First Amendment rights to record are strengthened, privacy of officers is necessarily diminished; when the privacy rights of officers are strengthened, the ability of individuals to record police officers as part of the First Amendment checking power weakens. Understanding the circumstances under which either of these rights may be strengthened at the expense of the other is important to creating a rule that strikes an appropriate balance. A rule with the correct balance will protect as many and sacrifice as few rights as possible, yet at the same time be clear enough to allow citizens and police officers to exercise their rights confidently. Part IV proposes a rule that is likely to meet all of these goals.

IV. A REBUTTABLE PRESUMPTION IN FAVOR OF CITIZEN RECORDERS

As written, many state recording statutes, as discussed in Part II, demonstrably have violated, or are in danger of violating the First Amendment, because they restrict more speech than is necessary. However, police officers as citizens are entitled to privacy when their expectation of privacy is reasonable. Therefore, states must determine how much restriction of speech is "necessary" to protect privacy. In order to walk the line between two strong canons of rights, legislatures in states with recording statutes that do not require a reasonable expectation of privacy should amend their laws to include one. In addition, all of the state legislatures should amend their re-

102. The Supreme Court has observed two general interests that are served by wiretapping statutes. "[F]irst, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted." Bartnicki v. Vopper, 532 U.S. 514, 529 (2001).

cording laws to include an express "rebuttable presumption" that while in the course of their official duties police officers have no reasonable expectation of privacy.

A rebuttable presumption benefits citizen recorders by preventing them from being arrested for recording a police officer. This is valuable, because many citizens will not record, and their speech will be chilled, if they perceive that there is a material risk of criminal prosecution.[103] The rebuttable presumption also benefits the officer, who would have an opportunity to prove, after the fact, that he had a reasonable expectation of privacy and thus justify the prosecution of the recorder.

This presumption must be strong enough to not allow rebuttal in any situation where a police officer is interacting with the public in her official capacity. If it is not, it will be no more useful than a general rule, such as the rule in Washington, that police officers are not entitled to privacy while engaging in their public duties. Instead, rebuttal should be allowed in very marginal cases where the argument is very strong that the police officer probably did expect his actions to be private and the value of the information to the public is low. There should be very few or no situations where a citizen would be surprised to learn that he is being prosecuted under the wiretapping law because the law enforcement officer has overcome the rebuttable presumption. Because a rebuttable presumption sets the bar higher than a general rule, it will be more difficult to get citizen recording cases past the summary judgment stage, and it will be possible to more easily predict the outcome of these cases without having to have lengthy discovery or litigation on the facts.

A. Problems with Existing Statutes and Other Proposed Solutions

The statutory schemes addressing this problem have been discussed at length in Part II, but generally attempt to address the problem by: (1) relying only on a reasonable expectation of privacy requirement,[104] (2) using a reasonable expectation of privacy

103. Hampton, *supra* note 57, at 1559 ("If citizens believe—correctly or otherwise—that it is illegal to record unethical police behavior, the potential for vigilante filming diminishes, and an important check on governmental authority diminishes correspondingly.").

104. *See supra* note 8 and accompanying text; Dina Mishra, Note, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1555 (2008) ("[S]tates should explicitly permit citizens to record police communications other than those uttered with the reasonable expectation that they would not be recorded.").

requirement coupled with a rule that police generally do not have a right to privacy in their public duties,[105] (3) determining whether conversations are protected based on whether the recording is secret or open,[106] and (4) prohibiting all recording, regardless of whether there was a reasonable expectation of privacy or the recording was made openly.[107] Another proposed solution has been to enact a blanket rule that police officers are never entitled to privacy when acting within the scope of their duties.[108]

1. Reasonable expectation of privacy

Statutes such as Pennsylvania's, which determine whether speech is protected based on whether there is a reasonable expectation of privacy, are useful to a limited extent but are not ideal. The biggest danger from such statutes is that citizens may not know whether they are allowed to record or not. Whether courts have decided that there was a reasonable expectation of privacy in cases decided under these statutes is very fact specific and is analyzed separately for each case. Factors such as whether the encounter was on a street or in a home, whether there were bystanders present, and the volume at which the conversation was conducted are all relevant inquiries when determining whether there was a reasonable expectation of privacy.[109] If the determinations are so ad hoc, it is difficult for both police officers and citizens to shape their behavior, because the determination about whether the police officer has a right to privacy is not made until the case is litigated. This results in the chilling of protected First Amendment speech, which consequently decreases the political and social benefits of "uninhibited, robust, and wide-open"[110] public discourse. Additionally, lengthy litigation is not ideal for either the officer or the citizen because of prohibitive costs. Furthermore, if the citizen is arrested because an officer is unsure whether he has a reasonable expectation of privacy, it may open the

105. *See supra* note 9 and accompanying text.

106. *See supra* notes 10–11 and accompanying text.

107. *See supra* note 13 and accompanying text.

108. Alderman, *supra* note 4, at 489 ("[T]he right of citizens to record police officers performing their public duties, without fear of punitive and retaliatory prosecution, must be expressly safeguarded in state wiretapping statutes.").

109. *See generally* Agnew v. Dupler, 717 A.2d 519 (Pa. 1998); Commonwealth v. Henlen, 564 A.2d 905 (Pa. 1989).

110. N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

officer and the city up to potential liability for violation of constitutional rights under § 1983.

2. Reasonable expectation of privacy plus general rule against police privacy

In general, rules regarding whether police are able to entertain a reasonable expectation of privacy turn on whether the officer was engaged in public business in a public space.[111] This rule is both open to too much interpretation and does not reach far enough to adequately protect citizens who wish to record their conversations with law enforcement. Although there are many places that are definitively "public," such as Boston Common in the *Glik* case,[112] and there are some places that are clearly private, such as one's own home, there is also a wide spectrum of places that are located somewhere in between public and private. Even in situations where it is unclear whether the space is public or private, it is still unlikely that a police officer interacting with a citizen should have a reasonable expectation of privacy. This spectrum also applies to an officer being engaged in "public business." That is, in addition to the many situations where officers are clearly engaged in official conduct, such as questioning a witness, there are many other gray areas where citizens may be unsure of their protection, such as when an off-duty officer intervenes in a situation. It is often in these gray areas, where police officers are engaging in questionable or borderline conduct, that unethical police behavior happens. These situations are where the individual's interest in having her free speech protected is at its maximum, and the balance weighs most heavily toward protection.

Even if it were easy to identify which spaces were public and which spaces were private, there is still a danger that a police officer would engage in unethical behavior in a private place. In *Jean v. Massachusetts State Police*,[113] for example, the unlawful behavior of police officers occurred entirely within the home of the citizen who was subjected to a warrantless search and arrest.[114] Under this rule, such a citizen whose nanny cam recorded the encounter would

111. *See supra* Part II.A.

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

113. 492 F.3d 24 (1st Cir. 2007).

114. *Id.* at 25.

still be criminally liable for recording what happened in his own home.

3. Secrecy requirement

The statutes that do not protect recordings that are made in secret but do protect recordings that are made openly are constitutionally problematic. The requirement of secrecy is an unworkable, arbitrary delineation. The different outcome in *Glik*[115] versus *Hyde*[116] has no logical constitutional explanation. Both Glik and Hyde attempted to record abusive conduct by police officers, a matter of public importance. The privacy interests held by the police at the time were both negligible because they were acting in a public space and were exposing themselves "to the 'plain view' of outsiders" and had exhibited "no intention to keep [their conduct] to [themselves]."[117] The fact that Simon Glik carried his recording device openly[118] and Michael Hyde activated his hand-held tape recorder "unbeknownst to the officers"[119] has no bearing on either the *Katz* analysis of whether the officers had a reasonable expectation of privacy, or the *Bartnicki* and *Jean* analysis of whether the information was important enough to the public discourse to override a reasonable expectation of privacy.

These secrecy statutes are the most constitutionally problematic because they have a demonstrable propensity to arbitrarily deprive some citizen recorders of their First Amendment rights and not others. Additionally, because the statutes do not include any expectation of privacy requirement, it is difficult to argue that the purpose of the statute is to protect the privacy of the law enforcement officers. The only consideration that matters for the purpose of these statutes is whether the recording is surreptitious or open, ignoring both the First Amendment and Fourth Amendment concerns. This inevitably deprives civilians like Michael Hyde of their First Amendment rights at the cost of overprotecting the governmental interest in police officers. Here, the statute fails the requirements of a conduct restriction that burdens free speech, because it is not "narrowly

115. *Glik*, 655 F.3d 78.

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

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

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

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

tailored" to serve the governmental interest and restricts much more speech than is necessary to keep police officers safe.[120]

4. Prohibiting all recording regardless of privacy or secrecy

The statutory scheme in Illinois, which restricts all recordings regardless of secrecy or privacy, has many of the same constitutional problems as the Massachusetts statutory scheme. Illinois has made this extreme prohibition of all recordings despite the unnecessarily high cost to the freedom of speech. Some argue that protecting privacy to such a degree is necessary to protect privacy rights, including Judge Richard Posner of the Seventh Circuit: "If you permit the audio recordings, they'll [sic] be a lot more eavesdropping. . . . There's going to be a lot of this snooping around by reporters and bloggers. . . . Yes, it's a bad thing. There is such a thing as privacy."[121] The major constitutional problem with this approach is that it protects privacy at all costs even where the Supreme Court has clearly articulated that privacy considerations must give way, for example, where they are "balanced against the interest in publishing matters of public importance."[122]

This statute was challenged by the American Civil Liberties Union of Illinois in 2012.[123] The ACLU wished to begin a "police accountability program," in which it would make audiovisual recordings of police officers who were in public places and speaking at a

120. Potts v. City of Lafayette, 121 F.3d 1106, 1111 (1997) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

121. Natasha Korecki, *Judge Casts Doubt on ACLU Challenge to Law Forbidding Audio Recording of Cops*, CHI. SUN-TIMES (Sept. 13, 2011), http://www.suntimes.com/news/crime/7639298-418/judge-casts-doubt-on-aclu-challenge-to-law-forbidding-audio-recording-of-cops.html. When this statute was later challenged in the Seventh Circuit, Judge Posner again voiced his concern for the privacy of officers:

> Privacy is a social value. And so, of course, is public safety . . . [A]n officer may freeze if he sees a journalist recording a conversation between the officer and a crime suspect, crime victim, or dissatisfied member of the public. He may be concerned when any stranger moves into earshot, or when he sees a recording device (even a cell phone, for modern cell phones are digital audio recorders) in the stranger's hand. To distract police during tense encounters with citizens endangers public safety and undermines effective law enforcement.

ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012) (Posner, J., dissenting), *cert. denied*, 153 S. Ct. 657, No. 12-318, 2012 WL 4050487 (Nov. 26, 2012).

122. Bartnicki v. Vopper, 532 U.S. 514, 534 (2001).

123. ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012) *cert. denied*, 153 S. Ct. 657, No. 12-318, 2012 WL 4050487 (Nov. 26, 2012).

volume audible to bystanders.[124] The ACLU sued for declaratory and injunctive relief that would prohibit the state from enforcing the statute against them.[125] The Seventh Circuit unequivocally held that "[a]udio recording is entitled to First Amendment protection," and that the First Amendment interests at stake were "quite strong."[126] The court determined that the *O'Brien* standard applied, and required that the "burden on First Amendment rights must not be greater than necessary to further the important governmental interest at stake."[127] The Illinois statute failed this test. The state's interest in protecting the privacy of the officers were weak, because the recordings would have been of public conversations where the officers had no reasonable expectation of privacy,[128] and the statute burdened "far more" speech than necessary to protect legitimate privacy interests.[129]

The Illinois statute flatly bans all recordings that are made without total consent of all participants. This burdens a large amount of protected speech without providing ample alternative methods of communication. In such circumstances, the Supreme Court has considered the constitutional calculus and determined that free speech that facilitates "participation in public affairs" is worth at least some "attendant loss of privacy."[130]

5. Blanket rule that police may never have an expectation of privacy when acting in their official capacity[131]

Although this rule gets closest to the benefits that come from a rebuttable presumption, it reaches too far and leaves no room for more extreme cases. There may be situations where police officers are acting within their official duty in technical terms, but the circumstances clearly show that their expectation of privacy was reasonable and the cost of a citizen recording them was simply too high.

124. *Id.* at 588.
125. *Id.*
126. *Id.* at 597.
127. *Id.* at 605.
128. *Id.*at 605–06.
129. *Id.* at 586.
130. *Id.*
131. Alderman, *supra* note 4, at 489.

Situations such as these will be discussed later in the section about possible rebuttable situations.[132]

B. Benefits of a Rebuttable Presumption

A strong presumption in favor of the citizen in police officer recordings will effectively tip the balance of power in favor of those that are more vulnerable. Situations in which the police interact with civilians are ones in which power is skewed heavily in favor of the police officer, resulting in a significant danger for abusive behavior.[133] This power balance tips even further in the direction of the law enforcement officer in the context of a traffic stop, the situation in which most citizens encounter the police.[134] The police officer in this situation has a very large amount of discretion,[135] and citizens may either be unaware of their rights or unintentionally give up some of their rights by granting the officer permission to search their car.[136] There is little to no oversight to "restrict[] these police powers from being utilized as a pretext for criminal investigation, as a

132. *See infra* Part III.C.

133. *See* Hampton, *supra* note 57, at 1559 ("Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties." (quoting Glik v. Cunniffe, 655 F.3d 78, 79–80 (1st Cir. 2011)) (internal quotation marks omitted)); David T. McTaggart, Note, *Reciprocity on the Streets: Reflections on the Fourth Amendment and the Duty to Cooperate with the Police*, 76 N.Y.U. L. REV. 1233, 1241–1242 (2001) ("There is always a risk that [officers] might make impassioned decisions in the heat of the moment that might prove 'unreasonable' in retrospect. When an overzealous police officer does not need to overcome procedural requirements before intruding upon an individual's liberty, the risk that he might abuse his authority becomes very real."); Mishra, *supra* note 104.

134. Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 429 (2003) (estimating that "there are over one hundred million traffic stops each year in the United States").

135. For example:

> Once a motorist is lawfully stopped, police, without any suspicion beyond the initial traffic offense, may order a driver and passenger from the vehicle and request consent to search the vehicle. Consent is virtually always given, and the scope of the search justified by the consent is limited only by what the police are looking for, which is almost always drugs. Therefore the police can search anywhere once consent is obtained. In addition, police are not required to inform motorists that they can refuse consent. . . . They may also issue a summons, arrest the motorist, give a written or verbal warning, or do nothing at all.

Id. at 431–32.

136. *See id.* at 431.

means of retaliating against an uncooperative motorist, or simply selectively enforcing the law[.]"[137]

This presumption also increases the chances that citizens will create evidentiary records of their encounters that are beneficial to both police and citizens. When a constitutional violation has actually occurred, the evidentiary record is very helpful to citizens bringing suit under § 1983, as such suits often turn on whether the jury believes the plaintiff or the officer.[138] It would also help to insulate the majority of officers who perform their jobs lawfully by supplying evidentiary material to defend against accusations of misconduct. Wherever there is a factual dispute as to the events that took place during an interaction with a police officer and a citizen, a rule that incentivizes the creation of more evidentiary records will be beneficial to all parties involved. Police departments themselves have been increasingly using cameras to record their interactions with the public in order to shield themselves from false accusations of misconduct.[139]

The most important advantage this rule has when compared to other proposed solutions is that it provides the greatest amount of clarity to the citizen. If the bar for an enforcement officer to show a reasonable expectation of privacy is high, it is much safer for the citizen to take the risk to record an encounter with the police. Additionally, if the police know that the wiretapping law can only be used to arrest citizens in truly exceptional circumstances, they will be less likely to risk arresting someone who is simply annoying them under the pretext of arresting them for violating the recording law. Additionally, clarity in the law is helpful not only for enforcement officers and citizens when they are making decisions, but it is also invaluable for purposes of litigating a § 1983 claim. If a citizen is arrested under a wiretapping law for recording a police officer, it will be much

137. *Id.* at 433.

138. Mishra, *supra* note 104, at 1554 ("When plaintiffs do bring § 1983 actions, they face significant evidentiary hurdles. Civil juries tend to trust police officers' testimony over suspected criminals' testimony. Where courts permit citizen recordings to be introduced as evidence, the recordings powerfully rebut jury bias favoring police credibility.").

139. *See* David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH. L. REV. 357, 360–364 (2010); Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1007 (2009) (describing the benefits that flow to both civilians and law enforcement officers when recordings are more available).

easier for that civilian to succeed in a claim for damages under § 1983. This will provide an incentive for police officers who wish to avoid liability by only arresting citizens in truly exceptional circumstances. Although *Glik v. Cunniffe*[140] established that the right to record police officers is clearly established in the First Circuit, other circuits see the right as being less clearly established for purposes of § 1983 claims.[141] If the states were to amend their statutes to include this rebuttable presumption, the law would be much more likely to be "clearly established" in all of the circuit courts. Uniformity in interpreting such an important constitutional principle is desirable so that citizens can be sure of their rights. Clarity would also benefit the police in § 1983 suits, because an officer will not pursue lengthy and costly litigation to defend a § 1983 claim unless the circumstances were exceptional enough to show that a reasonable officer in his position would not have known that the action was a constitutional violation.[142]

C. Possible Rebuttable Situations

Because of the impossibility of foreseeing all possible situations where a citizen may record a police officer while the officer is in the course of his public business, a safety valve is necessary for a strong rule to be effective and not produce absurd results. Although the bar for rebutting the presumption should be quite high, it is still possible that there will be unusual cases where the police officer can successfully argue that he enjoyed a reasonable expectation of privacy.

One such situation may be where a police officer was acting undercover and encountered a citizen who then recorded the encounter. The citizen's free speech rights are weak, because the citizen would likely not know that the person they recorded was a police officer and will have the same expectations about recording them as they would when recording any other citizen. The governmental interest in the privacy of the law enforcement officer is significant, because it is es-

140. 655 F.3d 78 (1st Cir. 2011).

141. Kelly v. Borough of Carlisle, 622 F.3d 248, 258, 262 (3d Cir. 2010) (stating "it was . . . clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects," but "there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment").

142. *See id.* at 255.

sential to the ability of the police officer to do his or her job effectively. In such a situation, the officer's privacy is linked to his safety on the job as well as the safety of the community he is working to protect.

The officer's safety should be a consideration in determining whether there was a reasonable expectation of privacy only if the loss of privacy would cause the loss in safety. This would mean that there is a strong governmental interest in protecting the privacy of the officer in order to keep him safe. A situation where an officer is working undercover may be one of these situations. However, the mere fact that a situation is dangerous is not justification for arresting a citizen with a recorder under a wiretapping statute. Some courts have suggested that where police officers are in a dangerous situation, they can make such arrests in order to control the situation. For example, in *Hornberger v. American Broadcasting Cos.*, the court considered whether the police officers had reasonable concern for their safety after the suspect in a traffic stop said that he disliked cops.[143] Although this may have made the law enforcement officers feel less safe about the situation, the fact that the encounter was being recorded without their knowledge would not have changed the safety of the situation. This kind of situation should not be used to tip the scales in favor of rebutting the presumption and arresting the suspect because he was recording them. It was the language of the suspect that may have created a dangerous situation. The recording had no bearing on whether the situation was dangerous or not.

Other possible circumstances where police officers may enjoy a reasonable expectation of privacy while engaging in public business are situations where officers must discuss confidential information with a civilian, discuss a case that has not been released to the public, or discuss a plan to apprehend a suspect. These are the types of conversations in which there is a strong governmental interest in maintaining confidentiality and privacy, even though the police officers are engaged in public business.

Finally, there may be situations where police officers are technically doing public business, but their actions are of the kind where they would not anticipate interacting with anyone in the public. These include meetings with other police officers, superiors, or representatives from other agencies. If a citizen happens to become a party to one of these conversations, the context of the conversation

143. 799 A.2d 566, 576 (N.J. Super. Ct. App. Div. 2002).

should indicate that this is a situation where the police have an expectation that they will not be recorded and that expectation is justifiable.

In summary, situations where the presumption can be rebutted are rare. This rarity is in the best interest of the public so that citizens can be confident about their rights, but the ability of a police officer to rebut the presumption is important to allow for unforeseen or extraordinary events where it is clear that the officer had a reasonable expectation of privacy.

V. CONCLUSION

Recording statutes present a difficult problem where two important sets of rights will inevitably come into conflict. When making the judgment about which right should be protected at the expense of the other, we should prefer the right that is most central to the workings of a free democracy. Unless the public has the opportunity to observe and disseminate information about their government officials, we will lose an important checking power to keep police officers and their superiors from abusing their power. Without that right, the public would continue to be vulnerable to all of the unethical and abusive conduct perpetrated by law enforcement that has been caught on tape throughout the years. The right must be preserved even at the expense of the rights of the government officials whose privacy may be infringed on. However, where infringing on those rights is not necessary to preserving a full and robust public dialogue, privacy rights should be protected as vigorously as speech rights. When legislatures strike a careful balance, they can avoid many rules that are over- or under-inclusive and secure as many rights for as many people as possible.

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