KEEP RECORDING: WHY ON-DUTY POLICE OFFICERS DO NOT HAVE A PROTECTED EXPECTATION OF PRIVACY UNDER MARYLAND'S STATE WIRETAP ACT

Carly Humphrey[*]

INTRODUCTION

While riding his motorcycle on Interstate 95 near Baltimore, Anthony Graber popped a few wheelies and drove well above the speed limit.[1] An unmarked vehicle cut off Mr. Graber when he slowed down at an exit, and a man wearing jeans and a fleece jacket hopped out of the vehicle with his gun drawn.[2] The armed man shouted for Mr. Graber to get off his motorcycle, and when Mr. Graber complied, the armed man identified himself as a state police officer.[3] The officer issued a speeding ticket to Mr. Graber for driving 80 mph in a 65 mph area, and Mr. Graber proceeded on his way.[4]

Little did he know, Mr. Graber was in for much more than a speeding ticket. Mr. Graber's helmet contained a mounted camera that he used to record his motorcycle rides.[5] The camera recorded the beginning of the traffic stop, capturing visual footage of the police officer and the officer's voice.[6] About a week after the traffic stop, Mr. Graber posted the video on YouTube.[7] Six state troopers raided Mr. Graber's home a few weeks later.[8] Acting with a search warrant, the troopers seized Mr. Graber's camera equipment and computers,[9] and prosecutors charged him with violating Maryland's State Wiretap Act ("Maryland Wiretap Act" or "the Act").[10]

---

[*] George Mason University School of Law, J.D. Candidate, May 2012; Associate Research Editor, GEORGE MASON LAW REVIEW, 2011-2012; University of Virginia, B.A., *With Distinction*, Foreign Affairs and Sociology, May 2007. I would like to thank Mitchell Bashur and James Kim for all of their thoughtful comments, and my family for their love and support.

1 David Rittgers, *Wiretap Law Needs Update*, BALT. SUN, June 1, 2010, at 13.

2 nikotyc, *Motorcycle Traffic Violation—Cop Pulls Out Gun*, YOUTUBE (Mar. 10, 2010), http://www.youtube.com/watch?v=BHjjF55M8JQ&feature=related; *see also* Peter Hermann, *Recording of Trooper Nets Charges*, BALT. SUN, May 9, 2010, at 6; Annys Shin, *From YouTube to Your Local Court*, WASH. POST, June 16, 2010, at A1.

3 nikotyc, *supra* note 2; *see also* Shin, *supra* note 2, at A1.

4 Hermann, *supra* note 2, at 6.

5 nikotyc, *supra* note 2; *see also* Shin, *supra* note 2, at A1.

6 nikotyc, *supra* note 2.

7 *Id.*; *see also* Shin, *supra* note 2, at A1.

8 Rittgers, *supra* note 1, at 13; Shin, *supra* note 2, at A1.

9 Rittgers, *supra* note 1.

10 Maryland v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *1 (Cir. Ct. Harford Cnty., Md. Sept. 27, 2010); Rittgers, *supra* note 1, at 13. The Harford County Grand Jury returned an

Mr. Graber's case and other incidents in which law enforcement threatened to prosecute citizens who recorded police officers[11] ignited a debate about whether the Maryland Wiretap Act protects on-duty police officers[12] from unconsented recording.[13] The Maryland appellate courts have yet to speak on the issue.[14] Mr. Graber's case illustrates the clash between advancing technology and privacy expectations, highlighting the need to clarify the First Amendment's protection of citizens' rights to actively record and disseminate information.[15]

Other states with similar wiretap statutes have prosecuted citizens for recording police officers.[16] At least one court, the Oregon Court of Appeals,

---

indictment charging Mr. Graber with "unlawful interception of an oral communication" in violation of Section 10-402(a)(1) of the Maryland Wiretap Act, "unlawful disclosure of an intercepted oral communication" in violation of Section 10-402(a)(2), and "unlawful possession of a device primarily useful for the purpose of the surreptitious interception of oral communications" in violation of Section 10-403(a). *Id.*; *see also* Shin, *supra* note 2, at A1.

11 One video posted on YouTube from the Preakness racehorse event shows a police officer on top of a girl on the ground, as various other police officers scramble to help the officer. bluekrab08, *Preakness 2010 Excessive Force*, YOUTUBE (May 17, 2010), http://www.youtube.com/watch?v=nWF3Ddr7vdc. The girl appears to be under control and bleeding from the head. *Id.* The person videotaping the scene asked a police officer if the violence towards the girl was really necessary. *Id.* The officer replies, "Do me a favor and turn that off. It's illegal to videotape anybody's voice or anything else. It's against the law of the state of Maryland." *Id.*; *see also* Peter Hermann, *Can You Record an Officer on the Job?*, BALT. SUN, May 21, 2010, at 6.

12 This Comment focuses on on-duty police officers, but in the Anthony Graber case, the trooper who actually pulled over Mr. Graber was not on-duty. Regardless, the trooper in Mr. Graber's case was performing official police duties when he pulled over Mr. Graber. *See* Hermann, *supra* note 2, at 6.

13 *See* Shin, *supra* note 2, at A1.

14 The Circuit Court judge on Mr. Graber's case, Judge Emory A. Plitt Jr., issued his opinion on September 27, 2010, and threw out the counts of the grand jury indictment against Mr. Graber relating to his videotaping of the state trooper. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *35-36. Judge Plitt found "that the recorded audio exchange between the Defendant and the Troopers was not a private conversation as intended by the statute." *Id.* at *7. Judge Plitt also noted that Maryland's appellate courts have yet to rule on this issue. *Id.* at *15 ("Our appellate courts . . . have not yet construed the Maryland act as it may apply to a conversation between a police officer and an individual during the course of an official police action involving the individual.").

15 The advancement in technology has diminished individual privacy. *See, e.g.*, James A. Pautler, Note, *You Know More Than You Think:* State v. Townsend, *Imputed Knowledge, and Implied Consent Under the Washington Privacy Act*, 28 SEATTLE U. L. REV. 209, 213-14 (2004). Only 150 years ago, the greatest privacy concern in conversation involved traditional eavesdropping, or listening in on a conversation with one's unaided ear. *See id.* Advancing technology has completely changed the way that people communicate, giving rise to various ways that people can intercept communications, from hacking computers to tapping cell phones. *See id.*

16 *See, e.g.*, People v. Beardsley, 503 N.E.2d 346, 348 (Ill. 1986); State v. Flora, 845 P.2d 1355, 1356 (Wash. Ct. App. 1992); *see also* Matt Miller, *He's Cleared in Police Taping*, PATRIOT-NEWS (Pa.), June 21, 2007, at A1; Andrew Wolfe, *Man Charged After Videotaping Police*, TELEGRAPH (N.H.), June 29, 2006, at 1; *Sarasotan Charged with Taping Police*, SARASOTA HERALD-TRIB. (Fla.), Sept. 1, 2000, at 4B; Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABC NEWS

convicted a citizen for the unconsented recording of a police officer.[17] Although few such prosecutions have resulted in convictions, the prosecutions alone have a chilling effect on citizens' exercise of their First Amendment right to record on-duty police officers.[18]

This Comment examines prosecutions under the Maryland Wiretap Act of citizens videotaping on-duty police officers. It argues that on-duty police officers do not have a reasonable expectation of privacy when performing their official duties. Further, prosecuting citizens who record on-duty police officers raises important First Amendment questions. Part I explains the development and legislative intent of the Maryland Wiretap Act, including the Act's two-party consent requirement. It also highlights the differences between the Maryland Wiretap Act and its federal counterpart. Part I discusses the reasonable expectation of privacy analysis as the test for applying the Maryland Wiretap Act. Through review of how courts and the legislature apply the reasonable expectation of privacy test, Part II analyzes what constitutes a private conversation under the Maryland Wiretap Act. Part II demonstrates that a conversation between a police officer and a citizen pulled over during a traffic stop is not a private conversation, and therefore, the Maryland Wiretap Act does not apply to citizens' recording of such traffic stops. Further, even if Maryland courts find that the Maryland Wiretap Act applies to citizen recording of on-duty police officers, such prosecutions would likely face a First Amendment challenge. Part III discusses citizen journalism and argues that the First Amendment protects this new-age type of press. Therefore, Part III also explains why the use of the Maryland Wiretap Act to prosecute citizens who record audio of on-duty police officers is unconstitutional.[19]

(July 19, 2010), http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076&page=1.

17 State v. Bichsel, 790 P.2d 1142, 1142 (Or. Ct. App. 1990). In *Bichsel*, the defendant recorded a conversation with a police officer after the police officer stopped the defendant in an alley late at night. *Id.* at 1143. The Oregon state wiretap statute at issue in *Bichsel* required that all parties to the conversation be "specifically informed" of the recording. *Id.* at 1144-45 (internal quotation marks omitted). The Oregon court held that because the defendant did not inform the police officer that she was recording their conversation, she violated the state wiretap statute. *Id.* at 1145.

18 *See* Adam Cohen, *Should Videotaping the Police Really Be a Crime?*, TIME (Aug. 4, 2010), http://www.time.com/time/nation/article/0,8599,2008566,00.html ("Even if these cases do not hold up in court, the police can do a lot of damage just by threatening to arrest and prosecute people.").

19 Although Mr. Graber argued in his case that the Maryland Wiretap Act on its face is unconstitutional because it violates the First Amendment, the court chose not to address constitutionality. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *6-7. The court highlighted that "[w]hen a matter can be decided on alternative grounds without reaching constitutionality, courts should do so." *Id.* at *7.

I. BACKGROUND

A. *Maryland Wiretap Act*

Traditionally recognized as intercepting voice over a telephone,[20] types of communication that qualify as wiretapping have broadened with growing access to enhanced technologies.[21] In the age of video recorders and cell phones, wiretapping has been described as "the use of a device to intercept an electric or electronic communication sent over a wire."[22] With the invention of the telegraph and later the telephone, state legislatures and the federal government recognized the invasion of privacy made possible by such technology.[23]

The Maryland Wiretap Act applies to intercepting communications and is codified as Annotated Code of Maryland, Courts & Judicial Proceedings, Sections 10-401 *et seq.* The relevant subsections of the Act provide:

> (a) Except as otherwise specifically provided in this subtitle it is unlawful for any person to:
>
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (2) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or
>
> (3) Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.[24]

---

20 WHITFIELD DIFFIE & SUSAN LANDAU, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION 151 (2d prtg. 1998).

21 *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 840 (2004).

22 *Id.*

23 *See* EDWARD V. LONG, THE INTRUDERS: THE INVASION OF PRIVACY BY GOVERNMENT AND INDUSTRY 36 (5th prtg. 1967) ("And then came electricity! Its uses, which have simplified so much of life for so many, have opened up a whole empire of enterprise for the invader of individual privacy. . . . In 1837, Samuel F. B. Morse invented the telegraph, and no sooner did it become operational than the wiretapper was born. California found it necessary to pass a law against wiretapping in 1862, and two years later one of the pioneer tappers was arrested under the statute."); *see also* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 10 (1995) ("[T]echnology was the catalyst for public concern about privacy."). Some states, such as California, New York, and Illinois banned certain wiretapping as early as 1895; other states followed suit, with more than half of all states enacting criminal bans on wiretapping by 1928. Kerr, *supra* note 21, at 841. The federal government placed restrictions on wiretapping in 1918. *See* 40 Stat. 1017, 1017-18 (1918).

24 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a) (West 2011).

As Mr. Graber's case demonstrates, many citizen encounters with on-duty police officers involve in-person conversations, and therefore, the focus of this Comment is on how the Act treats oral communications.[25] The Act defines oral communication as "any conversation or words spoken to or by any person in *private* conversation."[26] As the aforementioned statutory language shows, the interception, disclosure, or use of oral communication one knows or has reason to know has been intercepted is unlawful.[27] A violator "is guilty of a felony and is subject to imprisonment for not more than 5 years or a fine of not more than $10,000, or both."[28] However, the Act also provides that the interception, disclosure, or use of the intercepted oral communication is allowed "where all of the parties to the communication have given prior consent to the interception."[29] The requirement that all parties to a communication consent to its recording for the recording to be lawful is often referred to as the "two-party consent" rule.[30]

The Maryland Wiretap Act is based on its federal equivalent,[31] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Federal Wiretap Act" or "Title III").[32] Congress passed the Federal Wiretap Act after public dissatisfaction with the previous wiretapping protections,[33] incorporating groundbreaking Supreme Court decisions on wiretapping into the legislation.[34] With Title III, Congress aimed to protect an individual's constitutional right to privacy while providing practical limits for use of

---

25 *See* Rittgers, *supra* note 1, at 13.

26 CTS. & JUD. PROC. § 10-401(2)(i) (emphasis added).

27 *Id.* § 10-402(a).

28 *Id.* § 10-402(b).

29 *Id.* § 10-402(c)(3).

30 *See Recording Phone Calls and Conversations*, CITIZEN MEDIA L. PROJECT, http://www.citmedialaw.org/legal-guide/recording-phone-calls-and-conversations (last visited Feb. 29, 2012).

31 *See* State v. Bailey, 422 A.2d 1021, 1026 (Md. 1980); State v. Mayes, 399 A.2d 597, 599 & n.1 (Md. 1979).

32 18 U.S.C. §§ 2510-2522 (2006). For more information concerning the federal wiretap statute's history, see Kerr, *supra* note 21, at 839-57.

33 *See* Kerr, *supra* note 21, at 847 ("The 1960s brought rumblings of change in wiretapping law from all three branches of government. In 1967, President Johnson's Crime Commission described the existing wiretapping law as 'intolerable,' noting that it was both overprotective and underprotective. . . . Congress became increasingly dissatisfied with the 1934 Communications Act." (footnote omitted) (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967))).

34 In 1967, the Supreme Court reviewed the New York wiretapping statute in *Berger v. New York*. 388 U.S. 41, 43 (1967). In *Berger*, the Court laid out the constitutional requirements for a wiretap statute. *Id.* at 53-60. That same year, the Court also granted certiorari in *Katz v. United States*. *See* 386 U.S. 954, 954-55 (1967). In *Katz*, the Supreme Court abandoned the traditional view of Fourth Amendment protection as solely involving physical invasion of a tangible area and instead focused on individuals' reasonable expectations of privacy. Katz v. United States, 389 U.S. 347, 351 (1967). Title III conformed to the standards set out in *Berger* and *Katz*. *See* Kerr, *supra* note 21, at 850 n.303 (quoting 1968 U.S.C.C.A.N. 2112, 2113).

wiretapping by the government for law enforcement purposes.[35] One of Congress's main goals was to legalize certain eavesdropping by law enforcement to protect society as a whole, but only in limited circumstances.[36]

Interestingly, Title III did not provide a baseline of making wiretapping legal with specific restrictions.[37] Instead, Title III forbids wiretapping with certain exceptions. Such exceptions include allowing designated government officials to intercept wire and oral communications in certain cases, if the government abides by the specific procedural requirements.[38] Recognizing the potential abuse of power by the government,[39] Congress required law enforcement officers to obtain a warrant before installing a wiretap.[40] Title III detailed requirements for law enforcement to obtain such a warrant, including a written affidavit showing probable cause to believe the device targeted for a wiretap is being used to facilitate criminal activity.[41] Since enacting Title III, "statutory protections rather than constitutional [i.e., Fourth Amendment] protections provide the driving force behind wiretapping law."[42]

By enacting Title III, Congress sought to create a "uniform national standard" for the use of wiretaps, and therefore, included a provision that states must, at a minimum, comply with the standards of Title III.[43] States could, however, choose to enact their own state statutes that further limit wiretapping under state law.[44] In *State v. Siegel*,[45] the Maryland Court of

---

35 State v. Mayes, 399 A.2d 597, 599 (Md. 1979) (highlighting that by enacting Title III, Congress sought "to protect the privacy of the individual while at the same time aiding in the enforcement of the criminal laws"); *see also* EDITH J. LAPIDUS, EAVESDROPPING ON TRIAL 4 (1974) (describing the exception created by Title III that allowed the government to obtain information using wiretapping).

36 DIFFIE & LANDAU, *supra* note 20, at 170 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967)).

37 LAPIDUS, *supra* note 35, at 4.

38 *Id.*

39 The Framers recognized the potential abuse of power by the government, particularly law enforcement, and aimed to create protections for individuals against such abuse. *See* U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.; *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (highlighting that the Framers' purpose for enacting the Fourth Amendment was to "curb the exercise of discretionary authority by [law enforcement]").

40 18 U.S.C. § 2516 (2006); *see also* DIFFIE & LANDAU, *supra* note 20, at 171.

41 18 U.S.C. § 2518; *see also* DIFFIE & LANDAU, *supra* note 20, at 171.

42 Kerr, *supra* note 21, at 850 ("Fourth Amendment decisions regulating wiretapping remain notably rare. When confronted with claims that wiretapping violated the Fourth Amendment, courts typically fall back on the statutory protections of Title III and go no further.").

43 State v. Mayes, 399 A.2d 597, 599 (Md. 1979).

44 *Id.*

45 285 A.2d 671 (Md. Ct. Spec. App. 1971), *aff'd*, 292 A.2d 86 (Md. 1972).

Special Appeals highlighted that states are free to enact their own wiretap statutes, and state statutes can be stricter than the federal equivalent.[46] The court also pointed out that states may not adopt a wiretap statute less restrictive than the federal equivalent.[47]

Finding state-specific wiretap laws necessary, forty-nine states enacted state wiretapping statutes.[48] The Maryland legislature enacted the Maryland Wiretap Act in 1973.[49] The Maryland Wiretap Act, like its federal counterpart, does not mention video surveillance, but only wire and oral communications.[50] Maryland courts have also held that the Maryland Wiretap Act does not apply to the visual recording of images, but instead restricts the recording of audio,[51] although most video recording devices are equipped with both audio and visual recording capabilities.[52] Therefore, if Mr. Graber recorded only the visual images of the traffic stop on the video and did not record any audio, he could not have been prosecuted for violating the Maryland Wiretap Act. If Mr. Graber had only posted the visual portion of the traffic stop video onto YouTube, but originally recorded the audio portion of the traffic stop as well, Mr. Graber could have still been charged with intercepting the oral communication, even though he could not be charged with disclosure.[53]

B. *What Is a Two-Party Consent State?*

States that require all parties to consent to a recording are often referred to as "two-party consent" states.[54] While the majority of states follow

---

46 *Id.* at 680-81 (noting that states "may make the requirements [of their wiretap statutes] more restrictive but not more liberal").

47 *Id.* at 681.

48 Vermont is the only state without a state wiretapping statute. Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 965 n.58 (2005).

49 *See* Letter from Robert N. McDonald, Chief Counsel, Opinions & Advice, Office of Md. Att'y Gen., to Samuel I. Rosenberg, Md. House of Delegates 2 (July 7, 2010), *available at* http://www.oag.state.md.us/Topics/WIRETAP_ACT_ROSENBERG.pdf.

50 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (West 2011); *see also* Ricks v. State, 537 A.2d 612, 614 (Md. 1988).

51 *See, e.g.*, *Ricks*, 537 A.2d at 618 ("[T]he legality of the video surveillance . . . was not directly controlled by the provisions of the Maryland Act, which regulates only the interception of oral and wire communications.").

52 *See* Harvey Silvergate & James F. Tierney, *Echoes of Rodney King*, BOS. PHX., Feb. 22, 2008, at 16 (highlighting that most cell phones are now equipped with some type of audio-recording capability).

53 *See* Rittgers, *supra* note 1, at 13.

54 *See Recording Phone Calls and Conversations*, *supra* note 30 (internal quotation marks omitted).

Title III's one-party consent rule, eleven other states adopted a two-party consent wiretap statute similar to the Maryland Wiretap Act.[55] The other states with a state wiretap statute and a two-party consent rule include California, Connecticut, Florida, Illinois, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.[56] Whereas the Federal Wiretap Statute requires that one party consent to the recording, the Maryland Wiretap Act requires that all parties consent to any recording[57] and is, therefore, more restrictive.[58] Title III provides that a party to a conversation could be unaware that the conversation is being recorded, so long as one party consents to the recording—even if the consenter was the person actually recording.[59] Thus, in Mr. Graber's case, he could legally record and post the video of his traffic stop on YouTube in most states because he consented to the recording. In contrast, the Maryland statute provides that it is lawful "for a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication and where *all* of the parties to the communication have given prior consent to the interception."[60]

---

55 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, 982-83 (2009).

56 *Recording Phone Calls and Conversations*, *supra* note 30.

57 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2011); *see also* Wiretap & Elec. Surveillance, 85 Md. Op. Att'y Gen. 225, 230 (2000), *available at* http://www.oag.state.md.us/Opinions/2000/85oag225.pdf. The Maryland courts have yet to speak about whether citizens recording police officers in plain view satisfies the all-party consent requirement. There are cases, however, which state that the consent of parties is not the threshold under the statute, but instead focus the analysis on whether the parties had knowledge of any recording. In *Jones v. Gaydula*, No. 85-1859, 1989 WL 156343 (E.D. Pa. Dec. 22, 1989), the court held that police officers who repeatedly asked an individual under arrest to stop recording the interview did not have a reasonable expectation of privacy. 1989 WL 156343, at *3. The court reasoned that the police officers could not have had an actual expectation of privacy because the officers knew that the defendant was recording the arrest and did not take measures to ensure that the recording stopped. *Id.* For analysis of such plain view arguments as they relate to another two-party consent state, Massachusetts, see generally Skehill, *supra* note 55.

58 Miles v. State, 781 A.2d 787, 798 (Md. 2001) ("The Maryland Wiretapping Act provides broader protection than Title III in that Maryland requires consent from all parties before a conversation may be taped or otherwise intercepted in the absence of a court order authorizing law enforcement officials to conduct a wiretap."). For a detailed discussion of all of the differences between the Maryland Wiretap Act and the Federal Wiretap Act, see Richard P. Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law*, 8 U. BALT. L. REV. 183, 191-218 (1979).

59 18 U.S.C. § 2511(2)(d) (2006); Skehill, *supra* note 55, at 989-90. The Supreme Court held in *United States v. White*, a plurality opinion, that a one-party consent rule is constitutional. 401 U.S. 745, 752-54 (1971). In *White*, a government informant wore a recording device on his body during a conversation with the defendant, without the defendant's knowledge. *Id.* at 746-47. The Court reasoned that because an informant can testify in court about what he heard, the defendant assumed that risk and had no reasonable expectation of privacy in what he told the informant. *Id.* at 752-53.

60 CTS. & JUD. PROC. § 10-402(c)(3) (emphasis added). The Maryland Wiretap Act does permit investigations of some offenses to proceed with only one party's consent. *Id.* § 10-402(c)(2)(ii). The Maryland Wiretap Act specifically provides "for an investigative or law enforcement officer acting in a

The purpose of the two-party consent requirement in Maryland's Wiretap Act is to provide further privacy protection, beyond Title III, to Maryland citizens.[61] The Maryland Court of Appeals, Maryland's highest court, noted in *Schmerling v. Injured Workers' Insurance Fund*[62] that through enacting the Maryland Wiretap Act, "Maryland has professed a heightened interest in the privacy of its citizens."[63] Further, Maryland courts have emphasized that the purpose of the Maryland Wiretap Act is to protect the people of Maryland. The Act should not promote the privacy of government officials or provide the government with practical access to gather evidence through wiretapping.[64] The Maryland Court of Appeals explained that the Maryland Wiretap Act "guarantees to the people of Maryland, insofar as the state . . . is concerned, greater protection from surreptitious eavesdropping [than Title III provides]."[65]

One well-known example of Maryland's two-party consent approach is the prosecution of Linda Tripp under the Maryland Wiretap Act.[66] Linda Tripp was a resident of Columbia, Maryland, when she secretly recorded telephone conversations she had with former White House intern Monica Lewinsky. Lewinsky revealed to Tripp that she had multiple sexual encounters with President Bill Clinton.[67] Tripp later played the secret recordings to Newsweek and handed the tapes over to Independent Counsel in exchange for immunity from federal prosecution.[68] Maryland prosecutors charged Tripp under the Maryland Wiretap Act, but later dismissed the case because a judge ruled the primary evidence as inadmissible because of Tripp's federal immunity.[69] Regardless, the Tripp case highlights the difference be-

---

criminal investigation or any other person acting at the prior direction and under the supervision of . . . [such] officer to intercept a wire, oral, or electronic communication in order to provide evidence of the commission of" certain crimes. *Id.* Such crimes include murder, kidnapping, rape, a sexual offense in the first or second degree, and child abuse, among others. *Id.*

61 *See* Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 676 A.2d 65, 67 (Md. 1996) (stating that the Act "protects persons in Maryland"); Standiford v. Standiford, 598 A.2d 495, 498 (Md. Ct. Spec. App. 1991) ("One of the clear purposes of the Act is to prevent, in non-criminal situations, the unauthorized interception of conversations where one of the parties has a reasonable expectation of privacy.").

62 795 A.2d 715 (Md. 2002).

63 *Id.* at 725.

64 *See Standiford*, 598 A.2d at 499 ("The alterations that were made by the General Assembly before enacting the Maryland Act were obviously designed to afford the people of this State a greater protection than Congress provided in Title III.").

65 Wood v. State, 431 A.2d 93, 95 n.5 (Md. 1981) (quoting Gilbert, *supra* note 58, at 220-21) (internal quotation marks omitted).

66 *See* Saundra Torry & Raja Mishra, *Tripp Indicted on Charges of Wiretapping*, WASH. POST, July 31, 1999, at A1.

67 *Id.*

68 *Id.* at A11.

69 Robert L. Jackson, *No Criminal Prosecution in Md. Case Against Linda Tripp*, L.A. TIMES, May 25, 2000, at A5.

tween two-party consent states and the one-party consent approach. If Tripp had recorded the tapes in nearby Washington, D.C., or Virginia, she could not have been prosecuted under those wiretap statutes.[70]

The Maryland Wiretap Act carves out specific exceptions that pertain to law enforcement, such as when police officers can intercept oral communication.[71] The Act states that police officers can intercept oral communication when an officer "detain[s] a vehicle during a criminal investigation or for a traffic violation" and "is a party to the oral communication."[72] The police officer must identify himself as a police officer and "inform[] all other parties . . . of the interception at the beginning of the communication."[73]

The Maryland Wiretap Act creates an exception to the two-party consent requirement for police officers.[74] Some argue the exception requires a regular citizen recording a traffic stop in which he is a party to obtain the consent of *all* other parties, including police officers.[75] A police officer only

---

70 Torry & Mishra, *supra* note 66, at A11.

71 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(4)(i) (West 2011). The Maryland legislature originally added a provision explicitly permitting the interception of oral communications during a traffic stop in 1991. Wiretap & Elec. Surveillance, *supra* note 57, at 229. The Federal Wiretap Act has no similar provision making exceptions for law enforcement and traffic stops. *Id.* However, because the Federal Wiretap Act only requires one party to consent to the interception, a police officer recording a traffic stop would already be legal under the Federal Wiretap Act, because the officer consents to the recording. *Id.* at 229-30.

72 CTS. & JUD. PROC. § 10-402(c)(4)(i).

73 *Id.* The Maryland legislature also chose to make other exceptions in the Maryland Wiretap Act that only apply to government officials. For instance, the Act provides that it is lawful for government employees to intercept conversations that they are a party to if the conversation is "concerning an emergency." *Id.* § 10-402(c)(5). Further, the Act also allows "law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy." *Id.* § 10-402(c)(6)(i). In his 2000 advisory opinion, Maryland Attorney General Curran stated:

> Under the Police Department's procedures, as we understand them, the audio monitoring and recording equipment ordinarily records only the comments and oral notes of the officers inside the police car. The Police Department's policy permits the equipment to be used to monitor and record communications of other individuals in only two situations: (1) during a traffic stop; and (2) in other instances in the discretion of the officer with the consent of the individuals to be recorded.

Wiretap & Elec. Surveillance, *supra* note 57, at 228-29.

74 CTS. & JUD. PROC. § 10-402(c)(4)(i); *see also* Maryland v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *13 (Cir. Ct. Harford Cnty., Md. Sept. 27, 2010).

75 Some people, including the Harford County State's Attorney, Joseph Cassilly, who prosecuted Mr. Graber, argue that under the Maryland Wiretap Act citizens must obtain the consent of police in order to record a private conversation, even if the citizen is a party to the conversation and the conversation occurs during the official duties of the officer. *See* Radley Balko, *"Police Officers Don't Check Their Civil Rights at the Station House Door"*, REASON.COM (Aug. 9, 2010), http://reason.com/archives/2010/08/09/police-officers-dont-check-the. Others, however, argue that police have no expectation of privacy under the Maryland Wiretap Act. Indeed, the court held in Mr. Graber's case that on-duty police do not have "any reasonable expectation of privacy with regard to what is said between them in a traffic stop on a public highway." *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *17. However, because

has to tell the parties to the conversation that he is recording. There is no requirement that the police officer obtain consent of the other parties under the Act's exception.[76] In circumstances that do not qualify as a traffic stop as described in Section 10-402(c)(4)(i), police must obtain the consent of all parties to the conversation prior to any audio recording.[77]

C. *The Reasonable Expectation of Privacy Standard*

Another difference between the Maryland Wiretap Act and the Federal Wiretap Act is what constitutes an "oral communication."[78] The Federal Wiretap Act defines oral communication as what is "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[79] The Maryland Wiretap Act defines an oral communication as "any conversation or words spoken to or by any person in a *private* conversation."[80] Despite the textual differences in the definitions, courts use the reasonable expectation of privacy test to determine what constitutes oral communication.[81]

In 1967, well after the invention and common use of the telephone, the Supreme Court abandoned the traditional view of constitutional privacy protection as solely involving physical invasion of a tangible area.[82] Instead, the court focused on individuals' reasonable expectations of privacy.[83] In *Katz v. United States*,[84] federal agents placed a wire-tapping device on a public telephone booth to record a defendant's phone calls.[85] The Supreme Court held that the Fourth Amendment protects people from wrongful,

---

the Maryland appellate courts have yet to speak on the issue, and *Graber* only addressed traffic stops, the issue of whether citizens must obtain police consent to record on-duty police during their routine work continues to be debated.

76 CTS. & JUD. PROC. § 10-402(c)(4)(i); *see also Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *19.

77 CTS. & JUD. PROC. § 10-402(c)(3); *see also* Wiretap & Elec. Surveillance, *supra* note 57, at 231.

78 Gilbert, *supra* note 58, at 192.

79 18 U.S.C. § 2510(2) (2006).

80 CTS. & JUD. PROC. § 10-401(2)(i) (emphasis added). Retired Judge Richard Gilbert predicted that the Maryland definition of oral communication includes a "broader class of communications than that employed by the Congress" in the federal statute. Gilbert, *supra* note 58, at 192. Although Gilbert highlighted the textual differences in the definitions of "oral communication" in the Maryland and the Federal Wiretap statutes, in reality, the interpretations of oral communication have been similar because of the adoption of the reasonable expectation of privacy analysis. *See* United States v. Duncan, 598 F.2d 839, 849-53 (4th Cir. 1979); Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 676 A.2d 65, 71 (Md. 1996).

81 *See Duncan*, 598 F.2d at 853; *Fearnow*, 676 A.2d at 71-72.

82 *See generally* Katz v. United States, 389 U.S. 347 (1967).

83 *Id.* at 351 ("[T]he Fourth Amendment protects people, not places.").

84 389 U.S. 347 (1967).

85 *Id.* at 348.

physical invasion from the government, as well as from violations where no physical invasion occurred.[86] The Court reasoned that because the defendant went into the telephone booth, closed the door, and paid the fee to use the phone, he had a justifiable expectation of privacy of his communications inside the booth.[87] In his concurrence, Justice Harlan outlined a two-step reasonable expectation of privacy test for Fourth Amendment protection.[88] Justice Harlan explained that a person must show an actual expectation of privacy, and the expectation must be a reasonable one under an objective standard.[89] The Supreme Court has since applied the reasonable expectation of privacy test to various issues of privacy involving advancing technologies,[90] and *Katz* has "laid the groundwork for modern electronic surveillance law."[91]

The Federal Wiretap Act applies to verbal conversations only when a party to the communication has a reasonable expectation of privacy.[92] The Maryland Court of Appeals adopted the reasonable expectation of privacy test to analyze the extent of protections under the Maryland Wiretap Act.[93] Specifically, the two-step reasonable expectation of privacy test is the governing analysis in considering whether a communication qualifies as a protected private conversation under the Act.[94] "[W]hen an oral communication is intercepted, determining whether a violation of the [Maryland] Wiretap Act occurred hinges on a jury determination that at least one of the parties had a reasonable expectation of privacy."[95] Not only must at least one party to the conversation hold a subjective belief that the communication is private, but also the belief must also be one society recognizes as reasonable.[96]

II. ANALYSIS OF THE MARYLAND WIRETAP ACT APPLIED TO POLICE TRAFFIC STOPS

Case law from Maryland and other jurisdictions supports the conclusion that on-duty police officers do not have a reasonable expectation of privacy during a traffic stop. Therefore, a traffic stop is not a private conversation under the Maryland Wiretap Act.

---

86 *Id*. at 353.

87 *Id*. at 352.

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

89 *Id*.

90 Kerr, *supra* note 21, at 827-31.

91 Skehill, *supra* note 55, at 988.

92 *See* United States v. Duncan, 598 F.2d 839, 847 (4th Cir. 1979).

93 Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 676 A.2d 65, 71 (Md. 1996); *see also* Hawes v. Carberry, 653 A.2d 479, 482 (Md. Ct. Spec. App. 1995).

94 *See Fearnow*, 676 A.2d at 71.

95 *Id*.

96 *Id*.; *see also* Benford v. ABC, 554 F. Supp. 145, 154 (D. Md. 1982).

A. *Reasonable Expectation of Privacy During a Traffic Stop*

1. How Courts Apply the Reasonable Expectation of Privacy Test

The Maryland appellate courts have yet to address whether on-duty police officers have a reasonable expectation of privacy under the Maryland Wiretap Act. The courts' use of the reasonable expectation of privacy test supports the conclusion that on-duty police officers performing their official duties lack a reasonable expectation of privacy.[97] Courts in other jurisdictions have emphasized the difference between the privacy entitled to an off-duty police officer's personal information and the actions of a police officer while performing his official public duties.[98] Courts have found that police officers have no reasonable expectation of privacy in their actions while carrying out official duties or to information relating to official conduct.[99]

Maryland courts have held that there is no reasonable expectation of privacy in situations that take place in a public area and are viewable by third parties.[100] Likewise, if third parties can overhear the conversation of a traffic stop, then the parties to the traffic stop have no reasonable expectation of privacy.[101] "It is widely recognized that technologically unaided or unenhanced overhearing of statements does not constitute a search under

---

97 *See, e.g.*, Maryland v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *17 (Cir. Ct. Harford Cnty., Md. Sept. 27, 2010).

98 *See, e.g.*, Cowles Publ'g Co. v. State Patrol, 748 P.2d 597, 605 (Wash. 1988) (holding that internal investigation records are not protected from the state's open records law because a police officer's "actions while performing his public duties or improper off duty actions in public which bear upon his ability to perform his public office" are not a matter of "personal privacy" under tort law (second internal quotation marks omitted)).

99 *See* Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists, 927 P.2d 386, 407 (Haw. 1996) (holding that a police officer's personnel file that summarized his misconduct while performing his official duties must be available to the public because such performance of official duties is not personal information); Burton v. York Cnty. Sheriff's Dep't, 594 S.E.2d 888, 895-96 (S.C. Ct. App. 2004) (explaining that the public interest in obtaining information about the on-duty behavior of police officers far outweighs any privacy rights that police might have).

100 *See, e.g.*, Furman v. Sheppard, 744 A.2d 583, 586-87 (Md. Ct. Spec. App. 2000) (explaining that a member of a private yacht club had no reasonable expectation of privacy, even though the person who recorded the member trespassed to make the recording, because other members of the club could openly see the person recorded); McCray v. State, 581 A.2d 45, 48 (Md. Ct. Spec. App. 1990) (holding that police officers' videotaping of the defendant did not require a warrant because the videotaping occurred while defendant was walking on a public street); Fowler v. State, 558 A.2d 446, 450 n.2 (Md. Ct. Spec. App. 1989) ("Society does not consider the interior of an automobile parked in a public place to be a place where a person has a reasonable expectation of privacy.").

101 State v. Flora, 845 P.2d 1355, 1357-58 (Wash. Ct. App. 1992) (highlighting that one cannot have a reasonable expectation of privacy when their speech is within the earshot of a passerby).

the Fourth Amendment," and therefore, the reasonable expectation of privacy test would not apply to situations of overhearing.[102]

Physical boundaries and personal space are not determinative of whether one has a reasonable expectation of privacy.[103] In *Malpas v. State*,[104] a man in his own home was recorded without his knowledge by a neighbor during a phone altercation with his wife. The Court of Special Appeals of Maryland held that the man did not have a reasonable expectation of privacy.[105] Applying the *Katz* two-pronged test, the court reasoned that even if the man subjectively believed his conversation with his wife was private, he could not claim a reasonable expectation of privacy because he spoke loud enough for his neighbor to hear him.[106] "Statements in one apartment made in a tone of voice so loud as to be audible to persons in adjacent apartments are the functional equivalent of statements knowingly exposed to the public."[107]

Similarly, a police officer performing his duties in a public place during a traffic stop cannot claim he had a reasonable expectation of privacy because no one else was visible or physically present during the traffic stop.[108] While enclosed walls surround someone in her own home, a police officer during a traffic stop is on the side of a public road, visible and audible to those passing by.[109]

Most traffic stops occur on the side of a public roadway, where third parties can walk or drive by and hear the conversation between the police officer and citizen.[110] There is no reasonable expectation of privacy when a third party can hear the conversation, even if a third party does not actually hear it.[111] Many cases support that a traffic stop is not a private encounter,

---

102 Malpas v. State, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997); *see also* United States v. Mankani, 738 F.2d 538, 543 (2d Cir. 1984).

103 *See Mankani*, 738 F.2d at 542.

104 695 A.2d 588 (Md. Ct. Spec. App. 1997).

105 *Id.* at 596.

106 *Id.* at 595.

107 *Id.* at 596.

108 *Cf.* Kee v. City of Rowlett, 247 F.3d 206, 216 (5th Cir. 2001) (finding no reasonable expectation of privacy for communications that took place in an outdoor, publicly available space).

109 David Rocah, the attorney who represented Graber in *Maryland v. Graber*, however, "argues that a police officer stopping someone as part of his official duties has no expectation of privacy, regardless of whether it occurs on a deserted Maryland roadway or the crowded grounds of Pimlico." Hermann, *supra* note 11, at 6.

110 *See* James R. Parrish, *Motorcyclist Charged with Wiretapping Violations for Posting Youtube Video?*, VA. DWI BLOG (Aug. 20, 2010, 12:36 PM), http://www.virginiadwiblog.com/motorcyclist-charged-with-wiretapping-violations-for-posting-youtube-video-fairfax-reckless-driving-attorney (highlighting that police normally perform traffic stops on public roads).

111 *See* State v. Clark, 916 P.2d 384, 394 (Wash. 1996) (en banc).

and police officers cannot claim a reasonable expectation of privacy in such circumstances.[112]

In *State v. Clark*,[113] the Supreme Court of Washington held that a conversation between people on a street, "in plain view and *potentially* within sight or hearing of anyone who might have passed by" was not private.[114] In *Clark*, there was no evidence a third party heard the defendants' conversation, but because someone could hear the conversation due to its location, the court held that it was not private.[115] Therefore, when a traffic stop takes place on a public street, as most do,[116] a police officer cannot claim a reasonable expectation of privacy because a third party could hear the conversation between the police officer and the citizen at the traffic stop.[117] However, this analysis begs the question: what if the police officer is talking very low to the citizen during the traffic stop so no one else can hear? Does the officer then have a reasonable expectation of privacy?

Whispering or being in a remote area outside of earshot does not invoke a reasonable expectation of privacy.[118] In speaking with on-duty police officers, citizens are aware that what they say or do may be used against them in a court of law,[119] even though police need not inform them of their

---

112 *See, e.g.*, State v. Flora, 845 P.2d 1355, 1357 (Wash. Ct. App. 1992). In *Flora*, a defendant recorded his arrest and was later charged for violating the Washington State Wiretap Act, which requires the consent of all parties to a conversation. *Id.* at 1356. The defendant recorded his arrest, which occurred in front of his house, because he feared the police officers would use racial slurs toward him as they had previously done. *Id.* The Washington Court of Appeals held that the conversation during the arrest with the police officer did not constitute a private conversation because a public official performing an official duty within the earshot of a passerby did not have a reasonable expectation of privacy. *Id.* at 1357; *see also* Johnson v. Hawe, 388 F.3d 676, 683 (9th Cir. 2004); Alford v. Haner, 333 F.3d 972, 978 (9th Cir. 2003), *rev'd and remanded on other grounds sub nom.* Devenpeck v. Alford, 543 U.S. 146, 156 (2004); Tancredi v. Malfitano, 567 F. Supp. 2d 506, 512-13 (S.D.N.Y. 2008).

113 916 P.2d 384 (Wash. 1996) (en banc).

114 *Id.* at 394 (emphasis added).

115 *Id.* Washington state is also a two-party consent state, and although the Washington Wiretap statute at issue does not use the words "oral communication" like the Maryland Wiretap Act, the Washington statute uses the term "private communication." WASH. REV. CODE ANN. § 9.73.030(1)(a) (West 2011). Whether a conversation is "private" under the Washington Wiretap statute depends on the reasonable expectation of privacy of the parties. *See* Lewis v. State Dep't of Licensing, 139 P.3d 1078, 1083 (Wash. 2006) (en banc); *see also infra* note 139 and accompanying text (explaining factors that the Washington courts consider in deciding whether a conversation is protected under the Washington wiretap statute).

116 *See* Parrish, *supra* note 110.

117 *See* Wiggins v. State, 326 F. Supp. 2d 297, 312 (D.R.I. 2004) (holding that there is no violation of the state privacy statute when the incident "occurred on a public street in a place visible to the public").

118 *Cf.* Wiretap & Elec. Surveillance, *supra* note 57, at 234 n.8.

119 This point was well made by Maryland Attorney General Joseph Curran in his 2000 advisory opinion about the inadvertent recording of audio from a police cruiser. *See id.* at 233-34. Curran claimed that the recording would likely not violate the Maryland Wiretap Act and highlighted that a typical encounter between an on-duty police officer and a citizen likely does not qualify as "oral communica-

Miranda rights.[120] Although it is doubtful that all American citizens are aware of when police officers are required to read them their *Miranda* rights,[121] the statement and idea that "you have the right to remain silent, whatever you say or do can and will be used against you in a court of law" is commonplace in American society.[122] As the Supreme Court highlighted in *Dickerson v. United States*,[123] "the [*Miranda*] warnings have become part of our national culture."[124] Most people are familiar with the warnings and, at the very least, have heard them on television and in movies.[125]

Police officers are even more aware than citizens that the words of a conversation with a suspect can be used in the court of law. Many police departments require or at least recommend that police officers carry a card with the *Miranda* warning written on it.[126] For questioning to proceed, police officers are supposed to have the defendant complete a form stating his *Miranda* rights were read to him, he understands his *Miranda* rights, and he decided to waive his *Miranda* rights.[127] Because police officers are specifically trained about the *Miranda* warnings and taking statements from suspects,[128] police officers can hardly argue they are unaware that the conversa-

---

tion" under the Act. *Id.* He highlighted that citizens are often aware that "his or her statements . . . may be repeated as evidence in a courtroom." *Id.* at 234 n.8. Although traffic stops alone usually do not require the police officer to read the *Miranda* warning, what citizens say or do during the traffic stop may be admissible in court as evidence against them. *Cf.* Hicks v. State, 674 A.2d 55, 64 (Md. Ct. Spec. App. 1996) (holding that there is no reasonable expectation to privacy in videocassettes that have been made available to the public in a store).

120 *See* Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (holding that motorists pulled over in a traffic stop are not "in custody" and, thus, not entitled to be warned of their *Miranda* rights (internal quotation marks omitted)); *see also* Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 557 (2007) (supporting the premise that even if the details and purpose of the *Miranda* rights are not completely understood by suspects or defendants, the general idea that statements to police may be used in court is well-known).

121 Indeed, the *Miranda* Court addressed the issue of citizens perhaps not understanding the meaning of *Miranda* rights even when read to them. Miranda v. Arizona, 384 U.S. 436, 475 (1966). Therefore, the Court adopted requirements of voluntary, knowing, and intelligent waiver of *Miranda* rights. *Id.*

122 *See* Duke, *supra* note 120, at 551 ("*Miranda v. Arizona* is probably the most widely recognized court decision ever rendered." (footnote omitted)); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008) (referring to the *Miranda* warnings as "familiar" in American society); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 110 (1998) ("*Miranda v. Arizona* may be the United States Supreme Court's best-known decision." (footnote omitted)).

123 530 U.S. 428 (2000).

124 *Id.* at 443.

125 *See* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 142 & n.201 (2001) ("And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible." (quoting Brogan v. United States, 522 U.S. 398, 405 (1998) (internal quotation marks omitted))).

126 *See* GERALD M. CAPLAN, MODEL PROCEDURES FOR POLICE INTERROGATION 25 (1990).

127 *See id.* at 26.

128 *See generally id.*

tion between a police officer and suspect at a traffic stop could be admitted into evidence in court.

The state can use more than the suspect's words against him in court. Following an arrest or traffic ticket, officers complete paperwork, often describing any defendant statements.[129] Other people, including prosecutors, then review the police paperwork in deciding whether to prosecute a defendant.[130] A police officer and citizen cannot claim a reasonable expectation of privacy during a traffic stop, because their words can be shared with third parties, such as prosecutors, without the citizen's consent.[131]

Case law in other jurisdictions supports a finding that on-duty police officers do not have a reasonable expectation of privacy during traffic stops.[132] Various courts have decided that a citizen held in the back of a police car does not have a reasonable expectation of privacy of his or her statements while in the police car.[133] If a citizen in a police car lacks a reasonable expectation of privacy, then a police officer outside the car during a traffic stop lacks a reasonable expectation of privacy. Indeed, courts have held that police officers inside a police car with a third party do not have a reasonable expectation of privacy.[134]

In *Lewis v. State Department of Licensing*,[135] the Supreme Court of Washington examined whether police officers' conversations with citizens during traffic stops are private conversations. Like the Maryland Wiretap Act, the Washington State Wiretap Act requires the consent of both parties

---

129 This point is well made by the Washington Supreme Court in *Lewis v. State Department of Licensing*, 139 P.3d 1078, 1083 (Wash. 2006) (en banc). The court highlighted that it was non-persuasive for the driver citizens to argue that one "would expect the officers to keep their conversations secret, when the drivers would reasonably expect that the officers would file reports and potentially would testify at hearings about the incidents." *Id.*

130 *See* Freeman v. State, 857 A.2d 557, 588 (Md. Ct. Spec. App. 2004) (noting that police officers are responsible for completing paperwork that is essential with every arrest for later review by, in this case, the Commissioner).

131 *See* Wiretap & Elec. Surveillance, *supra* note 57, at 234 n.8.

132 *See* Letter from Robert N. McDonald to Samuel I. Rosenburg, *supra* note 49, at 8-10.

133 Wiretap & Elec. Surveillance, *supra* note 57, at 234 n.8; *see also* United States v. McKinnon, 985 F.2d 525, 528 (11th Cir. 1993).

134 *See, e.g.*, People v. Beardsley, 503 N.E.2d 346, 352 (Ill. 1986), *superseded by statute*, 720 ILL. COMP. STAT. 5/14–1(d) (2011). In *Beardsley*, the Illinois Supreme Court held that police officers in the front of a police car did not have a reasonable expectation of privacy. *Id.* Beardsley was a defendant in the back seat of the car who recorded the conversation of the officers in the front seat. *Id.* The court held that Beardsley did not violate the state wiretap statute, which required two-party consent, because the police could not argue that they were having a private conversation when there was a third party within earshot. *Id.* Illinois later amended its statute to "prohibit[] the recording of any conversation without the consent of all parties regardless of any party's expectation of privacy." Illinois v. Nunez, 756 N.E.2d 941, 952 (Ill. App. Ct. 2001) (alteration in original) (quoting *In re* Marriage of Almquist, 704 N.E.2d 68, 71 (Ill. App. Ct. 1998)) (internal quotation marks omitted).

135 139 P.3d 1078 (Wash. 2006) (en banc).

to the conversation and prohibits the recording of *private* conversations.[136] In *Lewis*, the citizens involved, all drivers charged with driving under the influence, opposed the admittance of police recordings from their traffic stops into court.[137] The Washington Court concluded that conversations between on-duty police officers and citizens during traffic stops are not private.[138]

In its analysis of whether police at traffic stops have a reasonable expectation of privacy, the Washington court identified three relevant factors, including the "(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party."[139] Under these factors, the court said that the traffic stop conversation between the officer and citizen was not a private conversation because it was essentially a "brief business conversation" that occurred in public.[140] Further, under the third factor, not only were there either third party officers or passengers involved, but the court highlighted that a driver could not reasonably expect that the officer would not file reports or testify about the conversation in court.[141]

2. Police Can Record Citizens During a Traffic Stop Without Their Consent

In 1991, the Maryland legislature carved out certain exceptions for law enforcement from the Maryland Wiretap Act.[142] Through statute, the legislature made it lawful for police officers to intercept oral communication during a traffic stop under various circumstances, including when the officer is a party to the communication.[143] The Act requires the law enforcement officer to notify the citizen involved in the traffic stop of the recording; the citizen's consent is not required.[144] Therefore, it follows that citizens should have the right to record police officers and should only have to notify the officer of such recording, not obtain officer consent. One motivation of the Federal and Maryland Wiretap Acts was "to balance the protection of an individual's privacy with the enforcement of criminal laws."[145] In carving out exceptions for on-duty police officers without allowing citizens

---

136 WASH. REV. CODE ANN. § 9.73.030(1)(b) (West 2011); *see also Lewis*, 139 P.3d at 1083.

137 *Lewis*, 139 P.3d at 1079.

138 *Id.* at 1084.

139 *Id.* at 1083.

140 *Id.*

141 *Id.*

142 *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(4) (West 2011).

143 *Id.* § 10-402(c)(4)(i)(2).

144 *See id.* § 10-402(c)(4)(i).

145 Miles v. State, 781 A.2d 787, 798 (Md. 2001).

similar rights to record, however, the Maryland legislature created an imbalance of power in which police are given a favored and protected status under the Maryland Wiretap Act.

Police officers in Maryland can use videotape to exonerate themselves after citizens file charges of misconduct against them.[146] Using both a strict interpretation of the Maryland Wiretap Act and the argument that police officers have a reasonable expectation of privacy, citizens cannot record on-duty police officers without the officers' consent, even if the recording is essential to their defense.[147] This dynamic raises serious public policy concerns. For one, if police officers can use videotape to exonerate themselves from charges of misconduct, then police officers who perform their duties without misconduct would encourage and welcome citizens to videotape them.[148] Instead, some police officers discourage citizens from recording them, even ordering citizens to stop recording, claiming such recordings are illegal in Maryland.[149]

One may argue that police officers' right to record traffic stops under the Maryland Wiretap Act should not extend to citizens because police officers have a heightened duty to protect society that citizens in general do not have.[150] Law enforcement needs certain access to eavesdropping mechanisms to gather evidence of crime, including traffic violations.[151] Police officers need practical access to evidence and face risks of injury in their law enforcement positions. Thus, the wiretapping statute should address officer safety.[152] If police officers can be recorded in all instances of their official duty, there is a risk that criminals will learn police patterns and plan criminal activity to surpass police presence. The argument follows that po-

---

146 *See* Scott v. Harris, 550 U.S. 372, 380-81 (2007) (holding that a private citizen's videotape of a police car chase could be used to exonerate an officer accused of misconduct).

147 *See* Hermann, *supra* note 2, at 6.

148 *See* Kevin Johnson, *For Cops, Citizen Videos Bring Increased Scrutiny*, USA TODAY, Oct. 15-17, 2010, at A1 (noting that with the prevalence of private citizens' videos of police officers on the Internet and television, police officers have the incentive to act as if citizens are always taping them, since such recording can benefit the police officer by exonerating him).

149 *See* bluekrab08, *supra* note 11.

150 *See* ELMER D. GRAPER, AMERICAN POLICE ADMINISTRATION: A HANDBOOK ON POLICE ORGANIZATION AND METHODS OF ADMINISTRATION IN AMERICAN CITIES 5 (1921) (highlighting importance of police force because of the special responsibility that police have to protect society and the public peace). "Upon the policeman we depend for protection. He is expected to preserve the public peace. His presence acts as a restraining influence upon the lawless elements who [sic] would endanger life and property." *Id.*

151 Courts have recognized that citizens must give up some privacy in order to live in a safe society and allow police officers to take practical means for citizen protection. In *Terry v. Ohio*, for instance, the Court concluded that when an officer touched a citizen's pockets outside of the clothing and felt what seemed to be a weapon, the police officer did not violate the Fourth Amendment. 392 U.S. 1, 30-31 (1968). The *Terry* Court recognized that such minimal privacy intrusions, such as a police officer feeling outside of one's clothing, is necessary in order for police to effectively protect society. *Id.*

152 *Cf.* GRAPER, *supra* note 150, at 5.

lice officers need a special status allowing law enforcement alone to record traffic stops. By enacting the exception that allows police officers to record citizens during traffic stops without the citizens' consent, the Maryland legislature seemed to propose that police officers need the right to record traffic stops to fulfill their law enforcement duties.[153]

This special status theory contradicts the Framers' goal of limiting police power.[154] Further, the theory violates the main purpose behind the Maryland Wiretap Act.[155] Police officers have the authority and duty to enforce laws. The potential abuse of power and wrongful invasion of citizens' privacy comes with the authority.[156] The Supreme Court has repeatedly emphasized that with positions of power, such as law enforcement, there must be protections in place to ensure the government does not abuse its power.[157] As the Supreme Court highlighted in *Wolf v. Colorado*,[158] "[t]he secu-

---

153 The Maryland legislature chose to carve out an exception permitting police officers to record traffic stops in 1991. For the boundaries of such exception, see former Maryland Attorney General Joseph Curran's advisory opinion, Wiretap & Elec. Surveillance, *supra* note 57.

154 The text of the Fourth Amendment reveals the Framers' concern over restricting police power while also providing practical methods for police to protect society, such as allowing police to attain a warrant to complete a search. *See* U.S. CONST. amend. IV; *see also* Davies, *supra* note 39, at 556 (arguing that the main purpose in the Framers' enactment of the Fourth Amendment was "to curb the exercise of discretionary authority by [police] officers"); Skehill, *supra* note 55, at 993 ("The constitutional framers recognized that police and governmental power could potentially lead to abuse, which would be hazardous to a free society.").

155 *See* State v. Mayes, 399 A.2d 597, 599 (Md. 1979) (highlighting that by enacting Title III, Congress sought "to protect the privacy of the individual while at the same time aiding in the enforcement of the criminal laws"). Further, as previously discussed, Maryland chose to adopt a two-party consent approach in order to provide greater individual privacy. Maryland courts have emphasized that the Maryland Wiretap Act focuses on protecting the privacy of Maryland's citizens, rather than focusing on granting more privacy protection to Maryland government officials. *See* Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 676 A.2d 65, 67 (Md. 1996) (stating that the Maryland Wiretap Act "protects persons in Maryland"); Standiford v. Standiford, 598 A.2d 495, 498 (Md. Ct. Spec. App. 1991) ("One of the clear purposes of the [Maryland Wiretap] Act is to prevent, in non-criminal situations, the unauthorized interception of conversations where one of the parties has a reasonable expectation of privacy.").

156 *See* Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1551 (2008).

> As compared to other government officials, law enforcement officers pose the greatest risk to citizens' physical integrity and privacy because they are authorized to implement the state's most physically coercive and invasive powers. Moreover, law enforcement abuses have the potential to be much worse than the harms inflicted by private citizens. First, the government's coercive and invasive powers exceed those of private citizens. Police officers are permitted to commit actions that would be illegal if committed by private citizens, and some officers abuse that permission. Second, police abuses are symbolically worse because they are taken on behalf of all citizens.

Id. (citations omitted).

157 *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) ("An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser . . . ."); Monroe v. Pape, 365 U.S. 167, 171-72 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

158 338 U.S. 25 (1949), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

rity of one's privacy against arbitrary intrusion by the police . . . is basic to a free society."[159] The exception for police officers to record traffic stops was intended to give them practical use of recordings as evidence. Instead, it creates an imbalance of power that favors police officers and fails to dissuade police misconduct.[160]

With this possession of power and heightened accountability to society, police officers should be subjected to high public scrutiny.[161] In *City of Ontario v. Quon*,[162] the Supreme Court held that a police officer does not have a reasonable expectation of privacy that his personal text messages sent from a department-provided phone would be entirely immune from scrutiny.[163] "As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications."[164] A main goal of the Maryland Wiretap Act is holding police officers more accountable in their positions of power. Allowing citizens who are or who have the consent of a party to the conversation in a traffic stop to record would serve this goal.[165]

3. On-Duty Police Officers Have a Reasonable Expectation of Privacy in Some Instances, but Not During Routine Traffic Stops

Stating that police officers never have a reasonable expectation of privacy in their official duties poses some dangerous results.[166] On-duty police officers perform many critical tasks that require privacy and confidentiality to promote effective law enforcement.[167] If an eyewitness to a crime agrees

---

159 *Id.* at 27.

160 Mishra, *supra* note 156, at 1553 (noting that without the right of citizens to videotape police surreptitiously, police do not have the same incentive to ensure they are acting legally because police officers alone are in control of when they are recording). Mishra also highlights that "citizen recording provides an external check not subject to intradepartment corruption." *Id.*

161 *See id.* at 1551-53.

162 130 S. Ct. 2619 (2010).

163 *Id.* at 2631-32.

164 *Id.* at 2631.

165 *See* Howard Friedman, *Evaluating Police Misconduct Cases*, TRIAL, Dec. 1997, at 44, 46-47 (stressing that recordings of police are critical in the pursuit of misconduct claims against police officers); s*ee also* Johnson, *supra* note 148 (noting that the rise in citizens' recording of police has "helped launch a new generation of public accountability for local law enforcement").

166 Harford County officials in the *Graber* case highlighted some of the potential problems with declaring that police never have a reasonable expectation of privacy when performing their official duties. *See* Glenn McNatt, *Do Police Have a Right to Privacy?*, BALT. SUN (Sept. 28, 2010, 6:04 PM), http://web.archive.org/web/20101005165750/http://weblogs.baltimoresun.com/news/opinion/2010/09/police_and_the_right_to_privac.html.

167 *Cf.* Alex Johnson, *'Start Snitching,' Crime-Hit Communities Urge*, MSNBC (Jan. 22, 2008, 3:38 PM), http://www.msnbc.msn.com/id/22734240/ (showing the importance of covert communications and confidentiality in police officers' interactions with potential witnesses).

to speak with a police officer on the scene, the confidentiality of that communication away from public cameras could be critical to the safety and cooperation of the eyewitness.[168] In today's "anti-snitching" culture, law enforcement has had increasing problems with encouraging witnesses to testify in court. Without any confidentiality guarantees, obtaining essential witnesses for trial could be more difficult.[169]

Likewise, if there is a car accident, a police officer may arrive on the scene and speak to an accident victim about her health. Such information should remain confidential and protected as a private conversation between the officer and the victim.[170] The concern is if police officers never have a reasonable expectation of privacy while performing their official duties, then third parties will record police officer conversations with victims or eye witnesses.[171]

If Maryland adopted a one-party consent statute, these dangers in confidentiality would be avoided. Unless the party to the conversation with the police officer (the eyewitness or the car accident victim) consented to recording the conversation, the recording would violate the one-party consent provision. There is another way to avoid sacrificing the confidentiality of a witness or privacy of an accident victim. The Maryland legislature could clarify what type of conversations citizens can record at a traffic stop because police have no reasonable expectation of privacy.

A conversation between an on-duty police officer and a citizen pulled over during a traffic stop does not constitute a private conversation under the Maryland Wiretap Act. Neither police officers nor citizens have a reasonable expectation of privacy during a routine traffic stop conversation. It is well-known that words spoken by the suspect during a traffic stop to a police officer can be used against the suspect in court and are also often on police paperwork shared with other parties, such as prosecutors.[172] Even if no one else near the traffic stop could hear the conversation, or if the police officer and citizen are whispering in a low voice, there is still no reasonable expectation of privacy.[173]

Citizens should be able to record traffic stops. A provision of the Maryland Wiretap Act allows police officers to record traffic stops and use such tapes to exonerate themselves.[174] Discouraging citizens from doing the same

---

168 *Cf. id.*

169 *See id.*

170 *Cf.* Lauren E. Parsonage, *Caught Between a Rock and Hard Place: Harmonizing Victim Confidentiality Rights with Children's Best Interests*, 70 MO. L. REV. 863, 871-73 (2005) (highlighting the importance of confidentiality statutes in situations in which victims' privacy rights may be hampered by public recording of sensitive information).

171 *See* McNatt, *supra* note 166.

172 *See* Lewis v. State Dep't of Licensing, 139 P.3d 1078, 1083 (Wash. 2006) (en banc).

173 *See* Malpas v. State, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997); *see also* United States v. Mankani, 738 F.2d 538, 543 (2d Cir. 1984).

174 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(4) (West 2011).

by prosecuting them under the Maryland Wiretap Act creates an imbalance of power in favor of law enforcement.[175]

III. ANALYSIS OF THE FEDERAL CONSTITUTIONALITY OF THE MARYLAND WIRETAP ACT

The Maryland Wiretap Act cannot forbid citizens from recording on-duty police officers during a traffic stop because a traffic stop is not a private conversation. Even if a Maryland court found that the Maryland Wiretap Act protects police officers' speech during a traffic stop, prosecuting citizens who record on-duty police officers under the Maryland Wiretap Act raises serious constitutional concerns. While some argue that on its face Maryland's two-party consent rule equally protects police officers and citizens,[176] the two-party consent rule restricts citizens' First Amendment rights to report and gather information in the age of citizen journalism. Because police officers possess great power and authority, they should be subject to higher public scrutiny, and citizens should have the right to record them.[177]

Subsection III.A discusses the development of citizen journalism and the use of citizens' recordings in traditional news media. Subsection III.B.1 describes the protections of the First Amendment's Press Clause, and Subsection III.B.2 addresses when press serves the public interest and, therefore, may justify an invasion of privacy. Subsection III.C concludes that citizen journalists likely qualify as press, but that the press distinction likely does not make a practical difference in First Amendment analysis. Subsection III.D argues that citizens who record official police officer conduct serve the public interest and, therefore, restricting such citizens from recording violates their First Amendment rights.

A. *What is Citizen Journalism?*

Since the infamous Rodney King beating,[178] public focus on police brutality and the important role citizens can play in videotaping such abuse has increased. Some police officers argue that such recording violates their

---

175 *See* Mishra, *supra* note 156, at 1551-52.

176 *See* Skehill, *supra* note 55, at 1000.

177 *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2631 (2010) (explaining that police officers are subject to greater scrutiny because of their positions of power).

178 In the opinion in the *Graber* case, the judge highlighted the importance of the Rodney King beating. Maryland v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *7-8 (Cir. Ct. Harford Cnty., Md. Sept. 27, 2010) ("George Holliday was instrumental in changing the landscape of the video taping of police activity when he video taped [sic] Los Angeles Police Officers beating Rodney King in 1991."); *see also* Cohen, *supra* note 18 (comparing recent cases in which citizens have been prosecuted for recording on-duty police officers to the Rodney King beating).

privacy rights.[179] With the invention of websites like YouTube and LiveLeak,[180] and the growing affordability of video cameras,[181] recording on-duty police officers and broadcasting the recording has become easier than ever. In an age when most people carry cell phones with recording capabilities, recording a police officer is just a click away.[182]

The Internet has become an important news source, allowing citizen journalism to become a prevalent method of news gathering.[183] Citizen journalism[184] is the active role of citizens in collecting, processing, and reporting news and information.[185] Instead of accessing news from a newspaper,[186] citizens now have the opportunity to report news.[187] With a few resources, someone can record and upload videos on websites such as YouTube or LiveLeak, write a blog covering current events, or have their video featured on a traditional news website.[188] Citizen journalists have

---

179 Daniel Rowinski, *Police Fight Cellphone Recordings*, BOS. GLOBE, Jan. 12, 2010, at A1.

180 LiveLeak's slogan on the main webpage is "Redefining the Media," highlighting that LiveLeak aims to serve as a news media source. *See* LIVELEAK, http://www.liveleak.com (last visited Feb. 29, 2012).

181 *See* Radley Balko, *How to Record the Cops*, REASON.COM (Sept. 20, 2010), http://reason.com/archives/2010/09/20/how-to-record-the-cops. Balko highlights that the Flip Video line is specially formatted with YouTube and LiveLeak and contains a USB port, so that users can quickly upload videos they record to the Internet. *Id.* Further, Balko describes how advancing technology provided cheaper camera alternatives, including one video camera on a key chain that sells for only $12. *Id.*

182 *Cf.* Alan Fram, *1 in 4 Households Have Cell Phone, No Landline*, SEATTLE TIMES (May 12, 2010, 8:31 AM), http://seattletimes.nwsource.com/html/politics/2011844912_apuscellphonesonly.html?syndication=rss.

183 Shayne Bowman & Chris Willis, *We Media: How Audiences are Shaping the Future of News and Information*, MEDIA CENTER AM. PRESS INST. 7-9 (July 2003), http://www.hypergene.net/wemedia/download/we_media.pdf.

184 Citizen journalism is also sometimes referred to as "participatory journalism" or "civic journalism." *See id.* at 9.

185 *Id.*

186 *See* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 523 (2007) ("With the traditional media of newspapers, radio, and television, there was a natural physical limit to the space and time available for individual participation. With the Internet, these spatial and temporal barriers no longer exist. As a result, more people are able to contribute their ideas and opinions to the public discourse." (citing Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1846-47 (1995))).

187 *See* Mark Glaser, *The New Voices: Hyperlocal Citizen Media Sites Want You (to Write)!*, ONLINE JOURNALISM REV. (Nov. 17, 2004), http://ojr.org/ojr/glaser/1098833871.php.

188 Some traditional news sources are incorporating citizen journalism as an official part of their news reporting. CNN, for instance, has an entire section of their website dedicated to citizen journalism, called "CNN iReport." CNN IREPORT, http://ireport.cnn.com/ (last visited Feb. 29, 2012). CNN describes CNN iReport as a user-generated section of CNN, where anyone with Internet access can share a story or opinion, post videos, and even have their story appear on other CNN platforms. *Id.* CNN even holds on online "boot camp" of tips for citizen journalists, including topics such as editing stories and shooting better video. *iReport Toolkit*, CNN IREPORT, http://ireport.cnn.com/toolkit.jspa (last visited Feb. 29, 2012).

broken major stories the traditional media sources failed to cover.[189] While the Internet and citizen journalism have redefined the media, the courts have failed to clarify First Amendment protections for this new age press.[190]

B. *First Amendment Jurisprudence*

1. Protections of the Press Clause

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[191] While freedom of the press is often addressed as a separate clause of the First Amendment, courts have interpreted the Press Clause almost as a branch of the Speech Clause.[192] The Constitution protects the press from government restriction and censorship not because they are members of the press, but because the Speech Clause provides those protections to everyone.[193] "The Court has held consistently that if the general public cannot do it, neither can the press. Likewise, if it cannot or is not done to the public, it cannot be done to the press."[194] For example, both regular citizens and the press have the right to attend criminal trials and cannot be barred from trials arbitrarily.[195] Further, the press does not have a constitutional right to information not available to the public.[196] There are, however, some special constitutional protections that apply to the press and not the public as a whole, such as editorial

---

189 Papandrea, *supra* note 186, at 524-25.

190 *See Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 998 (2007).

191 U.S. CONST. amend. I.

192 This is the traditional view, but Supreme Court jurisprudence on the differences between the Press and Speech Clauses is still heavily debated. For an argument that the Supreme Court has carved out separate press rights from general individual rights under the Speech Clause, see C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 958-59 (2007). Part of the reason for such debate about the meaning of the Press Clause is that the Framers were fairly silent on how protection of freedom of the press differs from the freedom of speech. *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 113-20, 124-25 (1999).

193 *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002); *see also* United States v. Hastings, 695 F.2d 1278, 1281 (11th Cir.1983) (finding that the press generally has no right to information superior to that of the general public (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 609 (1978))).

194 Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093, 1101 (2009).

195 *Id.*; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980) (plurality opinion).

196 Branzburg v. Hayes, 408 U.S. 665, 684 (1972); *see also* N.Y. Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring) (noting the importance of the press to a democratic government but also finding that the Executive has a constitutional duty to preserve the confidentiality of national security information).

autonomy.[197] The Supreme Court has not applied the protection of editorial autonomy in cases when it would not already be available to regular, non-press citizens.[198]

Because the protections under the Press and Speech Clauses tend to be one and the same, many scholars question what the purpose of the Press Clause is.[199] One prevailing theory about the purpose of the Press Clause is that the press should serve as a government "watchdog" and provide the public with information it has a right to know.[200] In drafting the Constitution, the Framers focused on creating a democracy in which the people are involved and informed to avoid government abuse of power.[201] Some maintain that the press has means to gather and disseminate information that individuals alone do not have.[202] The argument follows that individuals acting alone do not have the resources to serve as a government "watchdogs," and therefore, the freedom of press rights must be vigorously protected.[203] Courts have recognized citizens' First Amendment right to record public officials and the important role such recording plays in keeping the gov-

---

197 *See* Anderson, *supra* note 193, at 493-94. Professor David Anderson writes that "there are only two areas in which the Court has decided cases that seem to recognize special constitutional rights for the press." *Id.* at 493. Anderson says that one area that the Supreme Court has recognized specifically for the press is editorial autonomy. *Id.* Citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), Anderson highlights that the Court held that the government cannot regulate the content of a newspaper. Anderson, *supra* note 193, at 493-94. Anderson also argues, however, that the Court had not applied this editorial autonomy concept to any cases when it would not already be available to regular, non-press citizens. *Id.* at 494. The other special right given to the press involves taxation, as the Court has held that the press is not susceptible to the same type of tax discrimination as other businesses. *Id.* at 495-99. There are other types of special treatment that the press enjoys, such as reserved seating for the press in some popular trials. As Anderson highlights, however, in such circumstances the court should attempt to make the trial available to as many people as possible. *Id.* at 516. In some courts, such as the Superior Court of the District of Columbia, the court has "overflow" courtrooms where anyone from the public can listen to the case in real time. This type of preferential treatment to the press comes from non-constitutional sources and includes special access often given to the press through press passes, press rooms, and press galleries. *Id.* at 528.

198 Anderson, *supra* note 193, at 494.

199 For one theory of the purpose of the First Amendment, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 527-28 (1977).

200 Justice Potter Stewart argued that the Framers did not intend for the Press Clause to simply protect the speech rights of individuals, because if so, the Framers would have left the clause out. Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 633-34 (1975). Instead, Justice Stewart argued that the Framers purposefully added the Press Clause to ensure that the press served as a representative check by the people on the government. *Id.* at 634; *see also* Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 650-58 (1975) (determining the scope of "freedom of the press" as compared to "freedom of speech").

201 *See* Ilana Friedman, Comment, *Where Public and Private Spaces Converge: Discriminatory Media Access to Government Information*, 75 FORDHAM L. REV. 253, 256, 294 (2006).

202 In *Saxbe v. Washington Post Co*., Justice Powell stressed the importance of the press in providing information to citizens so that the public is able to be actively involved for a healthy democracy. 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting).

203 *See id.*; *see also* Stewart, *supra* note 200, at 634.

ernment accountable to the people.[204] The Supreme Court also defines "press" broadly for the purposes of the Press Clause.[205] Stressing the importance of free public discourse about public affairs, the Court highlighted that "[t]he Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs."[206]

Newsgathering by the press has also been recognized as protected under the First Amendment.[207] In *New York Times Co. v. United States*,[208] the Supreme Court held that the government could not censor a newspaper for publishing government documents that may have been illegally obtained.[209] The Court reasoned that the government's restraint on the newspaper violated the First Amendment, because the government did not meet its "heavy burden" of justifying the prior restraint.[210] The Supreme Court has further extended circumstances in which the press can publish truthful information from a disputed source.[211]

Courts have held that the government cannot restrict the freedom of press rights of a news source that publishes information illegally obtained by a third party.[212] In *Bartnicki v. Vopper*,[213] a radio station anonymously received a tape of a conversation between a union representative and a school negotiator.[214] The representatives later filed a civil suit under the

---

204 *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also* Mills v. Alabama, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

205 *Mills*, 384 U.S. at 219 (citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)).

206 *Id.* (citation omitted).

207 *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated.").

208 403 U.S. 713 (1971) (per curiam).

209 *See id.* at 714. The *New York Times* case involved a set of classified documents that detailed the United States' involvement in Vietnam. *Id.* at 717 (Black, J., concurring). A federal employee wrongfully shared the classified documents with the press, and the New York Times ran a story about the papers. *See id.* at 714 (majority opinion); *id.* at 741 (Marshall, J., concurring). The government argued that the President had executive authority to order the New York Times to cease publication of any further classified information. *Id.* at 718 (Black, J., concurring).

210 *New York Times*, 403 U.S. at 714 (majority opinion) (internal quotation marks omitted). "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *Id.* (citations omitted) (quoting, respectively, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), and Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

211 Fargo & Alexander, *supra* note 194, at 1103-06.

212 *Id.* at 1107 ("[T]he Supreme Court and lower courts generally have held that the press cannot be punished for publishing lawfully acquired, truthful information, even if the source of the information obtained it illegally.").

213 532 U.S. 514 (2001).

214 *Id.* at 518-19.

federal and state wiretap statutes against the radio station, arguing that the station should have reasonably known the tape was illegally obtained.[215] The Court analyzed the government interests versus the freedom of speech interests of the station to decide if restricting the station's speech was reasonable.[216] The Court held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[217]

2. When Press Serves the Public Interest

In analyzing whether the government violated the First Amendment rights of the press, courts address whether the content of the information serves the public interest.[218] Simply because information may be interesting to the public does not mean such content serves the public interest. Information that serves the public interest is that which "contributes to public understanding of important social and political issues."[219] The Supreme Court held that the First Amendment protects disclosure of information when it constitutes "the publication of truthful information of public concern."[220] As the United States Court of Appeals for the Ninth Circuit stated in *Dietemann v. Time, Inc.*,[221] however, "[t]he First Amendment is not a license . . . to intrude by electronic means . . . simply because the person subjected to the intrusion is reasonably suspected of committing a crime."[222]

Suspecting a crime does not alone justify the invasion of privacy. However, the courts have adopted a balancing test of public interests against privacy interests of individuals in determining whether the First Amendment protects a potential privacy invasion.[223] The Supreme Court emphasized the importance of protecting free speech in relation to public interest issues and public officials in *Garrison v. Louisiana*.[224] Finding that the Louisiana defamation statute violated the First Amendment, the Court analyzed the public interest in having the freedom to criticize government officials, even judges.[225] The Court reasoned that "where the criticism is of

---

215 *Id*. at 519-20.

216 *Id*. at 529.

217 *Id*. at 535.

218 *See* Fargo & Alexander, *supra* note 194, at 1106.

219 *Id*.

220 *See Bartnicki*, 532 U.S. at 534.

221 449 F.2d 245 (9th Cir. 1971).

222 *Id*. at 249 (footnotes omitted).

223 *See* Fargo & Alexander, *supra* note 194, at 1107 n.92 ("The determination of newsworthiness requires a finding . . . that the information in question is of public interest; this interest is then balanced against the right to privacy.").

224 379 U.S. 64, 74-75 (1964).

225 *Id*. at 77.

public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.'"[226]

In defining which matters are of "public concern" and, therefore, enjoy First Amendment protection, courts look to the form, context, and content of the statement or disclosure.[227] An individual's solely personal issues are not of public concern. Issues of public concern affect people outside of the individual or agency invoking the First Amendment protection.[228] Courts have found that allocating funds and administering of a school board are matters of public concern.[229] Further, courts have held that claiming racial and sexual discrimination[230] and speaking out about concerns of how the police department handled an incident in which a police officer shot and killed a suspect are also matters of public concern.[231]

Applying this balancing test of individual privacy interests versus public interest as a whole, courts have held that public officials have a higher burden of proof when arguing their privacy rights were violated.[232] For instance, public officials who file a libel suit must prove the publisher acted knowing the statement was false or with "reckless disregard" for whether the statement was false or not.[233] Regular citizens in the same circumstances, however, need only show that the publisher negligently published the statement.[234] Further, courts generally hold that the press can claim that news is in the public interest as a defense to some tenets of tort law.[235]

C. *Do Citizen Journalists Qualify As Press?*

Although the Supreme Court has yet to clarify the role of citizen journalists under the Press Clause, the Court's trend towards broadly defining press supports the notion that citizen journalists are protected under the

---

226 *Id.* at 72-73.

227 D. Duff McKee, *Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech*, *in* 22 AM. JUR. PROOF OF FACTS 3D § 14, at 227 (1993).

228 *Id.*

229 *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 564-65 (1968); Smith v. Atlanta Indep. Sch. Dist., 633 F. Supp. 2d 1364, 1377 (N.D. Ga. 2009).

230 *See, e.g.*, Tindal v. Montgomery Cnty. Comm'n, 32 F.3d 1535, 1540 (11th Cir. 1994).

231 Andrew v. Clark, 561 F.3d 261, 268 (4th Cir. 2009).

232 *See* Fargo & Alexander, *supra* note 194, at 1106.

233 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see also* Fargo & Alexander, *supra* note 194, at 1106-07.

234 Fargo & Alexander, *supra* note 194, at 1107 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974)).

235 *Id.* at 1107-08.

Press Clause.[236] Courts recognize that those protected under the Press Clause include anyone who, "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."[237] As such, certain press privileges have "been invoked successfully by persons who are not journalists in the traditional sense of that term."[238]

Courts have recognized that certain privileges under the Press Clause apply to citizen journalists such as bloggers.[239] One of the first cases addressing such new age journalism involved the creator of the Drudge Report, an online gossip column.[240] In *Blumenthal v. Drudge*,[241] the court held that the Drudge Report was protected under the First Amendment journalist's privilege, and therefore, did not require Drudge to divulge his confidential sources.[242] Further, in *O'Grady v. Superior Court*,[243] the California Court of Appeals held that the blogger defendants did not have to testify regarding the identity of their sources because the bloggers qualified under the same privilege.[244] Some states have stricter tests for whether a blogger qualifies for a journalist's privilege under a state shield statute.[245] Such states require that a blogger be affiliated in some way with a more traditional news medium, such as a newspaper or magazine.[246] On First Amendment grounds alone, however, case law shows that citizen journalists likely qualify as press and are protected under the Press Clause.[247]

For someone like Mr. Graber, who wore his motorcycle helmet camera for the purpose of recording his motorcycle travels, a court would focus on whether Mr. Graber intended to share the recordings with the public.[248] Citizens who happen to record something without the original purpose of disseminating the recording or sharing the information may not meet the grounds articulated in *von Bulow v. von Bulow*.[249] Mr. Graber could perhaps argue that he left the video camera on when he was pulled over because he planned to share the recording with others. If Mr. Graber showed that he

---

236 *See Developments in the Law—The Law of Media*, *supra* note 190, at 999-1000; *see also* Papandrea, *supra* note 186, at 518-19 (describing the struggle to define who should be entitled to invoke a reporter's privilege under state shield laws).

237 von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987).

238 *Id.*

239 *Developments in the Law—The Law of Media*, *supra* note 190, at 999-1000.

240 *See id.*

241 186 F.R.D. 236 (D.D.C. 1999).

242 *Id.* at 244.

243 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

244 *Id.* at 106.

245 *See Developments in the Law—The Law of Media*, *supra* note 190, at 1002.

246 *Id.*

247 *See id.* at 1004.

248 *See* nikotyc, *supra* note 2; *see also* Shin, *supra* note 2, at A1.

249 811 F.2d 136, 143 (2d Cir. 1987).

regularly posted videos to YouTube to share this type of information, he could better highlight that he intended to disseminate the information. For the citizen who happens to have a camera on their cell phone and decides to record something at that moment, and later shares that information on a public website, the citizen's status as "press" is more unclear.

Because the protections of the First Amendment are the same for citizens and the press, whether citizen journalists qualify as "press" is not determinative of their rights under the First Amendment.[250] In fact, the Supreme Court has refused to narrowly define "the press," and judges and scholars alike have argued against creating separate constitutional rights for the press and private individuals.[251] Therefore, for practical reasons, whether a citizen journalist qualifies as press under the Press Clause does not determine whether the Maryland Wiretap Act violates the First Amendment because the application of the Press and Speech Clauses are so similar.

D. *Citizen Recording of the Police and the First Amendment*

The First Amendment "secures 'the paramount public interest in a free flow of information to the people concerning public officials.'"[252] Citizens' public interest to record on-duty police, particularly when the person recording is a party to the conversation, outweighs any claim of privacy by police.[253] Police officers are subject to greater scrutiny than ordinary citizens and must sacrifice some privacy to serve in a government position of power.[254]

---

250 David Anderson argues that the advancement of technology has removed the boundaries that allowed press to at one point be easily identified. Anderson, *supra* note 193, at 507. Anderson notes that the demise of special constitutional rights for the press is not necessarily a bad thing and not different from what the Court has held. *Id.* Anderson also highlights how technology has changed the way society receives information from how information was received when the Framers drafted the Constitution. *Id.*

> Freedom of the press might have seemed less crucial to [the Framers] if their countrymen had had access to the Internet, if their governments had had watchful interest groups and traditions of openness, if the entities engaged in the collection and dissemination of information had been among the most powerful in the society.

Id.

251 In *Branzburg v. Hayes*, the Court claimed that defining specific groups of people who qualify as press "would present practical and conceptual difficulties of a high order," as various types of people perform duties of the press, including authors and lecturers, among others. 408 U.S. 665, 703-05 (1972); *see also* Anderson, *supra* note 193, at 430-31.

252 Pell v. Procunier, 417 U.S. 817, 832 (1974) (quoting Garrison v. Louisiana, 379 U.S. 64, 77 (1964)).

253 *See* Mishra, *supra* note 156, at 1551-52.

254 *See, e.g.*, Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2002, 2006 (2006) (establishing that most private employees are protected from lie detector tests by their private employers, but explicitly declining to extend the same protection to government employees, such as police officers, and private security officers who have similar responsibilities to that of police officers); *see also* Mishra, *supra* note 156, at 1552.

Protecting citizens' right to record on-duty police officers serves a public interest because it allows the public to check police power and monitor police misconduct.[255] Rather than applying to a few individuals, the conduct of police officers affects society as a whole because police officers are the main law-enforcing body. Therefore, police conduct serves a public concern because police officers have the responsibility to protect society.[256] They have extensive authority and power that does not apply to normal citizens to perform such duty.[257] Police can search peoples' homes with a showing of probable cause, whereas regular citizens do not have this power to search and seize.[258]

The Framers recognized when drafting the Constitution that with this greater authority and power, came a significant risk of abuse.[259] In drafting the Fourth Amendment, the Framers sought to balance protecting citizens from government abuse of power with the necessity of having certain practical laws and police authority to maintain social order.[260] Audio and video recordings of police officers provide evidence in cases of disputed facts like claims of police misconduct, in which it is often the police officer's word against the citizen's word.[261] Allowing citizens to record police serves the public interest and purpose of holding those in power to high accountability, as the Framers intended.[262]

Courts recognize that new technology allows citizens to record public officials, and some stress that this type of citizen journalism promotes a healthy democracy.[263] In *Tarus v. Borough of Pine Hill*,[264] an individual was arrested for videotaping a city council meeting.[265] In finding that the public has a common law right to videotape council meetings, the court considered how such recording served the public interest.[266] The New Jersey Supreme Court, in *Tarus*, emphasized that "[t]he use of modern technology to record and review the activities of public bodies should marshal pride in our open

---

255 *See* Mishra, *supra* note 156, at 1550-52.

256 *See id.* (explaining the need for strong checks on the conduct of law enforcement officers, who "pose the greatest risk to citizens' physical integrity and privacy because they are authorized to implement the state's most physically coercive and invasive powers").

257 Skehill, *supra* note 55, at 993.

258 *Cf.* U.S. CONST. amend. IV.

259 *See* Commonwealth v. Hyde, 750 N.E.2d 963, 976-77 (Mass. 2001) (Marshall, C.J., dissenting) ("It is the recognition of the potential for [police] abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers.").

260 *See* Skehill, *supra* note 55, at 1003; *see also* Davies, *supra* note 39, at 556.

261 Skehill, *supra* note 55, at 998.

262 *See* Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 2-3 (1980).

263 *See* Tarus v. Borough of Pine Hill, 916 A.2d 1036, 1050-51 (N.J. 2007).

264 916 A.2d 1036 (N.J. 2007).

265 *Id.* at 1039-40.

266 *Id.* at 1051.

system of government, not muster suspicion against citizens who conduct the recording."[267] One may argue that a city council meeting is different than a traffic stop, because the city council meeting involves more people and likely discusses matters that affect the greater community. The right to record police officers, however, also serves the greater public interest because traffic stops are common and allowing citizens to record traffic stops increases the accountability of police officers to society as a whole.[268] Courts in other jurisdictions have also held that journalists have a legitimate need to access law enforcement records that reflect on-duty official actions of police.[269]

Courts have recognized citizens' rights to record police under the First Amendment. In *Smith v. City of Cumming*,[270] the Smiths filed suit against the city, alleging they were restricted from videotaping police officers in violation of their First Amendment rights.[271] The United States Court of Appeals for the Eleventh Circuit agreed that the public has a First Amendment right to record police, stating the Smiths "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."[272] The court further highlighted 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."[273]

In *Jean v. Massachusetts State Police*,[274] the United States Court of Appeals for the First Circuit held that police misconduct is a great public concern, and the right to publish police misconduct outweighs privacy rights of police officers and any governmental interest in deterring surreptitious recordings.[275] Various other courts have also held that citizens have a right to record public meetings and other events or people, highlighting that such recording is in the public interest.[276]

---

267 *Id.*

268 *See* Skehill, *supra* note 55, at 998.

269 *E.g.*, Burton v. York Cnty. Sheriff's Dep't, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) ("The newspaper, in fulfilling its obligation to report on and hold to account those in public service, had a legitimate need to access the records [that the journalist] requested.").

270 212 F.3d 1332 (11th Cir. 2000).

271 *Id.* at 1332.

272 *Id.* at 1333. The *Smith* court did hold, however, that although the Smiths have a First Amendment right to record public officials, the Smiths did not meet the burden of showing that such First Amendment right had been restricted. *Id.*

273 *Id.*

274 492 F.3d 24 (1st Cir. 2007).

275 *Id.* at 30.

276 *See* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (holding that plaintiffs had a "First Amendment right to film matters of public interest"); Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (per curiam) (finding that the plaintiffs had stated a claim for a First Amendment violation by being prohibited from filming public meetings); Iacobucci v. Boulter, No. Civ. A. 94-10531-PBS, 1997 WL 258494, at *7 (D. Mass. Mar. 26, 1997) (finding that a reporter unaffiliated with any

By restricting citizens' rights to record on-duty police, the Maryland Wiretap Act prevents the press from serving its purpose as a government "watchdog." It also restricts individuals from obtaining information for their defense.[277] In allowing police officers to record citizens without their consent, the Maryland Wiretap Act tips the balancing scale in full favor of the police and weakens the power of press and citizens to monitor the government. If used to restrict citizens from recording on-duty police officers, the Maryland Wiretap Act acts as a prior restraint on citizens' freedom of speech rights. As the Supreme Court held in *New York Times Co. v. United States*, when the government imposes a prior restraint on freedom of speech, the government has a "heavy burden" to justify such restraint.[278] The Maryland Wiretap Act removes the "heavy burden" from the government to justify why citizens cannot videotape police without their consent. It simply restricts citizens from recording police officers, without providing justification.

Other concerns surround police bringing charges in violation of the Maryland Wiretap Act *after* a recording has been disseminated to the public. Police may investigate and prosecute the person who recorded the audio to control the content of what citizens publish about police.[279] If a police officer is portrayed positively in a published video, law enforcement would be less likely to prosecute the person who recorded the video than if the video posted shows police officer misconduct or controversial behavior.[280]

In Mr. Graber's case the trooper featured in the video was probably embarrassed by his actions. He steps out of an unmarked car in plain clothes with a gun drawn and does not identify himself as a police officer

---

news media source has a protected First Amendment right to videotape public meetings), *aff'd*, 193 F.3d 14 (1st Cir. 1999); Thompson v. City of Clio, 765 F. Supp. 1066, 1070-71 (M.D. Ala. 1991) (finding that the city council could not ban citizens from recording city council proceedings because the ban restricted citizens' First Amendment rights); Lambert v. Polk Cnty., 723 F. Supp. 128, 133 (S.D. Iowa 1989) (recognizing that ordinary citizens can also videotape events, the court stated, "It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events").

277 *See* Skehill, *supra* note 55, at 998. One example of citizen recording serving as an effective watchdog on the government and police power is the posting of a beating of an arrested girl at the Preakness horse race. *See* bluekrab08, *supra* note 11. After the posting of the Preakness video, the media started focusing more on potential cases of police brutality and covering stories about the rights of police and citizens. *See, e.g.*, Hermann, *supra* note 11, at 6.

278 403 U.S. 713, 714 (1971) (per curiam) (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)) (internal quotation marks omitted).

279 Ilana Friedman addressed a similar concern about government-imposed, content-based restrictions on press. *See* Friedman, *supra* note 201, at 296.

280 *See* Hermann, *supra* note 2, at 6. Hermann quotes a spokesman for the Maryland troopers who states that he tells troopers that "we're always on camera now . . . . Someone somewhere has a camera, and you are to remember that and are to act professionally at all times." *Id.* (internal quotation marks omitted). This viewpoint from the trooper spokesperson reveals that troopers want to be portrayed in a good light, and the prevalence of recording devices is motivation to act professionally. *See id.*

until several seconds into the video.[281] Mr. Graber's posting of the video on YouTube led to public outcry that the trooper's conduct was inappropriate, particularly in exiting the car with his gun drawn.[282] One must wonder if the public reaction to the video had been more positive and the trooper's actions less controversial if police officers would have ever investigated or prosecuted Mr. Graber under the Maryland Wiretap Act.[283]

By allowing troopers to investigate the posting of a YouTube video, the government is acting to control the content of media about police officers. Although prosecutors have broad discretion in deciding whether to bring forth criminal charges against someone, police officers play a vital role in first deciding to make an arrest, providing the police reports and suggesting charges to the prosecutors.[284] The Supreme Court has stressed that "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[285] By allowing police officers to decide when to investigate a citizen who records them, police officers have the power to restrict citizen speech and recordings that portray law enforcement in a negative light.

The use of the Maryland Wiretap Act to prosecute individuals who record police officers while they perform their official, public duties violates citizens' First Amendment rights. Courts give great deference to matters that serve the public interest. In analyzing potential First Amendment violations, they emphasize the public interest over individual privacy concerns. Here, citizens have a right to record and share information on official

---

281 *See* nikotyc, *supra* note 2; *see also* Shin, *supra* note 2, at A1.

282 *See, e.g.*, Zach Bowman, *Video: Motorcyclist Arrested for Recording Cop Brandishing Gun With Helmet Cam*, AUTOBLOG (Apr. 19, 2010, 8:55 AM), http://www.autoblog.com/2010/04/19/motorcyclist-arrested-for-recording-cop-brandishing-gun-with-hel/; Carlos Miller, *Motorcyclist Jailed for 26 Hours for Videotaping Gun-Wielding Cop*, PIXIQ (Apr. 16, 2010, 2:46 AM), http://www.pixiq.com/article/maryland-motorcyclist-spends-26-hours-in-jail-on-wiretapping-charge-for-filming-cop-with-gun.

283 *See* Johnson, *supra* note 148, at A1 (highlighting that many of the videos citizens have posted of police are controversial and have ultimately increased police officer accountability and opened police officers up to "deserved criticism").

284 The Supreme Court has upheld the prosecutor's right to broad discretion. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."). The Court also noted, however, that although prosecutorial discretion is broad, it is not "unfettered." *Id.* at 608 (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)) (internal quotation marks omitted). In cases of flagrant abuse, including criminal activity by a prosecutor, a court may overrule a prosecutor's decision. *Id.* at 608-09.

285 Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)). For more detail on content-based restrictions and how the Supreme Court has typically evaluated such restrictions, see LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS 33-52 (2004).

police conduct, and the government cannot place a prior restraint on such right without meeting a heavy burden of justification.

CONCLUSION

Within seconds, someone can upload a video onto YouTube or various other websites, and people around the world can watch the uploaded video. This growing accessibility necessitates treading the Maryland Wiretap Act's unclear legal standards towards recording police. Although the Maryland court dismissed the case against Mr. Graber, prosecuting citizens who record conversations with police officers performing their official duties has a chilling effect on citizens' practice of their First Amendment rights.

The Maryland Legislature should update the Maryland Wiretap Act to clarify that the statute should not be used to prosecute citizens who record on-duty police officers because police officers do not have a reasonable expectation of privacy during traffic stops. By carving out an exception that allows police officers to record traffic stops, but denying the same right to citizens, the Maryland Wiretap Act contradicts the fundamental goals of the Framers, and the federal and state wiretap acts. These fundamental goals were to cabin police abuse of power while also providing practical means of law enforcement. Considering the authority and power police officers are given to fulfill their role of protecting society, it is necessary to limit police officers' privacy when they are acting in their official capacity. In Mr. Graber's case, the court found that even an off-duty officer performing official duties did not have a reasonable expectation of privacy. Therefore, Maryland law supports a change in the Maryland Wiretap Act limited to on-duty officers.

Police officers do not have a reasonable expectation of privacy under the Maryland Wiretap Act during a traffic stop. Most traffic stops take place on public roads where third parties can potentially hear the conversation. Even if the traffic stop occurs in a remote area or the police officer and citizen are whispering, there is still no reasonable expectation of privacy. A conversation between a citizen and an officer at a traffic stop is known to be used as evidence in court and detailed on police paperwork to which third parties, like prosecutors, have access.

The Maryland Wiretap Act also poses threats to the First Amendment rights of the press. Recording on-duty police officers performing their official duties is in the public interest. Therefore, courts should give great deference to citizens' right to record police officers. Allowing citizens to record on-duty police officers is in the public interest. It serves the purpose of monitoring police activity and potential abuses of police power. Further, the internal measures of reporting police misconduct are insufficient. Most checks on police misconduct, such as computer monitoring and drug testing, do not follow police activity outside the police station. Allowing citizens to record on-duty police officers serves a public interest because citi-

zens are better able to hold police officers accountable during their regular duties. To avoid the potential unconstitutional consequences of the Maryland Wiretap Act, the Maryland legislature should amend the Act to allow citizens to record traffic stops, extending the right already given to police officers.