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## Tipping the Scale in Favor Civilian Taping of Encounters with Police Officers

### Keywords

Communications law, Law enforcement, Police, Records

**TIPPING THE SCALES IN FAVOR OF CIVILIAN  
TAPING OF ENCOUNTERS WITH POLICE  
OFFICERS**

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## INTRODUCTION

The original purposes of eavesdropping statutes were to protect the citizen against government intrusion into the citizen's privacy and to authorize law enforcement interception to fight organized crime.<sup>1</sup> Yet, in certain instances, the statutes have been used offensively by the government to avoid citizen oversight of policing and even to intimidate citizens. These uses are far different from the original legislative intent behind the statutes, doing nothing to thwart organized crime activities and significantly interfering in the lives of otherwise law-abiding citizens. The prohibition against taping police activity ultimately hurts society more than it benefits society, given over-enforcement of eavesdropping statutes and under-enforcement of discipline or penalties for officers lying or falsifying evidence. The over-enforcement of eavesdropping statutes must be viewed against the backdrop of officer falsification of evidence and the police code of silence.

Citizens who audio record or videotape conversations run the risk of being arrested for violating eavesdropping statutes, especially in the eleven states that require all-party consent prior to taping. Even in a one-party consent state, there may be grounds to arrest the citizen if the citizen is a bystander rather than a party to the conversation. The risk is greater where the person being recorded is a police officer because the police officer may feel challenged by a civilian recording the police officer's actions; this is so although several federal circuit courts have found that the First Amendment protects gathering such information. The civilian fear of arrest for taping an encounter involving a police officer has a chilling effect on the civilian's gathering of information concerning law enforcement, as the eavesdropping statutes in most jurisdictions carry a hefty prison term, or fine, or both for their violation.

Two federal courts of appeals have found that the First Amendment protects civilian taping of encounters with police officers.<sup>2</sup> Those decisions and the Department of Justice's statement of interest in *Garcia v. Montgomery County, Maryland*<sup>3</sup> may signal a trend in the law. In effect, the scales may be tipping in favor of sanctioning civilian recording of encounters with police officers.

The facts of *Garcia* are discussed in Section I. Section II provides information on eavesdropping statutes of various jurisdictions, as does Appendix A, and Section III reviews federal court decisions considering whether there is First Amendment protection for civilian taping. Section IV discusses officer falsification of evidence and the police code of silence. Section V analyzes the role civilian taping plays in society and Section VI proposes an exemption to eavesdropping statutes that would safeguard a civilian's right to tape an encounter with a police officer.

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<sup>1</sup> See S. REP. NO. 90-1097 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2153, 2157, for the Senate report that accompanied the passage of the federal eavesdropping statutes in 1968. See also CAL. PENAL CODE § 630 (West 2010); FLA. STAT. ANN. § 934.01(3), (4) (West 2001); and MASS. GEN. LAWS ANN. Ch. 272, § 99(A) (West 2014) for the state statutes of three all-party consent states.

<sup>2</sup> *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012), on remand, No. 10 C 5235, 2012 WL 6680341, at \*3 (N.D. Ill. Dec. 18, 2012) (granting the plaintiff's motion for summary judgment and a permanent injunction); *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

<sup>3</sup> See *infra* notes 11-15 and accompanying text.

## I. THE CASE OF MANNIE GARCIA

The following case is illustrative of what can happen when police officers take offense at a civilian recording a police encounter.

Mannie Garcia is a well-known freelance photojournalist whose photos have appeared in national publications, such as *The New York Times* and *Newsweek*, and international publications such as *Der Spiegel*.<sup>4</sup> He was leaving a restaurant with his wife and a friend on June 16, 2011 when he spotted several Montgomery County, Maryland police officers arresting two male Hispanics at a nearby intersection. Believing that the officers were using excessive force in making the arrest, Garcia began to photograph the incident from a distance of some thirty feet. When Officer Baxter shone a spotlight on him, Garcia retreated to a distance of almost 100 feet. As Officer Malouf approached Garcia, Garcia identified himself as a member of the press. Officer Malouf announced that Garcia was under arrest, restrained Garcia in a choke hold, dragged him to the patrol car, placed handcuffs on Garcia, and confiscated Garcia's camera.<sup>5</sup> While Garcia was in handcuffs, Officer Malouf kicked one of Garcia's feet out from under him, resulting in Garcia's head hitting the patrol car. When Garcia's wife asked Officer Baxter what was happening, Officer Baxter threatened to arrest her also. Officer Malouf placed Garcia in the patrol car and drove Garcia to the police station. Outside the police station, Garcia observed Officer Malouf remove the video card and battery from Garcia's camera.<sup>6</sup>

Garcia was charged with disorderly conduct under Maryland Criminal Code § 10-201.<sup>7</sup> On December 16, 2011 following trial, the judge declared Garcia not guilty.<sup>8</sup> A police department investigation reached the finding on April 12, 2012 that there had been no administrative violation.<sup>9</sup> Garcia filed a title 42 U.S.C. § 1983 action on December 7, 2012 against Montgomery County, Maryland and several officers, including Officer Malouf and Officer Baxter, claiming, among other things, that they had deprived him of his First and Fourth Amendment rights.<sup>10</sup>

On March 4, 2013, the United States Department of Justice (DOJ) took the rare step of filing a Statement of Interest in Garcia's § 1983 action asking the court to find that "both the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street, if officers arrest the individual and seize the camera of that individual for that activity."<sup>11</sup> The DOJ then proceeded to make two other points, the first of which was to recognize that a police department often uses certain "discretionary" charges of general applicability such as "disorderly conduct, loitering, disturbing the peace, and resisting arrest" to dissuade citizens from exercising their First Amendment right and to urge a court encountering these types of charges to examine them critically as

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<sup>4</sup> Complaint at 2-3, *Garcia v. Montgomery Cnty., Md.*, No. JFM-12-cv-03592, 2013 WL 4539394 (D. Md. Aug. 23, 2013).

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 12-14.

<sup>11</sup> Statement of Interest of the United States at 1, *Garcia v. Montgomery Cnty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013). The United States filed a similar Statement of Interest in a second Maryland case. Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep't.*, No. 1:11-cv-02888 (D. Md. Jan. 10, 2012), 2012 WL 9512053.

a subterfuge for curtailing constitutionally protected conduct.<sup>12</sup> “Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges.”<sup>13</sup> The second point was that it is not just the media, but individuals also, who enjoy the First Amendment right to tape police activities.<sup>14</sup> “The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.”<sup>15</sup>

In addition to eavesdropping charges, discretionary charges are often used against a civilian recording an encounter with a police officer. However, use of these charges against a civilian recording this type of encounter flies in the face of the First Amendment. In 1987, the United States Supreme Court struck down a Houston ordinance as overbroad because it criminalized civilian speech that “in any manner . . . interrupt[s]” a police officer.<sup>16</sup> Similar to other discretionary charges used in civilian taping cases, the Houston ordinance “accord[ed] the police unconstitutional discretion in enforcement.”<sup>17</sup> “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>18</sup>

According to Garcia’s version of the facts, he was well out of the way of the police officers effecting the arrest of the two Hispanic males and did nothing to interfere with the arrest.<sup>19</sup> Garcia was at a location open to the public, as he was on a public thoroughfare. To him, the encounter was newsworthy, as the police officers seemed to be using excessive force.<sup>20</sup> Perhaps the officers’ perception that they might have been photographed engaging in police misconduct was what caused them to arrest Garcia. In a number of respects, the public nature of the location, the photographer’s concern for the person being arrested, the subsequent arrest of the photographer on a discretionary charge, the failure to convict on the discretionary charge, and the ensuing civil rights lawsuit against the police officer, Garcia’s case is factually similar to *Glik v. Cunniffe*,<sup>21</sup> one of the First Amendment cases reviewed in Section III.

The circumstances of bystander Garcia photographing police officers arresting individuals and Garcia’s subsequent arrest happened in Maryland, an all-party consent jurisdiction.<sup>22</sup> Had Garcia been videotaping the encounter rather than photographing it, he might have been charged with eavesdropping under the Maryland eavesdropping statutes, in addition to being arrested for disorderly conduct. The eavesdropping statutes of the various jurisdictions are discussed in the following section.

## II. EAVESDROPPING STATUTES

Federal statutes prohibit eavesdropping and all states but one protect certain types of conversation from being taped; the highest court of the single state without a statutory

<sup>12</sup> Statement of Interest of the United States at 1-2, *Garcia*, No. 8:12-cv-03592-JFM.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *City of Hous., Tex. v. Hill*, 482 U.S. 451, 462 (1987).

<sup>17</sup> *Id.* at 466.

<sup>18</sup> *Id.* at 462-63.

<sup>19</sup> Complaint, *supra* note 4, at 5.

<sup>20</sup> *Id.*

<sup>21</sup> 655 F.3d 78, 79-80 (1st Cir. 2011). See *infra* notes 223-36 and accompanying text.

<sup>22</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1), (c)(3) (West 2011 & Supp. 2014).

prohibition against taping interpreted the state constitution to provide some protection against eavesdropping.<sup>23</sup>

Although all states but one protect certain types of conversation against being recorded, three states, Indiana, New Mexico, and Mississippi, appear not to make surreptitious taping of a face-to-face conversation a crime. The statutes of Indiana and New Mexico appear to prohibit taping of telephone conversations but not face-to-face conversations.<sup>24</sup> Although the Mississippi statutes contain procedures for obtaining a court order to intercept an oral communication,<sup>25</sup> research has failed to locate any statute or case law interpretation of any statute affirmatively prohibiting such taping.

Eavesdropping statutes of the various jurisdictions vary widely in the manner in which they protect face-to-face conversations from being recorded; however, two factors to consider are the consent required to tape a conversation and the type of conversation protected. Eavesdropping statutes generally require a police officer not a party to the conversation to obtain a court order prior to secretly taping a face-to-face conversation.<sup>26</sup> Other than obtaining a court order, a conversation may be taped with the consent of at least one party to the conversation.<sup>27</sup> A major distinction among the jurisdictions is the consent required to permit legal recording without a court order; until very recently, eleven states required all-party consent<sup>28</sup> and the federal statutes and the eavesdropping statutes from the balance of the states required only one-party consent.<sup>29</sup>

The other factor is the type of conversation that receives statutory protection. *Katz v. United States* was the landmark 1967 case that found Fourth Amendment protection for a telephone conversation.<sup>30</sup> The case is remembered for Justice Harlan's concurring opinion in which he announced a two-pronged test to determine whether a conversation would receive constitutional protection against secretly being taped.<sup>31</sup> The focus of the test is on the speaker's privacy rather than the substance of the conversation or the possibility that the conversation may be divulged later. The first prong is that there must be an expectation of privacy and the second prong is that the expectation of privacy must be reasonable.<sup>32</sup>

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<sup>23</sup> See *infra* app. A (Vermont).

<sup>24</sup> See *infra* app. A (Indiana & New Mexico).

<sup>25</sup> See *infra* app. A (Mississippi).

<sup>26</sup> See, e.g., 18 U.S.C.A. §§ 2516-2519 (West 2000 & Supp. 2014). The federal eavesdropping statute includes an exemption allowing a police officer who is a party to the conversation to secretly tape the conversation. *Id.* § 2511(2)(c). The statute provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a[n] . . . oral . . . communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.*

<sup>27</sup> See, e.g., *Id.* § 2511(2)(d). The statute provides:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

*Id.* The eavesdropping statutes of a number of states contain a similar exemption. See *infra* app. A.

<sup>28</sup> See *infra* notes 34-187 and accompanying text.

<sup>29</sup> See *infra* notes 188-210 and accompanying text.

<sup>30</sup> 389 U.S. 347, 353 (1967).

<sup>31</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>32</sup> *Id.*

The federal statutes protect face-to-face conversations against recording under this two-pronged test. Thus, a face-to-face conversation qualifies for protection as an oral communication against being taped where the speaker had an expectation of privacy that society would consider reasonable.<sup>33</sup> Many of the state statutes incorporate the term “oral communication” and define that term similar to the definition contained in the federal statutes. The next portion of this paper contains a discussion of all-party consent states, followed by a discussion of one-party consent jurisdictions.

#### A. All-Party Consent States

A starting point is to examine the nature of the face-to-face conversation protected under the eavesdropping statutes of the eleven all-party consent states. The statutes from the eleven all-party consent states are discussed in this section, as they are the most problematic for a civilian who desires to tape an encounter with a police officer. The pertinent provisions of the federal statutes and the statutes of the other states are reviewed in Appendix A.

Florida,<sup>34</sup> New Hampshire,<sup>35</sup> and Pennsylvania<sup>36</sup> are all-party consent states that protect a face-to-face conversation as long as there is an expectation of privacy that is reasonable; thus, other than requiring all-party consent to taping, the way in which they define the term “oral communication” is similar to the way in which it is defined in the federal statutes. However, as more fully discussed below, what constitutes a reasonable expectation of privacy has been interpreted differently by Florida and Pennsylvania.

The Massachusetts eavesdropping statute protects “oral communication” but does not tie this to whether the speaker has a reasonable expectation of privacy.<sup>37</sup> What is important in determining whether the face-to-face conversation is protected is whether the conversation was secretly taped and whether the taping was done with all-party consent.

Until two recent decisions of the Illinois Supreme Court, the Illinois eavesdropping statutes were the most rigid and unforgiving of any of the all-party consent statutes. Although the statutes protected “oral communication” they did so in such a way as to specifically negate any exemption for a conversation made with a reasonable expectation of privacy.<sup>38</sup>

The eavesdropping statutes of Maryland,<sup>39</sup> Michigan,<sup>40</sup> and Washington<sup>41</sup> protect “private conversation,” California eavesdropping statutes<sup>42</sup> protect “confidential communication,” and the eavesdropping statutes of Montana<sup>43</sup> and Oregon<sup>44</sup> protect “conversation” against being recorded without all party consent. In those states and as more fully explained below, case law provides some guidance in determining the nature of the face-to-face conversation protected against eavesdropping.

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<sup>33</sup> 18 U.S.C.A. § 2510(2) (West 2000 & Supp. 2014). *See infra* app. A (United States).

<sup>34</sup> *See infra* notes 45-75 and accompanying text.

<sup>35</sup> *See infra* notes 76-83 and accompanying text.

<sup>36</sup> *See infra* notes 84-101 and accompanying text.

<sup>37</sup> *See infra* notes 102-12 and accompanying text.

<sup>38</sup> *See infra* notes 113-26 and accompanying text.

<sup>39</sup> *See infra* notes 127-31 and accompanying text.

<sup>40</sup> *See infra* notes 132-46 and accompanying text.

<sup>41</sup> *See infra* notes 147-59 and accompanying text.

<sup>42</sup> *See infra* notes 160-63 and accompanying text.

<sup>43</sup> *See infra* notes 164-76 and accompanying text.

<sup>44</sup> *See infra* notes 177-87 and accompanying text.



## 1. A Conversation Made with a Reasonable Expectation of Privacy

### a. Florida

Florida defines “oral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”<sup>45</sup> Under Florida law, it is illegal to deliberately tape a private conversation without all-party consent.<sup>46</sup> One who illegally tapes a conversation is subject to up to five years imprisonment,<sup>47</sup> or a fine of up to five thousand dollars, or both.<sup>48</sup>

The Florida Supreme Court had occasion to determine whether there was a reasonable expectation of privacy in a private home, *State v. Walls*,<sup>49</sup> in a business office open to the public, *State v. Inciarrano*,<sup>50</sup> and in a police car, *State v. Smith*.<sup>51</sup> While the *Walls* and *Smith* decisions presented little difficulty, *Inciarrano* highlighted the difficulty faced by the courts in other states of interpreting the terms “oral communication” and “intercept.”

In *Walls*, two individuals were allegedly extorting Antel in his home when Antel secretly taped the conversation.<sup>52</sup> The Florida Supreme Court found that the conversation was an oral communication and no statutory exception would allow the taped conversation to be used as evidence.<sup>53</sup>

In *Inciarrano*, the victim was in his business office secretly taping the conversation between the victim and Inciarrano when Inciarrano shot and killed the victim. Because the taped information was the only evidence against Inciarrano, the Florida courts faced a tough situation.<sup>54</sup> The trial court did not suppress the taped information, considering “the quasi-public nature of the premises within which the conversations occurred, the physical proximity and accessibility of the premises to bystanders, and the location and visibility to the unaided eye of the microphone used to record the conversations.”<sup>55</sup> Inciarrano pled nolo contendere but reserved the right to appeal the denial of his motion to suppress. The intermediate appellate court reversed, feeling duty-bound to follow *Walls*. However, even in reversing, the intermediate court expressed its uneasiness with the decision it felt it needed to make.<sup>56</sup> The court suggested that the Florida Supreme Court could take one of three avenues of interpretation that would allow the information secretly taped by the victim to be used against Inciarrano.

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<sup>45</sup> FLA. STAT. ANN. § 934.02(2) (West, Westlaw through Ch. 255 (End) of the 2014 Sp. "A" Sess. of the Twenty-Third Legislature).

<sup>46</sup> *Id.* § 934.03(1), (2)(d).

<sup>47</sup> *Id.* § 775.082(3)(e).

<sup>48</sup> *Id.* § 775.083(1).

<sup>49</sup> *State v. Walls*, 356 So. 2d 294, 295 (Fla. 1978).

<sup>50</sup> *State v. Inciarrano*, 473 So. 2d 1272, 1274 (Fla. 1985).

<sup>51</sup> *State v. Smith*, 641 So. 2d 849, 850 (Fla. 1994).

<sup>52</sup> 356 So. 2d at 295.

<sup>53</sup> *Id.* at 296. Although the court did not state its reasoning, presumably the parties had an expectation of privacy because there were only three people talking in a confined space and the expectation of privacy was reasonable because they were in a private home. The court explained that Antel, had he wished, could have obtained authorization to secretly tape the conversation. Even though Antel had not received the required authorization, the prosecution could use Antel’s testimony as evidence. *Id.* at 297.

<sup>54</sup> *Inciarrano v. State*, 447 So. 2d 386, 387-88 (Fla. Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272, 1276 (Fla. 1985).

<sup>55</sup> *State v. Inciarrano*, 473 So. 2d at 1274.

<sup>56</sup> *Inciarrano v. State*, 447 So. 2d at 387, 390.

One route would have been to interpret the term “intercept” to allow a conversant to secretly tape a conversation but preclude a third party not a party to the conversation from taping.<sup>57</sup> Another route would have been to read the legislative history to protect the privacy of an “innocent” individual.<sup>58</sup> The final route would be to limit application of the exclusionary rule to secret government taping of a conversation.<sup>59</sup>

When *Inciarrano* reached the Florida Supreme Court, the four-member court majority stated that Inciarrano’s expectation of privacy was not reasonable and quashed the lower court’s decision.<sup>60</sup> Without offering more of an explanation why Inciarrano’s expectation of privacy was not reasonable, the court quoted from the intermediate appellate court decision:

One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises.<sup>61</sup>

Perhaps in indication of the difficulty in reaching a decision in *Inciarrano*, there were two concurring opinions, the first authored by one justice and the second, concurring in result only, joined in by two justices.<sup>62</sup> The reasoning of the first concurring opinion is that Inciarrano did not have an expectation of privacy, as he went into the victim’s business. “[W]hen an individual enters someone else’s home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply.”<sup>63</sup>

The second concurring opinion characterized the majority opinion as a “tortuous misconstruction of the plain language of the statute.”<sup>64</sup> The concurring opinion criticized the reasoning that the majority borrowed from the intermediate appellate court. “To hold, as the majority does, that the commission of a criminal act waives a privacy right requires an entirely new legal definition of privacy rights which would, in turn, shake the foundation of fourth amendment analysis.”<sup>65</sup> The concurring opinion added, “If criminal

<sup>57</sup> *Id.* at 388-89.

<sup>58</sup> *Id.* at 390.

<sup>59</sup> *Id.*

<sup>60</sup> *State v. Inciarrano*, 473 So. 2d at 1276. In 2000, the intermediate appellate court relied on *Inciarrano* in deciding a case in which a part business owner of Balgres Distributing Company, Inc., Lamaletto, secretly taped a conversation in his office with Jatar who was allegedly attempting to extort Lamaletto. *Jatar v. Lamaletto*, 758 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 2000). Jatar sued Lamaletto and Balgres civilly, asking for damages for the taping. The trial court granted Lamaletto and Balgres’ motion for summary judgment, and the appellate court affirmed. *Id.* at 1168-69. The intermediate appellate court certified the following question to the Florida Supreme Court as one of great public importance:

DOES *STATE v. WALLS*, 356 So.2d 294 (Fla.1978), HAVE CONTINUED VALIDITY AND BAR SUMMARY JUDGMENT IN THE VICTIM’S FAVOR, WHERE AN EXTORTION THREAT WAS DELIVERED IN THE VICTIM’S OFFICE AND ELECTRONICALLY RECORDED BY THE VICTIM BECAUSE HE FEARED THAT SUCH AN EXTORTION THREAT WAS IMMINENT, IN VIEW OF THE HOLDING IN *STATE v. INCIARRANO*, 473 So.2d 1272 (Fla. 1985)?

*Id.* at 1169-70. The Florida Supreme Court declined to hear the case. *Jatar v. Lamaletto*, 786 So. 2d 1186 (Fla. 2001) (mem.).

<sup>61</sup> *State v. Inciarrano*, 473 So. 2d at 1275-76.

<sup>62</sup> *Id.* at 1276.

<sup>63</sup> *Id.* (Overton, J., concurring). Justice Overton also recommended that the Florida legislature consider amending chapter 934. *Id.*

<sup>64</sup> *Id.* at 1277 (Ehrlich, J., concurring).

<sup>65</sup> *Id.*

acts waive privacy rights, as the majority implies, police have the right and duty to intrude without a warrant into a bedroom where the owner/resident is smoking marijuana, reasoning that the fourth amendment protection has ‘gone up in smoke.’<sup>66</sup> The author of the concurring opinion would have adopted one of the suggestions of the intermediate appellate court and would have interpreted the term “intercept” to allow a conversant to secretly tape a conversation but preclude a third party not a party to the conversation from secretly taping a conversation.<sup>67</sup> In addition, the opinion recognized the special status of being in one’s own home, which gave Inciarrano’s victim a “higher degree of privacy.”<sup>68</sup> In contrast, any expectation of privacy that Inciarrano claimed was not reasonable.<sup>69</sup>

*State v. Smith*<sup>70</sup> was a typical traffic stop case in which the driver consented to the officer’s request to search the car in which Smith was a passenger. At the officer’s suggestion, the driver and Smith sat in the back seat of the patrol car while their car was being searched. Unbeknownst to them, the officer secretly taped their conversation, which contained incriminating information. The suspects were not under arrest while their conversation was taped but were arrested after the officer found illegal drugs in the car.<sup>71</sup> The suspects did seem to have a subjective expectation of privacy while in the patrol car, as evidenced by their disclosure of incriminating information.<sup>72</sup> Even though this was a case of first impression for the Florida Supreme Court, the court had several cases of persuasive authority to rely on and, thus, the decision was a fairly easy one.<sup>73</sup> “We agree with the Eleventh Circuit Court’s reasoning and hold that a person does not have a reasonable expectation of privacy in a police car and that any statements intercepted therein may be admissible as evidence.”<sup>74</sup> That means that the suspects’ conversation did not fall within the definition of an oral communication and, therefore, the conversation was not protected against being secretly recorded.<sup>75</sup>

#### b. New Hampshire

The New Hampshire statutory prohibition against eavesdropping is similar to that of Florida in a number of respects. New Hampshire defines “oral communication” as “any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation.”<sup>76</sup> Under New Hampshire law, it is a class B felony if “without the consent of all parties to the communication, the person . . . [w]ilfully intercepts . . . any . . . oral communication”;<sup>77</sup> however, it is “a misdemeanor if, . . . without consent of all parties to the communication, the person knowingly intercepts a[n] . . . oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication.”<sup>78</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1276.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1276-77.

<sup>70</sup> 641 So. 2d 849, 850 (Fla. 1994).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 852.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* The court reasoned: “Because we find that there is no reasonable expectation of privacy in a police car, section 934.03 does not apply to conversations that take place in those vehicles. Consequently, the section 934.06 prohibition against the use of intercepted oral communications as evidence is inapplicable as well.” *Id.*

<sup>76</sup> N.H. REV. STAT. ANN. § 570-A:1.II (2012).

<sup>77</sup> *Id.* § 570-A:2.I.

<sup>78</sup> *Id.* § 570-A:2.1-a.

The New Hampshire statute provides two exceptions allowing a police officer to record a conversation when performing the officer's duties. The first exception makes the eavesdropping prohibition inapplicable to a police officer recording a traffic stop, in other words allowing:

A uniformed law enforcement officer to make an audio recording in conjunction with a video recording of a routine stop performed in the ordinary course of patrol duties on any way as defined by RSA 259:125 [street or other thoroughfare], provided that the officer shall first give notification of such recording to the party to the communication.<sup>79</sup>

The second exception allows an officer to record an incident involving the use of a taser, in other words making the eavesdropping prohibition inapplicable to:

A law enforcement officer in the ordinary course of the officer's duties using any device capable of making an audio or video recording, or both, and which is attached to and used in conjunction with a TASER or other similar electroshock device. Any person who is the subject of such recording shall be informed of the existence of the audio or video recording, or both, and shall be provided with a copy of such recording at his or her request.<sup>80</sup>

One who illegally tapes a conversation without the consent of at least one party to the conversation has committed a class B felony, making the individual subject to more than one year and a maximum of seven years imprisonment, or a maximum fine of \$4,000, or both.<sup>81</sup> One who illegally tapes a conversation with the consent of only one party to the conversation has committed a misdemeanor, punishable as a class B misdemeanor, making the individual subject to "conditional or unconditional discharge, a [maximum] fine [of \$1,200], or other sanctions"; "[a] fine may be imposed in addition to any sentence . . . conditional discharge."<sup>82</sup>

In contrast to Florida and Pennsylvania, research showed no case law interpreting the New Hampshire statutory term "oral communication."<sup>83</sup>

### c. Pennsylvania

The Pennsylvania statutory prohibition against eavesdropping is similar to that of Florida in a number of respects. Pennsylvania defines "oral communication" as "[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation."<sup>84</sup> Similar to the New Hampshire eavesdropping statute, an exception to the Pennsylvania statute makes the eavesdropping prohibition inapplicable to a police officer recording a traffic stop.<sup>85</sup>

<sup>79</sup> *Id.* § 570-A:2.II.(j).

<sup>80</sup> *Id.* § 570-A:2.II.(l).

<sup>81</sup> *Id.* §§ 625:9.III.(a)(2), 651:2.II, IV.

<sup>82</sup> *Id.* §§ 625:9.IV.(c), 651:2.III, IV.

<sup>83</sup> A New Hampshire statute provides an exemption making it lawful for a "law enforcement officer . . . to intercept a telecommunication or oral communication, when . . . one of the parties to the communication has given prior consent to such interception." *Id.* § 570-A:2.II.(d). The Supreme Court of New Hampshire has interpreted the consent requirement under that statute in the context of a face-to-face conversation, *State v. Locke*, 761 A.2d 376, 381 (N.H. 1999), and instant messaging, *State v. Moscone*, 13 A.3d 137, 145 (N.H. 2011); *State v. Lott*, 879 A.2d 1167, 1172 (N.H. 2005).

<sup>84</sup> 18 PA. CONS. STAT. ANN. § 5702 (West 2013).

<sup>85</sup> *Id.* § 5704(16). The statute provides:

Under Pennsylvania law, it is a third degree felony if one “intentionally intercepts . . . any . . . oral communication;”<sup>86</sup> however, it is not illegal for “[a] person, to intercept a[n] . . . oral communication, where all parties to the communication have given prior consent to such interception.”<sup>87</sup> One convicted of a third degree felony is subject to a maximum of seven years imprisonment and a maximum fine of \$15,000.<sup>88</sup>

The Pennsylvania Supreme Court’s case law interpretation of the term oral communication tracks the statutory definition in part, but with a layered approach. The statutory language directs the court to determine if the conversant had a reasonable expectation that the conversation would not be intercepted, which interception, in most instances, means that the conversation would not be recorded; however, according to the Pennsylvania Supreme Court in *Agnew v. Dupler*, the non-interception determination is dependent on a determination that the conversant had a reasonable expectation of privacy.<sup>89</sup> This approach asks a court to first consider whether there was a reasonable

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A law enforcement officer, whether or not certified under section 5724 (relating to training), acting in the performance of his official duties to intercept and record an oral communication between individuals in accordance with the following:

(i) At the time of the interception, the oral communication does not occur inside the residence of any of the individuals.

(ii) At the time of the interception, the law enforcement officer:

(A) is in uniform or otherwise clearly identifiable as a law enforcement officer;

(B) is in close proximity to the individuals' oral communication;

(C) is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) to intercept the oral communication; and

(D) informs, as soon as reasonably practicable, the individuals identifiably present that he has intercepted and recorded the oral communication.

*Id.*

<sup>86</sup> *Id.* § 5703.

<sup>87</sup> *Id.* § 5704(4).

<sup>88</sup> *Id.* §§ 106(b)(4), 1101, 1103.

<sup>89</sup> *Agnew v. Dupler*, 717 A.2d 519, 523 (Pa. 1998). As the court explained:

[I]n determining what constitutes an “oral communication” under the Wiretap Act, the proper inquiries are whether the speaker had a specific expectation that the contents of the discussion would not be intercepted, and whether that expectation was justifiable under the existing circumstances. In determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy. To determine the existence of an expectation of privacy in one's activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable.

*Id.*

A 1996 case involved a police officer who secretly taped traffic stops. *Commonwealth v. McIvor*, 670 A.2d 697, 698 (Pa. Super. Ct. 1996). In contrast to the analysis of *Agnew*, the *McIvor* court found no linkage between a reasonable expectation of non-interception and a reasonable expectation of privacy. “Under the circumstances of this case, while the stopped motorists had no expectation of privacy, they had a very real expectation of non-

expectation of privacy prior to considering whether the expectation that the conversation would not be recorded was reasonable. This two-step approach, unique to the state, may well be because the Pennsylvania Supreme Court has recognized an implicit right to privacy under Article I, Section 8 of the Pennsylvania Constitution, the state's version of the Fourth Amendment to the United States Constitution.<sup>90</sup>

This interpretation asks a court to make two determinations, one about privacy and the other about non-interception, both of which have a subjective and an objective component. Case law focus is often on the reasonableness of the speaker's expectation of privacy because the reasonable expectation of non-interception finding is necessarily dependent on a reasonable expectation of privacy finding.<sup>91</sup> As for the subjective component, the conversant naturally claims an expectation of privacy and an expectation that the conversation was not being recorded. Thus, the key to the court's decision is the objective component of whether society would view the speaker's expectation of privacy as reasonable.<sup>92</sup>

The reasonableness objective component is often based on the location of the conversation and the identities or positions of the parties to the conversation. In 1998 in *Agnew v. Dupler*, the Pennsylvania Supreme Court found that a police officer did not have a reasonable expectation of privacy in a squadroom in the police department where the police officer was talking to two other police officers and the chief of police was eavesdropping on the conversation via intercom.<sup>93</sup> The squadroom was large and the door was open, allowing others outside the room to overhear conversations in the room without amplification, and the intercom on the room's four telephones, which could be activated at any time, permitted conversations in the room to be heard in other locations within the building.<sup>94</sup>

In the 1994 Pennsylvania Supreme Court case *Commonwealth v. Brion*, a confidential informant with a body wire entered Brion's home to make an illegal drug

interception. They legitimately could expect that their words would not be electronically seized and carried away by the officer." *Id.* at 704. The court then found that the secretly taped conversations were oral communication. *Id.* The Pennsylvania Supreme Court denied review of the case on appeal. *Commonwealth v. McIvor*, 692 A.2d 564 (Pa. 1997) (mem.).

The continued viability of *McIvor* seems doubtful, given *Agnew*. In addition, a police officer can easily tape a traffic stop in compliance with § 5704(16) quoted above, which was adopted in 2002.

<sup>90</sup> *Commonwealth v. Blystone*, 549 A.2d 81, 87 (Pa. 1988), *aff'd on other grounds*, 494 U.S. 299 (1990) ("Article I, § 8 creates an implicit right to privacy in this Commonwealth. . . . To determine whether one's activities fall within the right of privacy, we must examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable"). Another reason for making the non-interception dependent on a determination of a reasonable expectation of privacy may be to refute the reasoning of *McIvor*. The concurring opinion of *Agnew* would have separated the finding of interception from the finding of privacy. "Contrary to the Majority's position, I believe that the expectation of non-interception and the expectation of privacy involve two distinct inquiries. Thus, a speaker, under certain circumstances, may possess a reasonable expectation of non-interception even in the absence of a reasonable expectation of privacy." *Agnew*, 717 A.2d at 525 (Nigro, J., concurring).

<sup>91</sup> In determining whether the speaker has a reasonable expectation of privacy, the subjective component is whether the speaker expects privacy, and the objective component is whether society would consider this expectation reasonable. In determining whether there is a reasonable expectation of non-interception, the subjective component is whether the speaker expects that the conversation will not be recorded, and the objective component is whether society would consider this expectation reasonable. *Agnew*, 717 A.2d at 523.

<sup>92</sup> *Id.* "Since the standard for such expectation of privacy is one that society is prepared to recognize as reasonable, the standard is necessarily an objective standard and not a subjective standard . . ." *Id.* The determination of the reasonableness of the conversant's expectation of privacy is like a house of cards; with this objective component of reasonableness missing, the house of cards collapses.

<sup>93</sup> *Id.* at 521, 524.

<sup>94</sup> *Id.* at 524.

purchase and the informant taped the conversation.<sup>95</sup> The court found that the recording violated Brion's right to privacy under the Pennsylvania Constitution and held that "an individual can reasonably expect that his right to privacy will not be violated in his home through the use of any electronic surveillance."<sup>96</sup>

In a 1989 case, *Commonwealth v. Henlen*, a Pennsylvania state trooper was questioning a prison guard regarding the theft of an inmate's personal property.<sup>97</sup> Unbeknownst to the trooper, the guard was secretly taping the conversation, which conversation was being conducted at the county jail.<sup>98</sup> The Pennsylvania Supreme Court found that "the circumstances do not establish that Trooper Dibler possessed a justifiable expectation that his words would not be subject to interception."<sup>99</sup> Questioning of suspects is usually recorded, the trooper took notes of the questioning, which were to be made part of a report, and there was a third person present during part of the questioning.<sup>100</sup>

Thus, although the definition of "oral communication" in the statutes of the three states, Florida, New Hampshire, and Pennsylvania, is almost identical in wording, the interpretation of that term by two states is differs significantly. New Hampshire has not had occasion to interpret the meaning of oral communication. Florida and Pennsylvania have each decided a number of cases interpreting the meaning of the term.

Under Florida case law, a court would first consider the threshold issue of whether the subject conversation qualifies as an oral communication. Florida has interpreted the two prongs of the definition as being given equal weight. Thus, if either the speaker did not have an expectation of privacy or if the expectation of privacy was not reasonable, then Florida would find no protected oral communication. In *Walls*, the Florida Supreme Court easily found that the conversation qualified as an oral communication because the conversation took place in a private home. In both *Inciarrano* and *Smith*, the Florida Supreme Court found that the objective prong of the two-prong test lacking and, therefore, tape recording did not violate the Florida eavesdropping statute. Once it has been determined that the taped conversation qualifies as an oral communication, the court would move on to consider whether there was an eavesdropping violation because all parties to the conversation failed to consent.

In examining whether the taped conversation was private, Pennsylvania case law emphasizes the objective prong of the two-pronged test and assumes that the subjective prong of the test was met. Thus, it was reasonable for Brion to have an expectation of privacy in his home but it was not reasonable for there to be an expectation of privacy in a squadroom, as in *Agnew*, or during an interview that took place in a county jail, as in *Henlen*.

## 2. A Conversation that is Secretly Taped - Massachusetts

After reviewing the eavesdropping statutes of Florida, New Hampshire, and Pennsylvania, one should not necessarily expect the same two-pronged approach to apply to a state statute that protects a face-to-face conversation under the term "oral

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<sup>95</sup> 652 A.2d 287, 287 (Pa. 1994).

<sup>96</sup> *Id.* at 289.

<sup>97</sup> 564 A.2d 905, 905 (Pa. 1989).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 907.

<sup>100</sup> *Id.* at 906.

communication.” As more fully explained below, the key to the Massachusetts eavesdropping statute is whether the person who recorded the conversation did so secretly.

In Massachusetts,

...any person who--willfully commits an interception . . . of any . . . oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.<sup>101</sup>

Pursuant to the statute, “‘interception’ means to . . . secretly record . . . the contents of any . . . oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.”<sup>102</sup> The statute further defines “oral communication” as “speech, except such speech as is transmitted over the public air waves by radio or other similar device.”<sup>103</sup>

In a 2001 case, *Commonwealth v. Hyde*, the Supreme Judicial Court of Massachusetts held that the Massachusetts eavesdropping statute “strictly prohibits the secret electronic recording by a private individual of any oral communication, and makes no exception for a motorist who, having been stopped by police officers, surreptitiously tape records the encounter.”<sup>104</sup> The four police officers involved did not discover that Hyde, the driver, had secretly taped the fifteen to twenty minute stop, which was “confrontational” until Hyde went to the police department to file a complaint.<sup>105</sup> The police department requested that Hyde be charged with four counts of eavesdropping and Hyde was convicted of the charges.<sup>106</sup>

On appeal, Hyde argued that he could not be convicted because the officers did not have an expectation of privacy, reasoning that the term “oral communication” should be interpreted to require an expectation of privacy.<sup>107</sup> The four-member majority of the court declined to so interpret the Massachusetts eavesdropping statute in light of the statute’s “plain language and legislative history,” explaining that Hyde could have recorded the encounter had he “simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight.”<sup>108</sup>

The two justices joining in the vigorous dissent would have read the Massachusetts statute to prohibit recording only of a conversation made with “a legitimate expectation of privacy.”<sup>109</sup> The dissent emphasized the vital role that the public has in monitoring police activity. “To hold that the Legislature intended to allow police officers to conceal possible misconduct behind a cloak of privacy requires a more affirmative showing than this statute allows.”<sup>110</sup> Finally, the dissent noted the flawed nature of the

<sup>101</sup> MASS. GEN. LAWS ANN. ch. 272, § 99 C.1. (West 2014)

<sup>102</sup> *Id.* § 99 B.4.

<sup>103</sup> *Id.* § 99 B.2.

<sup>104</sup> 750 N.E.2d 963, 964 (Mass. 2001).

<sup>105</sup> *Id.* at 964-65.

<sup>106</sup> *Id.* at 965.

<sup>107</sup> *Id.* at 965-66.

<sup>108</sup> *Id.* at 971.

<sup>109</sup> *Id.* at 975 (Marshall, C.J., dissenting).

<sup>110</sup> *Id.* at 976. “It is the recognition of the potential for 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.” *Id.* at 977.



statute because it does not distinguish between a private individual and a reporter exercising the reporter's right under the First Amendment to Freedom of the Press and would subject both individuals to criminal liability.<sup>111</sup>

The dissenting opinion in *Hyde* makes it clear that not only face-to-face conversations made with a reasonable expectation of privacy are protected against being recorded. The Massachusetts interpretation of the state's eavesdropping statute focused on the autonomy of the individual in consenting or not consenting to being recorded. Still, a determination whether the taping was done secretly may be fact specific to a particular case and may be dependent on whether the speaker recognizes that a device in plain view has the capability of taping.

### 3. Taping a Conversation Where There is no Claim of a Reasonable Expectation of Privacy - Illinois

Until two 2014 Illinois Supreme Court decisions, Illinois law protected "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."<sup>112</sup> An individual eavesdropped when the individual "[k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation or electronic communication."<sup>113</sup> The statutory language specifically negated limiting conversations protected against recording to those made with a reasonable expectation of privacy; thus, it would have been an offense to tape a conversation even in a public place or in the midst of a crowd of people.<sup>114</sup> Among a lengthy string of exemptions, were two that allowed an officer to tape a conversation relating to a traffic stop while suspects were in a patrol car.<sup>115</sup>

Eavesdropping was a class 4 felony<sup>116</sup> unless the person recorded was a law enforcement officer or other official, in which event eavesdropping was a class 1 felony.<sup>117</sup> One convicted of a class 4 felony was subject to imprisonment of not less than one to not more than three years and a fine of a maximum of \$25,000.<sup>118</sup> One convicted of a class 1 felony was subject to imprisonment of not less than four to not more than fifteen years and a fine of a maximum of \$25,000.<sup>119</sup>

In 2014 in *People v. Clark*<sup>120</sup> and *People v. Melongo*,<sup>121</sup> two cases decided on the same day, the Illinois Supreme Court recognized the unforgiving nature of the Illinois statute that protected face-to-face conversations even if there was no reasonable

<sup>111</sup> *Id.*

<sup>112</sup> 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West 2003).

<sup>113</sup> *Id.* 5/14-2(a)(1).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* 5/14-3(h), (h-5).

<sup>116</sup> *Id.* 5/14-4(a). "Eavesdropping, for a first offense, is a Class 4 felony and, for a second or subsequent offense, is a Class 3 felony." *Id.*

<sup>117</sup> *Id.* 5/14-4(b).

<sup>118</sup> 730 ILL. COMP. STAT. ANN. 5/5-4.5-45(a), 5/5-4.5-50(b) (West, Westlaw through P.A. 98-756 of the 2014 Reg. Sess.).

<sup>119</sup> *Id.* 5/5-4.5-30(a), 5/5-4.5-50(b).

<sup>120</sup> *People v. Clark*, 6 N.E.3d 154 (Ill. 2014). Clark was charged with secretly taping a conversation with an attorney and secretly taping a conversation with a judge and an attorney. *Id.* at 156.

<sup>121</sup> *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014). Melongo was charged with secretly taping three telephone conversations with the Assistant Administrator of the Cook County Court Reporter's Office, Criminal Division, and illegally posting the recordings and a transcript of the recordings on her website. *Id.* at 122-23.

expectation of privacy and held the recording statute to be unconstitutional on its face.<sup>122</sup>

The court found the statute problematic for several reasons. First of all, the statute “criminalize[d] a wide range of innocent conduct.”<sup>123</sup> The court explained, “[t]he statute criminalizes the recording of conversations that cannot be deemed private: a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others.”<sup>124</sup> A second reason for concern is that one who openly tapes a conversation with the recording device in plain view might have been charged under the statute unless the person taping had the express consent of all parties to the conversation. “[T]he individual must risk being charged with a violation of the statute and hope that the trier of fact will find implied consent.”<sup>125</sup> In addition, the court recognized the value of an eavesdropping statute in protecting conversations that are truly private from being surreptitiously taped; otherwise, the possibility of an intimate conversation being taped might have a chilling effect.<sup>126</sup>

Thus, with two Illinois Supreme Court decisions, Illinois has moved from rigidly protecting conversations against being taped to presently providing no protection. The Illinois legislature will have the task of fashioning a new eavesdropping statute.

#### 4. Taping a Private Conversation

Maryland, Michigan, and Washington prohibit taping a “private conversation” without all-party consent.

##### a. Maryland

Maryland makes it illegal to tape “any person in private conversation” unless “the person is a party to the communication and where all of the parties to the communication have given prior consent.”<sup>127</sup> One who illegally tapes a conversation is subject to up to five years imprisonment, or up to ten thousand dollars in fine, or both.<sup>128</sup> An exception to a Maryland statute allows a police officer to record a traffic stop subject to certain conditions.<sup>129</sup>

<sup>122</sup> *Clark*, 6 N.E.3d at 162 (“[S]ection [5/14-2](a)(1)(A) of the eavesdropping statute is unconstitutional as violative of the overbreadth doctrine under the first amendment to the United States Constitution.”); *Melongo*, 6 N.E.3d at 127 (“[T]he recording provision is unconstitutional on its face because a substantial number of its applications violate the first amendment.”).

<sup>123</sup> *Melongo*, 6 N.E.3d at 126.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Clark*, 6 N.E.3d at 160-61.

<sup>127</sup> MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401(13)(i), (3), 10-402(a)(1), (c)(3) (West 2011 & Supp. 2014).

<sup>128</sup> *Id.* § 10-402(b).

<sup>129</sup> *Id.* § 10-402(c)(4). The statute provides:

(i) It is lawful under this subtitle for a law enforcement officer in the course of the officer's regular duty to intercept an oral communication if:

1. The law enforcement officer initially lawfully detained a vehicle during a criminal investigation or for a traffic violation;
2. The law enforcement officer is a party to the oral communication;
3. The law enforcement officer has been identified as a law enforcement officer to the other parties to the oral communication prior to any interception;
4. The law enforcement officer informs all other parties to the communication of the interception at the beginning of the communication; and
5. The oral interception is being made as part of a video tape recording.

The Maryland term “private conversation” is not defined by statute. In 1997, a Maryland court analyzed whether a conversation qualified as an oral communication by determining whether the conversation was made with a reasonable expectation of privacy.<sup>130</sup> In so doing, the court employed the two-pronged *Katz* test of “whether Craigie exhibited an actual, subjective expectation of privacy with regard to his statements. If we answer that question in the affirmative, we then ask whether that expectation is ‘one that society is prepared to recognize as ‘reasonable.’”<sup>131</sup>

### b. Michigan

Michigan statutes define “eavesdropping” as “to overhear, record, amplify or transmit” the “private discourse of others without the permission of all persons engaged in the discourse.”<sup>132</sup> It is illegal for “[a]ny person who is present or who is not present” to eavesdrop on a “private conversation,” with one who illegally eavesdrops subject to up to two years imprisonment, or a fine of up to two thousand dollars, or both.<sup>133</sup> In contrast to the eavesdropping and wiretapping statutes in most other states, the Michigan statutes do not distinguish between eavesdropping on a face-to-face conversation and wiretapping a telephone conversation, with the terms “private discourse of others” and “private conversation” applying to both types of conversations.

In 2001 in *People v. Stone*, the Michigan Supreme Court interpreted a private conversation to be “a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance.”<sup>134</sup> Although *Stone* involved a cordless telephone conversation, the court’s interpretation in *Stone* coincides with its decision in *Dickerson v. Raphael*,<sup>135</sup> which involved the recording of a face-to-face conversation.<sup>136</sup>

In *Dickerson*, the Michigan Court of Appeals had held that, where one of the participants in the conversation was wearing a concealed microphone, a non-participant who was taping the conversation could be liable for eavesdropping.<sup>137</sup> In reversing in part, the Michigan Supreme Court found that the intermediate appellate court had improperly granted a directed verdict in favor of the participant whose conversation had been secretly broadcast because the lower court had not first determined whether the conversation was private.<sup>138</sup> The Michigan Supreme Court stated, “the question whether plaintiff’s conversation was private depends on whether she intended and reasonably expected it to

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(ii) If all of the requirements of subparagraph (i) of this paragraph are met, an interception is lawful even if a person becomes a party to the communication following:

1. The identification required under subparagraph (i)3 of this paragraph; or
2. The informing of the parties required under subparagraph (i)4 of this paragraph.

*Id.*

<sup>130</sup> *Malpas v. State*, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997).

<sup>131</sup> *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The court found that Craigie did not have an expectation of privacy because, on his side of the telephone conversation, he was yelling loud enough to be heard in the next apartment. *Id.* at 591, 595.

<sup>132</sup> MICH. COMP. LAWS ANN. § 750.539a(2) (West, Westlaw through P.A.2014, No. 280, of the 2014 Reg. Sess., 97th Legislature).

<sup>133</sup> *Id.* § 750.539c.

<sup>134</sup> *People v. Stone*, 621 N.W.2d 702, 705 (Mich. 2001).

<sup>135</sup> *Dickerson v. Raphael*, 601 N.W.2d 108 (Mich. 1999).

<sup>136</sup> *Dickerson v. Raphael*, 564 N.W.2d 85, 87-88 (Mich. Ct. App. 1997), *rev’d in part*, 601 N.W.2d 108 (Mich. 1999).

<sup>137</sup> *Id.* at 88.

<sup>138</sup> 601 N.W.2d at 108.

be private at the time and under the circumstances involved.”<sup>139</sup> The trial court had mistakenly focused on the substance of the conversation rather than the speaker’s reasonable expectation of privacy. “The proper question is whether plaintiff intended and reasonably expected that the *conversation* was private, not whether the subject matter was intended to be private.”<sup>140</sup>

In 2011 in *Bowens v. Ary, Inc.*,<sup>141</sup> the Michigan Supreme Court applied language from *Stone* when finding that the plaintiffs did not have a reasonable expectation of privacy based on the following facts:

(1) the general locale of the meeting was the backstage of the Joe Louis arena during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes; (2) the concert-promoter defendants were not receptive to the public-official plaintiffs’ requests and, by all accounts, the parties’ relationship was antagonistic; (3) the room in which plaintiffs chose to converse served as defendants’ operational headquarters with security personnel connected to defendants controlling the open doors; (4) there were at least nine identified people in the room, plus unidentified others who were free to come and go from the room, and listen to the conversation, as they pleased; (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including a crew from MTV and a crew specifically hired by defendants to record backstage matters of interest; (6) and video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present, thereby establishing that at least one cameraman was openly and obviously filming during the course of what plaintiffs have characterized as a “private conversation.”<sup>142</sup>

An interesting question in Michigan is whether a participant can tape a conversation without running afoul of the prohibition against eavesdropping even though the all-party consent requirement would be applicable if a bystander were to tape the conversation. In 1982 in *Sullivan v. Gray*, the Michigan Court of Appeals interpreted that statute to allow taping by one of the parties to a telephone conversation.<sup>143</sup> “The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on.”<sup>144</sup> The Michigan Supreme Court did not weigh in on this interpretation, denying review in *Sullivan*,<sup>145</sup> nor in *Dickerson* did the Michigan Supreme Court comment on whether there was an exception for a participant recording the conversation.<sup>146</sup>

### c. Washington

Washington makes it illegal to tape “any . . . [p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation.”<sup>147</sup> One who

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> 794 N.W.2d 842 (Mich. 2011).

<sup>142</sup> *Id.* at 843-44.

<sup>143</sup> 324 N.W.2d 58, 60 (Mich. Ct. App. 1982).

<sup>144</sup> *Id.*

<sup>145</sup> *Sullivan v. Gray*, 335 N.W.2d 473 (Mich. 1983) (mem.).

<sup>146</sup> *Dickerson v. Raphael*, 601 N.W.2d 108, 108 (Mich. 1999).

<sup>147</sup> WASH. REV. CODE ANN. § 9.73.030(1) (West, Westlaw through 2014 legislation). The statute specifies how all party consent may be demonstrated:

illegally tapes a private conversation has committed a gross misdemeanor<sup>148</sup> and is subject to up to three hundred sixty four days imprisonment, or up to five thousand dollars in fine, or both.<sup>149</sup> Under the state eavesdropping statutes, a police officer who uses the patrol car video to tape a conversation must specifically inform civilians that the conversation is being recorded.<sup>150</sup>

The term “private conversation” has no statutory definition; however, the term has been subject to case law interpretation. The Washington Supreme Court found that a traffic stop conversation is not private.<sup>151</sup> The court also found that “conversations with police officers are not private.”<sup>152</sup>

In other circumstances, the court has interpreted the term to first require that the parties to the conversation have a subjective expectation of privacy and that the court consider three other factors in determining whether the taped conversation is a private conversation within the meaning of the statute.<sup>153</sup> In a 2006 case, *Lewis v. State, Dept. of Licensing*, the Washington Supreme Court stated that the three factors are: “(1) duration and subject matter of the conversation, (2) location of conversation and presence or

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Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

*Id.* § 9.73.030(3).

<sup>148</sup> *Id.* § 9.73.080(1).

<sup>149</sup> *Id.* § 9.92.020.

<sup>150</sup> *Id.* § 9.73.090(1)(c). The statute exempts “[s]ound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles” from the reach of the eavesdropping prohibition. *Id.* However, there are several conditions that a police officer must abide by when making the recording. The statute provides:

All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into “pre-event” mode.

....

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

*Id.*

<sup>151</sup> *Lewis v. State, Dep’t of Licensing*, 139 P.3d 1078, 1086 (Wash. 2006). In *Lewis*, the Washington Supreme Court held that “traffic stop conversations are not private.” *Id.* the court further held that “the language of RCW 9.73.090(1)(c) directs officers to inform all traffic stop detainees that they are being recorded, not just those having private conversations. Therefore, we conclude that police officers must strictly comply with RCW 9.73.090(1)(c), even though recording those traffic stop conversations does not also violate RCW 9.73.030.” *Id.*

<sup>152</sup> *Id.* at 1084.

<sup>153</sup> *Id.* at 1083.

potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party.”<sup>154</sup>

In *Lewis*, the court considered four consolidated cases in which police officers had stopped drivers for alleged DUI offenses and the officers had taped the conversations.<sup>155</sup> In considering the three factors, the court easily concluded that the conversations were not private;<sup>156</sup> however, the court excluded the use of the taped conversation in each of the three cases in which the police officer failed to inform the driver that the conversation was being taped.<sup>157</sup>

In the 2014 case *State v. Kipp*, the Washington Supreme Court considered the three factors in deciding that the conversation was private.<sup>158</sup> Kipp engaged in a ten-minute conversation with his brother-in-law about a sensitive subject when they were alone in a private home.<sup>159</sup>

Thus, although Maryland, Michigan, and Washington all protect face-to-face conversations under the term “private conversation,” the case law interpretation of the term differs from state to state. In addition, Michigan may allow participant taping as an exception to all-party consent.

### 5. Taping a Confidential Communication - California

In California, it is illegal to tape a “confidential communication . . . without the consent of all parties.”<sup>160</sup> A “confidential communication” is defined as:

[A]ny communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.<sup>161</sup>

<sup>154</sup> *Id.* The court first identified the three factors in 1996. *State v. Clark*, 916 P.2d 384, 392-93 (Wash. 1996). In that case, the court provides analysis, perhaps instructive, of whether the three factors apply in a number of situations. *Id.*

<sup>155</sup> 139 P.3d at 1079.

<sup>156</sup> *Id.* at 1084.

Under the first factor, the recorded conversations in these cases were essentially brief business conversations with uniformed police officers. Under the second factor, the conversations between the police officers and the detainees occurred in public, in several cases along busy roads. Additionally, in the case of *Lewis and Kelly*, third parties were present for part or all of the conversations because the police officers called back-up, and in the case of *Kelly*, a passenger was in his car. Finally, under the third factor, it is not persuasive that the nonconsenting parties to these conversations, the drivers, 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.* at 1083.

<sup>157</sup> *Id.* at 1090.

<sup>158</sup> 317 P.3d 1029, 1035-36 (Wash. 2014).

<sup>159</sup> *Id.* at 1034-35.

<sup>160</sup> CAL. PENAL CODE § 632(a) (West, Westlaw through urgency legislation through Ch. 187 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2nd Ex. Sess., and all propositions on the 6/3/2014 ballot).

<sup>161</sup> *Id.* § 632(c).

The California Supreme Court found that “a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.”<sup>162</sup> One who illegally tapes a conversation is subject to up to one year imprisonment, or a fine of up to two thousand five hundred dollars, or both.<sup>163</sup>

Thus, California employs the *Katz* two-pronged test to determine if a face-to-face conversation qualifies for protection as a “confidential communication.”

## 6. Protection Against Taping a Conversation

### a. Montana

Montana makes it illegal to secretly record a conversation without all party consent.<sup>164</sup> Under the Montana statute, one “commits the offense of violating privacy in communications if the person knowingly or purposely . . . records . . . a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation.”<sup>165</sup> The statute exempts from criminal sanction “elected or appointed public officials or . . . public employees when the . . . recording is done in the performance of official duty.”<sup>166</sup> This exception would allow a uniformed police officer to secretly record a conversation with a suspect.<sup>167</sup> One who illegally tapes a conversation is subject to up to six months imprisonment, or up to five hundred dollars in fine, or both.<sup>168</sup>

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<sup>162</sup> *Flanagan v. Flanagan*, 41 P.3d 575, 582 (Cal. 2002). *Flanagan* involved the secret taping of telephone conversations; however, pursuant to statutory language the term “confidential communication” is not limited to face-to-face conversation. Section 632(a) provides:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

§ 632(a). As evidence of the inclusive nature of the term, in *Flanagan* the California Supreme Court cited with approval to a case involving a face-to-face conversation. 41 P.3d at 581 (citing *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 492 (Cal. 1998) (finding that the recording is illegal if one has “an objectively reasonable expectation of privacy” in the conversation)).

<sup>163</sup> § 632(a).

<sup>164</sup> MONT. CODE ANN. § 45-8-213(1) (West 2009), *invalidated on other grounds by State v. Dugan*, 303 P.3d 755 (Mont. 2013).

<sup>165</sup> *Id.* Secret recording is not illegal in circumstances in which either “persons [are] speaking at public meetings” or “persons [are] given warning of the . . . recording, and if one person provides the warning, either party may record.” *Id.* § 45-8-213(1)(c).

<sup>166</sup> *Id.*

<sup>167</sup> However, the Montana Constitution may prohibit secret taping by a police informant. The Montana Constitution contains a right to privacy and a right against unreasonable search and seizure. *See* MONT. CONST. art. II, §§ 10, 11. In a 2008 decision, the Montana Supreme Court held that “recording of the Defendants’ conversations with the confidential informants, notwithstanding the consent of the confidential informants, constituted searches subject to the warrant requirement of Article II, Section 11 of the Montana Constitution.” *State v. Goetz*, 191 P.3d 489, 504 (Mont. 2008). The court further found that “recording of those conversations without a warrant or the existence of an established exception to the warrant requirement violated the Defendants’ rights under Article II, Sections 10 and 11.” *Id.*

<sup>168</sup> § 45-8-213(3)(a).

In addition to the eavesdropping statute, Article 2, § 10 of the Montana Constitution guarantees Montana citizens a right to privacy: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>169</sup>

The eavesdropping statute does not define the term “conversation” and research fails to show that the term has been interpreted by the Montana state courts. However, two Supreme Court of Montana cases have interpreted the Montana Constitution privacy provision to protect certain conversations against being secretly taped.

In 2008 in *State v. Goetz*, the court considered two consolidated cases in which police confidential informants had been fitted with body wires and secretly taped conversations with the two suspects, with two of the conversations taking place in the suspects’ residences and one conversation taking place in the informant’s vehicle located in a parking lot.<sup>170</sup> In determining if the suspect had a right to privacy, the court considered “1) whether the person challenging the state’s action has an actual subjective expectation of privacy; [and] 2) whether society is willing to recognize that subjective expectation as objectively reasonable.”<sup>171</sup> The court found that the suspects did have “actual subjective expectations of privacy” because of the “private settings”<sup>172</sup> and that “society is willing to recognize as reasonable the expectation that conversations held in a private setting are not surreptitiously being electronically monitored and recorded by government agents.”<sup>173</sup>

In 2010 in *State v. Meredith*, police officers secretly taped Meredith’s allegedly incriminating statements while he sat alone in a police station interrogation room.<sup>174</sup> The Supreme Court of Montana used the two-pronged test from *Goetz* and concluded that “while Meredith *may* have an expectation of privacy in his statements, it is not one that society would recognize as objectively reasonable.”<sup>175</sup> The court reasoned that “[h]ad [Meredith] wanted to preserve his privacy, he would not have voiced his thoughts.”<sup>176</sup>

### b. Oregon

The Oregon statute provides that one “may not . . . [o]btain . . . the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are

<sup>169</sup> MONT. CONST. art. II, § 10.

<sup>170</sup> *Goetz*, 191 P.3d at 492-93.

<sup>171</sup> *Id.* at 497.

<sup>172</sup> *Id.* at 499. “The [suspects] did not conduct their conversations where other individuals were present or physically within range to overhear the conversations.” *Id.* at 498.

<sup>173</sup> *Id.* at 500. An open question is whether the court would have reached the same two conclusions if the person secretly taping had been a private individual. The court stated:

[W]hile we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.

*Id.*

<sup>174</sup> 226 P.3d 571, 575, 580 (Mont. 2010).

<sup>175</sup> *Id.* at 580.

<sup>176</sup> *Id.* “Police interrogation rooms are traditionally areas where people are watched and monitored in some form or fashion whether it be by two-way glass, video taping or audio recording. In addition, there was no reason for Meredith to make the incriminating statements out loud unless he wanted to be overheard.” *Id.*



specifically informed that their conversation is being obtained.”<sup>177</sup> The term “conversation” is defined as “the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication.”<sup>178</sup> The Oregon eavesdropping statutes are in some respects similar to those of Illinois in that Oregon requires all party consent and does not limit protected conversations to those made with an expectation of privacy considered to be reasonable.<sup>179</sup> Research of Oregon case law reveals no case that read a reasonable expectation of privacy requirement into a protected conversation. Illegal eavesdropping is a class A misdemeanor,<sup>180</sup> carrying a maximum one year prison term<sup>181</sup> and a maximum fine of six thousand two hundred fifty dollars.<sup>182</sup>

Surprisingly enough, the words “specifically informed” were the focus of two Oregon Court of Appeals cases, one from 1990 and the second from 2011, decided en banc.<sup>183</sup> In the 1990 case, Bichsel’s conviction for recording her in-person conversation with at least two officers and her companion was affirmed because she failed to tell the officers that she was recording the conversation.<sup>184</sup> In the 2011 case, a police officer pulled over Neff for a traffic stop and told Neff that the officer was recording the conversation; the officer did not know that Neff was also recording the conversation from his driver’s position with a recorder not in view of the officer.<sup>185</sup> The court held that officer “Ou’s own act of informing defendant that their conversation was being recorded was sufficient to satisfy the requirement of ORS 165.540(1)(c) that all participants to the conversation be ‘specifically informed’ that the conversation was being obtained.”<sup>186</sup>

<sup>177</sup> OR. REV. STAT. ANN. § 165.540(1) (West, Westlaw through 2014 Reg. Sess. legislation effective through July 1, 2014).

<sup>178</sup> *Id.* § 165.535(1).

<sup>179</sup> The statute does except from the reach of the prohibition against recording, face-to-face conversations made in certain specified settings so long as the tape recorder is not hidden. *Id.* § 165.540(6). The statute provides:

The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept or attempt to intercept with an unconcealed recording device the oral communications that are part of any of the following proceedings:

(a) Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;

(b) Regularly scheduled classes or similar educational activities in public or private institutions; or

(c) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

*Id.*

<sup>180</sup> *Id.* § 165.540(8).

<sup>181</sup> *Id.* § 161.615.

<sup>182</sup> *Id.* § 161.635(1).

<sup>183</sup> See *State v. Bichsel*, 790 P.2d 1142 (Or. Ct. App. 1990) (en banc); *State v. Neff*, 265 P.3d 62 (Or. Ct. App. 2011) (en banc).

<sup>184</sup> *Bichsel*, 790 P.2d at 1143. Bichsel had been counseling young people at a local mall and was carrying a tape recorder that continued to record when she and a companion met up with at least two police officers in an alley of downtown Eugene. One of the officers arrested Bichsel when the officer discovered that their conversation had been recorded. *Id.* The court opined that, even if the recorder was in plain sight, as Bichsel claimed, the statute required her to tell the officers that she was taping the conversation. *Id.* at 1144-45.

<sup>185</sup> *Neff*, 265 P.3d at 63.

<sup>186</sup> *Id.* at 68. The court found that “the primary concern underlying ORS 165.540(1)(c) was the protection of participants in conversations from being recorded without their knowledge.” *Id.* at 66. The court reasoned that “[w]here, as here, all participants in a conversation know that the conversation is being recorded, the legislature’s primary concern has been satisfied.” *Id.*

Similar to the New Hampshire eavesdropping statute, the Oregon statute provides two exceptions allowing a police officer to record a conversation when performing the officer's duties.<sup>187</sup>

Although the eavesdropping statutes of Montana and Oregon protect face-to-face conversations, the focus of the two states is quite different. Montana uses the *Katz* two-pronged test to gauge the speaker's privacy. Oregon is more akin to Massachusetts in Oregon's focus on the autonomy of the speaker in consenting or not consenting to being taped.

## 7. One-Party Consent States

The federal eavesdropping statutes prohibit taping a conversation that qualifies as an oral communication.<sup>188</sup> In defining the term oral communication, the federal statutes incorporate the *Katz* two-pronged reasonable expectation of privacy test. Thus, an oral communication is a conversation in which the speaker has an expectation of privacy that society would consider to be reasonable. The first prong is the subjective component of the test and the second prong is the objective component of the test.<sup>189</sup> One of the exemptions from liability under the federal statutes allows a private individual to tape a conversation if the person is a party to the conversation or one of the parties to the conversation consents to the taping unless the taping is for a criminal or tortious purpose.<sup>190</sup> This exemption makes the federal eavesdropping statutes one-party consent statutes.

Although the federal statutes allow a conversation to be taped upon one-party consent, it would be illegal for someone who is not a party to the conversation to tape the conversation so long as the participants expect privacy in the conversation and society would consider that expectation of privacy to be reasonable.<sup>191</sup> Typically, people discussing confidential, sensitive, or intimate information expect privacy; therefore, the subjective component of the test is usually satisfied. The second prong of the test, the objective component, is usually fact specific and is often tied to location and the possibility that the conversation might be overheard. A reasonable expectation of privacy is often recognized in a private home, but not in a public park or on a public street. However, there may not be a reasonable expectation of privacy in a private home if the doors or windows were open or the parties to the conversation were speaking loud enough to be heard outside the home<sup>192</sup> and there might be a reasonable expectation of privacy in a

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<sup>187</sup> The first exception allows a police officer to record a traffic stop, in other words making the eavesdropping prohibition inapplicable to:

A law enforcement officer who is in uniform and displaying a badge and who is operating a vehicle-mounted video camera that records the scene in front of, within or surrounding a police vehicle, unless the officer has reasonable opportunity to inform participants in the conversation that the conversation is being obtained.

§ 165.540(5)(c). The second exception allows an officer to record an incident involving the use of a taser, in other words making the eavesdropping prohibition inapplicable to: "A law enforcement officer who, acting in the officer's official capacity, deploys an Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable of recording audio or video, for the duration of that deployment." *Id.* § 165.540(5)(d).

<sup>188</sup> 18 U.S.C.A. § 2511 (West 2000 & Supp. 2014).

<sup>189</sup> See *supra* notes 30-32 and accompanying text.

<sup>190</sup> See *supra* note 27 and accompanying text.

<sup>191</sup> See *supra* notes 30-32 and accompanying text.

<sup>192</sup> See, e.g. *Malpas v. State*, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997); *People v. Kirsh*, 575 N.Y.S.2d 306, 307 (App. Div. 1991). The *Malpas* court found that Craigie did not have an expectation of privacy because, on

park if the conversation is being conducted in a low tone of voice and the parties to the conversation are far removed from others in the park.<sup>193</sup>

The federal eavesdropping statutes have been quite influential and serve as a model for many states adopting their own eavesdropping statutes. The eavesdropping statutes of a number of states track the above provisions of the federal eavesdropping statutes. The states that track the federal eavesdropping statutes fairly closely are: Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island,<sup>194</sup> Utah, West Virginia, and Wisconsin.<sup>195</sup> Other states that are one-party consent states and use a two-pronged definition of oral communication but do not track the federal statutes include: Arizona, Colorado, Idaho, Missouri,<sup>196</sup> North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming.<sup>197</sup>

Other states protect a face-to-face conversation using a term other than “oral communication” but define the term using subjective and objective components. The Alaska eavesdropping statutes protect “private communication” and define the term using the two-pronged *Katz* test.<sup>198</sup> The eavesdropping statutes of Georgia<sup>199</sup> and Kansas<sup>200</sup> protect “private conversation” made in a “private place” and define private place as a location where one can be “reasonably safe” from “surveillance.” The Maine eavesdropping statutes protect the privacy of sounds made in a “private place” and define private place as a location where one can be “reasonably safe” from “surveillance.”<sup>201</sup> The New York eavesdropping statutes protect “conversation” but the statutes do not define conversation;<sup>202</sup> New York case law indicates that a conversation made with a reasonable expectation of privacy is protected against recording.<sup>203</sup>

Other states protect a face-to-face conversation against being secretly taped but do not provide a definition for the type of conversation protected.<sup>204</sup> These states are: Alabama, Arkansas, Kentucky, Tennessee, Connecticut, and Nevada. The Alabama eavesdropping statutes<sup>205</sup> protect “private communication”; the eavesdropping statutes of

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his side of the telephone conversation, he was yelling loud enough to be heard in the next apartment. 695 A.2d at 591, 595. The *Kirsh* court found that “absent a reasonable expectation of privacy, the recording of conversations, *per se*, is not illegal” and the defendant had no reasonable expectation of privacy in “conversations . . . heard through a hole in the floor, and tape recorded.” 575 N.Y.S.2d at 307.

<sup>193</sup> See, e.g., *Dickerson v. Raphael*, 564 N.W.2d 85, 87-88 (Mich. Ct. App. 1997), *rev'd in part*, 601 N.W.2d 108 (Mich. 1999). The conversation took place in a public park with one of the parties wearing a microphone that simultaneously broadcast the conversation to a TV van. On appeal the Michigan Supreme Court stated “the question whether plaintiff’s conversation was private depends on whether she intended and reasonably expected it to be private at the time and under the circumstances involved.” *Dickerson v. Raphael*, 601 N.W.2d 108, 108 (Mich. 1999).

<sup>194</sup> In Rhode Island, the term “oral communication” is defined in a criminal procedure statute, rather than in the eavesdropping statute. R.I. GEN. LAWS ANN. § 12-5.1-1(10) (West 2006).

<sup>195</sup> See *infra* app. A (Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, Utah, West Virginia, and Wisconsin).

<sup>196</sup> Missouri eavesdropping statutes protect “oral communication” where the conversation is intercepted using a microphone transmitting the conversation elsewhere and define the term using the two-pronged *Katz* test. See app. A (Missouri).

<sup>197</sup> See *infra* app. A (Arizona, Colorado, Idaho, Missouri, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming).

<sup>198</sup> See *infra* app. A (Alaska).

<sup>199</sup> See *infra* app. A (Georgia).

<sup>200</sup> See *infra* app. A (Kansas).

<sup>201</sup> See *infra* app. A (Maine).

<sup>202</sup> See *infra* app. A (New York).

<sup>203</sup> *People v. Kirsh*, 575 N.Y.S.2d 306, 307-08 (App. Div. 1991).

<sup>204</sup> See *infra* app. A (Alabama, Arkansas, Kentucky, Tennessee, Connecticut, and Nevada).

<sup>205</sup> See *infra* app. A (Alabama).

Arkansas,<sup>206</sup> Kentucky,<sup>207</sup> and Tennessee<sup>208</sup> protect “oral communication”; the Connecticut eavesdropping statutes<sup>209</sup> protect “conversation”; and the Nevada eavesdropping statutes<sup>210</sup> protect “private conversation.” In these states, lack of a definition for the type of conversation being protected is problematic for a bystander taping an encounter with a police officer. The police officer could claim that the taping was illegal even if the taping were done in a location traditionally open to the public, such as a street or a park.

As one might imagine, arresting someone who is videotaping an encounter with a police officer has been challenged under the theory that the First Amendment protects the videotaping. The following section discusses First Amendment protection for videotaping a police officer.

### III. FIRST AMENDMENT RIGHT TO GATHER INFORMATION

There is a circuit split as to whether there is a First Amendment right to record a police officer and the United States Supreme Court has yet to clarify whether such a First Amendment right exists. However, two federal courts of appeals, the first and the seventh circuits, found that the First Amendment protects civilian taping of encounters with police officers.<sup>211</sup> These cases are discussed in subsections A and B below.

As one might expect, a much higher percentage of cases advocating a First Amendment right to gather information are from all-party consent states than from one-party consent states because it is easier for a police officer in an all-party consent state to allege that the civilian taping an encounter with a police officer has violated the state eavesdropping statute. Although just over one-fifth of the states have all-party consent eavesdropping statutes, just over sixty percent of the cases discussed in this section are from all-party consent states.

#### A. The Seventh Circuit

The impetus behind the seventh circuit’s 2012 decision in *American Civil Liberties Union of Illinois v. Alvarez*<sup>212</sup> was the ACLU’s planned “police accountability program” pursuant to which individuals would videotape and audiotape public police officer activity where the police officer’s conversation could be heard by a bystander. Fearful that the individuals taping would be charged under the Illinois eavesdropping statutes, the ACLU filed the lawsuit against the Cook County State Attorney requesting that the judge enter an injunction preventing enforcement of the eavesdropping statutes against individuals participating in the planned program.<sup>213</sup> The Illinois eavesdropping statutes make recording a conversation illegal except with the consent of all parties to the

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<sup>206</sup> See *infra* app. A (Arkansas).

<sup>207</sup> See *infra* app. A (Kentucky).

<sup>208</sup> See *infra* app. A (Tennessee).

<sup>209</sup> See *infra* app. A (Connecticut).

<sup>210</sup> See *infra* app. A (Nevada).

<sup>211</sup> *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012), on remand, No. 10 C 5235, 2012 WL 6680341 (N.D. Ill. Dec. 18, 2012) (granting the plaintiff’s motion for summary judgment and a permanent injunction); *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011).

<sup>212</sup> *Alvarez*, 679 F.3d at 586.

<sup>213</sup> *Id.*

conversation and do not limit protection to those conversations made with an expectation of privacy.<sup>214</sup>

In considering “whether the First Amendment prevents Illinois prosecutors from enforcing the eavesdropping statute against people who openly record police officers performing their official duties in public,”<sup>215</sup> the court emphasized the all-inclusive nature of the Illinois statutes.<sup>216</sup> The court found that “[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”<sup>217</sup> The court reasoned that the Illinois statute “restricts . . . an integral step in the speech process” as it “interferes with the gathering and dissemination of information about government officials performing their duties in public.”<sup>218</sup> The court noted that recorders are devices generally available and used by the public, with the characteristics of being “uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public” and “self-authenticating” making “it highly unlikely that other methods could be considered reasonably adequate substitutes.”<sup>219</sup>

The court remanded the case to the federal district court to enjoin the “State’s Attorney from applying the Illinois eavesdropping statute against the ACLU and its employees or agents who openly audio record the audible communications of law-enforcement officers (or others whose communications are incidentally captured) when the officers are engaged in their official duties in public places.”<sup>220</sup> After the United States Supreme Court denied certiorari,<sup>221</sup> the federal district court granted the ACLU’s motion for summary judgment and entered a permanent injunction barring the State’s Attorney from enforcing the Illinois statute against those participating in the ACLU accountability program.<sup>222</sup>

## B. The First Circuit

*Glik v. Cunniffe* was a 2011 case from the first circuit in which Glik was walking past the Boston Common when he began using his cell phone to videotape three officers ten feet away, allegedly using excessive force, arresting a young male.<sup>223</sup> Following the

<sup>214</sup> *Id.* at 587. The *Alvarez* court described the history of the eavesdropping statutes, including an interesting interplay between the judicial and legislative branches. *Id.* A 1986 Illinois Supreme Court case involved an arrestee with a tape recorder seated in the back seat of a patrol car who taped a conversation between two officers in the front seat. *People v. Beardsley*, 503 N.E.2d 346, 347-48 (Ill. 1986). The *Beardsley* court read into the eavesdropping statute a requirement that there be a reasonable expectation of privacy for the conversation to be protected. “Because there was no surreptitious interception of a communication intended by the declarants to be private, secret, or confidential, under circumstances justifying such expectation, there was no violation of the eavesdropping statute.” *Id.* at 350. Eight years later, the Illinois Supreme Court followed the same path in deciding that “the Illinois eavesdropping statute . . . allows the recording of a conversation by a party to that conversation.” *People v. Herrington*, 645 N.E.2d 957, 959 (Ill. 1994).

In response to *Beardsley* and *Herrington*, the Illinois legislature amended the Illinois statute to include participant recording without the consent of all parties as eavesdropping and to expand protected conversations beyond those made with an expectation of privacy. *Alvarez*, 679 F.3d at 587.

<sup>215</sup> *Id.* at 586.

<sup>216</sup> *Id.* at 595. “Unlike the federal wiretapping statute and the eavesdropping laws of most other states, . . . the [Illinois] statute sweeps much more broadly, banning *all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private.” *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 600.

<sup>219</sup> *Id.* at 596, 607.

<sup>220</sup> *Id.* at 608.

<sup>221</sup> *Alvarez v. ACLU of Ill.*, 133 S. Ct. 651 (2012).

<sup>222</sup> *ACLU of Ill. v. Alvarez*, No. 10 C 5235, 2012 WL 6680341, at \*3 (N.D. Ill. Dec. 18, 2012).

<sup>223</sup> *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

completion of the arrest, one of the officers asked Glik whether Glik was taping the audio portion of the encounter. The officer arrested Glik under the Massachusetts eavesdropping statute after Glik admitted that he was taping sound.<sup>224</sup> After the eavesdropping charge was dismissed, Glik filed a 42 U.S.C. § 1983 claim against the police officers and the City of Boston.<sup>225</sup>

The court found that “the First Amendment protects the filming of government officials in public spaces [and] accords with the decisions of numerous circuit and district courts.”<sup>226</sup> The court stated that there was no reason to distinguish this case from a prior case in which the court had noted that a journalist was exercising his First Amendment right to film officials.<sup>227</sup> “[C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw.”<sup>228</sup> However, “the right to film . . . may be subject to reasonable time, place, and manner restrictions.”<sup>229</sup> Glik did not run afoul of any of these limitations as he was in a public park at a safe distance from the arrest and did not interfere with the arrest in any way.<sup>230</sup> The court held that, “though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”<sup>231</sup> The court concluded that “the district court did not err in denying qualified immunity to the appellants on Glik’s First Amendment claim.”<sup>232</sup>

Glik’s Fourth Amendment claim was that the officer lacked probable cause to arrest Glik because his taping was not done secretly and taping secretly was a prerequisite to violating the Massachusetts eavesdropping statute.<sup>233</sup> After reviewing Massachusetts cases interpreting the statute, the court determined that the cases “indicate that the use of a recording device in ‘plain sight,’ as here, constitutes adequate objective evidence of actual knowledge of the recording” and, on top of that, “here the police officers made clear through their conduct that they knew Glik was recording them.”<sup>234</sup> The court concluded that “Glik’s recording was not ‘secret’ within the meaning of Massachusetts’s wiretap statute, and therefore the officers lacked probable cause to arrest him.”<sup>235</sup> Therefore, the court affirmed the district court’s denial of qualified immunity for the police officers.<sup>236</sup>

Almost three years after *Glik*, the United States Court of Appeals for the First Circuit had occasion to determine in *Gericke v. Begin* whether *Glik* applied to a bystander

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<sup>224</sup> *Id.* at 79-80.

<sup>225</sup> *Id.* at 80.

<sup>226</sup> *Id.* at 83.

<sup>227</sup> *Id.* “[T]he news-gathering protections of the First Amendment cannot turn on professional credentials or status.” *Id.* at 84.

<sup>228</sup> *Id.* The court explained:

The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.

*Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 85.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 86.

<sup>234</sup> *Id.* at 87.

<sup>235</sup> *Id.* at 88.

<sup>236</sup> *Id.* at 89.

appearing to videotape a traffic stop “where there was no police order [for Gericke] to stop filming or leave the area.”<sup>237</sup>

Late in the evening of March 24, 2010 in Weare, New Hampshire, Carla Gericke, part of a two-car caravan, was following Tyler Hanslin’s car when a police car behind them activated its emergency lights. Both Gericke and Hanslin pulled over and the police car parked between them. When the police officer told Gericke that Hanslin’s car was the one being pulled over and asked Gericke to move her car, Gericke told the officer that she would pull into an adjacent school parking lot at least thirty feet away. After moving her car to the parking lot, Gericke exited her car, announced that she would videotape the stop, and attempted to do so.<sup>238</sup> Although Gericke’s camera malfunctioned and failed to record, Gericke continued to act as if she were taping the incident even after the officer ordered her to return to her car.<sup>239</sup> According to Gericke, the officer did not order her to stop taping nor did the officer order her to move her car.<sup>240</sup>

After other officers arrived, Gericke was arrested for failing to produce her license and registration. At the police station, Gericke was charged with disobeying a police officer, obstructing a government official, and illegally taping a conversation under New Hampshire law.<sup>241</sup> After neither the town prosecutor nor the county attorney pressed the charges, Gericke filed a civil rights 42 U.S.C. § 1983 lawsuit against the police officers, the Weare police department, and the town of Weare for violating her First Amendment right by charging her with illegally taping a conversation.<sup>242</sup> The officers filed a motion for summary judgment asking the court to find that they had qualified immunity, as there was no clearly established right to videotape a traffic stop.<sup>243</sup>

At the trial level, the United States District Court for the District of New Hampshire denied the motion for summary judgment, largely because the facts were unclear as to whether Gericke was disruptive. The officers filed an interlocutory appeal of their motion for summary judgment, accepting Gericke’s version of the facts solely for purposes of the appeal. The issue before the First Circuit was “whether it was clearly established that Gericke was exercising a First Amendment right when she attempted to film Sergeant Kelley during the traffic stop.”<sup>244</sup>

According to the court, *Glik* and *Gericke* were similar in that someone was attempting to gather information on a police officer performing a duty in public.<sup>245</sup> Although an officer may place reasonable restrictions on taping a traffic stop, “a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.”<sup>246</sup> Because in *Glik* the court found that a First Amendment right to tape a police officer performing a duty in public was clearly established and the *Glik* incident occurred more than two years prior to the *Gericke* incident, Gericke’s First Amendment right to

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<sup>237</sup> *Gericke v. Begin*, 753 F.3d 1, 3, 10 (1st Cir. 2014).

<sup>238</sup> *Id.* at 3.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 4.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 5.

<sup>245</sup> *Id.* at 7.

<sup>246</sup> *Id.* at 8.

videotape was clearly established.<sup>247</sup>

Thus, the court found *Glik* controlling as to Gericke's First Amendment right to videotape. "It was clearly established at the time of the stop that the First Amendment right to film police carrying out their duties in public, including a traffic stop, remains unfettered if no reasonable restriction is imposed or in place."<sup>248</sup> The court held "that the district court properly denied qualified immunity to the officers on Gericke's § 1983 claim that the wiretapping charge constituted retaliatory prosecution in violation of the First Amendment."<sup>249</sup>

Although the court affirmed the denial of the officers' motion for summary judgment on Gericke's version of the facts, it left open the possibility that the fact-finder could reach a different conclusion at trial. "Of course, a trial might leave a fact-finder with a different view of whether Sergeant Kelley ordered Gericke to leave the area or stop filming. That view, in turn, might affect the court's analysis of the availability of qualified immunity to the officers."<sup>250</sup>

### C. The Third, Fourth, and Tenth Circuits

Three federal courts found that a First Amendment right to tape a government official was not clearly established under the circumstances, entitling the official to qualified immunity on the First Amendment claim.<sup>251</sup> However, the courts did not state that a First Amendment right to gather information does not exist.

In *Kelly v. Borough of Carlisle*, a third circuit case from Pennsylvania, Brian Kelly was riding with his friend in his friend's truck when a police officer stopped the truck for alleged traffic violations.<sup>252</sup> Kelly was accustomed to carrying his video camera with him, which he used to tape various encounters. During the traffic stop, Kelly held the camera in his lap and proceeded to tape the incident. It is unclear whether the camera was in plain view of the officer. Later in the traffic stop, the officer told Kelly and the driver that the officer was taping the stop and, according to the officer, it was then that the officer realized that Kelly was taping. After confiscating Kelly's camera, the officer telephoned Assistant District Attorney Birbeck to inquire whether the officer could arrest Kelly for violating the Pennsylvania eavesdropping statute because Kelly had failed to inform the officer that Kelly was taping the traffic stop.<sup>253</sup> The officer arrested Kelly based on Birbeck telling the officer it was appropriate to do so, but the charge was later dropped. Believing that the officer and the Borough of Carlisle had violated his First and Fourth Amendment rights, Kelly filed a 42 U.S.C. § 1983 claim against them.<sup>254</sup>

The court first considered Kelly's Fourth Amendment claim in light of the officer's conversation with Birbeck. The court held "that a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on

<sup>247</sup> *Id.* at 9.

<sup>248</sup> *Id.* at 10.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 10 n.13.

<sup>251</sup> *Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010); *Szymbek v. Houck*, 353 F. App'x 852, 852 (4th Cir. 2009); *Mocck v. City of Albuquerque*, No. CIV 11-1009 JB/KBM, 2013 WL 312881, at \*57 (D. N.M. Jan. 14, 2013) (deciding a case within 10th circuit jurisdiction).

<sup>252</sup> *Kelly*, 622 F.3d at 251.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 252.



a lack of probable cause.”<sup>255</sup> The court ordered that, on remand, the district court investigate the facts to make findings as to whether the officer knew he was being recorded at the beginning of the traffic stop and whether the officer asked Birbeck for legal advice or for an arrest number.<sup>256</sup> The appellate court found that the lower court had erred in reviewing case law interpreting the Pennsylvania eavesdropping statute, as the Pennsylvania Supreme Court had twice held that recording a police officer did not violate the statute where the police officer did not have a reasonable expectation of privacy<sup>257</sup> and “it was also clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects.”<sup>258</sup>

In considering Kelly’s First Amendment claim, the court held “that the right to videotape police officers during traffic stops was not clearly established and Officer Rogers was entitled to qualified immunity on Kelly’s First Amendment claim.”<sup>259</sup> The court characterized traffic stops as “inherently dangerous situations” and pointed out that courts within the third circuit that had recognized a First Amendment right to tape a police officer had not dealt with the traffic stop environment.<sup>260</sup>

*Szymecki v. Houck*, a case from Virginia, was a brief, unpublished decision of the United States Court of Appeals for the Fourth Circuit.<sup>261</sup> In the decision, the court agreed with the lower court’s conclusion “that Szymecki’s asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.”<sup>262</sup>

In *Mocek v. City of Albuquerque*, a case from New Mexico, Mocek had a practice of refusing to show identification when passing through a Transportation Security Administration airport checkpoint.<sup>263</sup> In 2009, Mocek was passing through the checkpoint at the Albuquerque airport when he refused to show identification and began videotaping the incident. One of the Transportation Security Administration officers (TSOs) ordered Mocek to stop filming and called in officers from the Albuquerque Aviation Police

<sup>255</sup> *Id.* at 255-56. The court noted that “a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor’s advice.” *Id.* at 256.

<sup>256</sup> *Id.* at 256.

<sup>257</sup> *Id.* at 257. The two cases are *Agnew v. Dupler*, 717 A.2d 519, 523 (Pa. 1998) and *Commonwealth v. Henlen*, 564 A.2d 905, 906 (Pa. 1989).

<sup>258</sup> *Kelly*, 622 F.3d at 258.

<sup>259</sup> *Id.* at 263.

<sup>260</sup> *Id.* at 262. “Moreover, even insofar as it is clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions . . .” *Id.* *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) was one of the cases discussed in *Kelly*. Robinson was worried about safety concerns regarding Pennsylvania state troopers conducting truck inspections on Route 41. After obtaining permission from an adjoining landowner, Robinson began videotaping the inspections while positioned twenty to thirty feet from the highway. In 2000, officers arrested him for harassment and he was convicted but did not appeal the conviction. A similar incident and arrest occurred late in 2002; Robinson was found guilty, but on appeal the judge dismissed the charge. Believing that the three officers had violated his First and Fourth Amendment rights, Robinson filed a 42 U.S.C. § 1983 claim against them. *Id.* at 538. The court concluded that “there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants on October 23, 2002.” *Id.* at 541. The court reasoned that “[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case.” *Id.* The court found each of the three officers liable to Robinson, awarding Robinson \$35,000 in compensatory damages against the three officers, jointly and severally, and \$2,000 in punitive damages against each of the three officers. *Id.* at 545-46.

<sup>261</sup> *Szymecki v. Houck*, 353 F. App’x 852, 852-53 (4th Cir. 2009).

<sup>262</sup> *Id.* at 853.

<sup>263</sup> *Mocek v. City of Albuquerque*, No. CIV 11–1009 JB/KBM, 2013 WL 312881, at \*1 (D. N.M. Jan. 14, 2013).

Department (AAPD) when Mocek did not stop.<sup>264</sup> The AAPD officers escorted Mocek away from the checkpoint and placed him in a holding cell. Mocek had four criminal charges filed against him but a jury acquitted him.<sup>265</sup> Believing that the TSOs and the AAPD officers had violated his First and Fourth Amendment rights, Mocek filed a 42 U.S.C. § 1983 claim against them.<sup>266</sup>

The location of the filming incident, the checkpoint of an airport terminal, weighed heavily in the court's decision to grant the TSOs qualified immunity. "[R]ecording TSA employees at a screening checkpoint raises safety concerns, because, if Mocek had ill intentions and was able to record information regarding the TSA's screening procedures which would allow someone to evade the procedures, the safety of passengers at commercial airports would be jeopardized."<sup>267</sup> The court found that Mocek's right to videotape under the circumstances was not clearly established. "Just as the Court finds that the TSOs did not violate Mocek's right to gather news, which entails some First Amendment protection, neither the Tenth Circuit nor the Supreme Court has found that Mocek's right to gather news in this context is clearly established."<sup>268</sup> The court noted that the United States Supreme Court had approved reasonable limitations on the exercise of Constitutional rights in airports. "[T]he Supreme Court has upheld reasonable limitations on First Amendment conduct in airport terminals, and thus a reasonable TSA agent in the TSOs' shoes would not likely understand that telling Mocek to stop recording and subsequently summoning the police when he refused to comply violated his rights."<sup>269</sup>

#### D. The Eleventh and Ninth Circuits

In 2000, one federal court of appeals found that civilians had a First Amendment right to tape police officers<sup>270</sup> and, in 1995, another federal court of appeals recognized in passing a First Amendment right to videotape police officers.<sup>271</sup>

The Court of Appeals for the Eleventh Circuit decided *Smith v. City of Cumming*, a case out of Georgia, in 2000.<sup>272</sup> Aside from the allegation that police officers had prevented Mr. Smith from videotaping police activities and that police officers had harassed the Smiths, the facts in the Smiths' 42 U.S.C. § 1983 lawsuit are non-existent in the decision.<sup>273</sup> The court held that, "[a]s to the First Amendment claim under § 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."<sup>274</sup> The court reasoned 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."<sup>275</sup> The court affirmed the summary judgment in favor of the defendants because, "[a]lthough the Smiths have a right to videotape police activities, they have not shown that the Defendants' actions violated that right."<sup>276</sup>

<sup>264</sup> *Id.* at \*3.

<sup>265</sup> *Id.* at \*4.

<sup>266</sup> *Id.* at \*5.

<sup>267</sup> *Id.* at \*57.

<sup>268</sup> *Id.* at \*56.

<sup>269</sup> *Id.*

<sup>270</sup> *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

<sup>271</sup> *Fordyce v. City of Seattle*, 55 F.3d 436, 439, 442 (9th Cir. 1995).

<sup>272</sup> *Smith*, 212 F.3d at 1332.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1333.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

The Court of Appeals for the Ninth Circuit decided *Fordyce v. City of Seattle* in 1995.<sup>277</sup> Fordyce was videotaping a protest march, including police officers on duty, and later tried to videotape some bystanders.<sup>278</sup> Fordyce alleged that in the earlier incident an officer smashed the camera into Fordyce's face.<sup>279</sup> In the later incident, a different officer arrested Fordyce under the Washington eavesdropping statute when the bystanders indicated that they did not want to be videoed.<sup>280</sup> Several months later, a court dismissed the charges.<sup>281</sup> Believing that the city and eight officers had violated his First and Fourth Amendment rights, Fordyce filed a 42 U.S.C. § 1983 claim against them. The court granted the defendants' motions for summary judgment on the § 1983 claims.<sup>282</sup> Of its own accord and without a request from Fordyce, the lower court granted him declaratory relief, "declaring that [the Washington eavesdropping statute] 'does not prohibit the videotaping or sound-recording of conversations held in a public street, within the hearing of persons not participating in the conversation, by means of a readily apparent recording device.'"<sup>283</sup>

On appeal, the court reversed the grant of summary judgment to the officer who allegedly attempted to stop Fordyce from videotaping the march. "[A] genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest."<sup>284</sup> Thus, the court assumed in passing that Fordyce did have a First Amendment right to videotape the march and the court repeated the existence of that right in the conclusion paragraph. "[A] genuine issue of material fact exists concerning whether he interfered with Fordyce's First Amendment right to gather news."<sup>285</sup>

Other information necessary to understand the tension behind a civilian taping an encounter with a police officer are two common characteristics of police culture. These characteristics are explained in the following section.

#### IV. "TESTILYING" AND THE CODE OF SILENCE

The job of the police officer is not an easy one, to say the least, with the officer forced to make difficult decisions in the face of looming violence. "Patrol officers and detectives deal with the public without direct oversight by administrative superiors, and so they must be trusted to behave in an ethical way on their own."<sup>286</sup> Often there is an outcry from television viewers that suspects be apprehended almost immediately following a newsworthy and violent televised incident. "When a terrible crime has occurred, the

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<sup>277</sup> 55 F.3d 436 (9th Cir. 1995).

<sup>278</sup> *Id.* at 438.

<sup>279</sup> *Id.* at 439.

<sup>280</sup> *Id.* at 438.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 439 (quoting *Fordyce v. City of Seattle*, 840 F. Supp. 784, 794 (W.D. Wash. 1993), *aff'd in part, vacated in part, rev'd in part*, 55 F.3d 436 (9th Cir. 1995)). On appeal, the court vacated the declaratory judgment because the lower court had not provided Washington State a chance to be heard on the issue of the constitutionality of the eavesdropping statute. *Id.* at 442.

<sup>284</sup> *Id.* at 439.

<sup>285</sup> *Id.* at 442.

<sup>286</sup> James Q. Wilson, *Police Ethics*, EJOURNAL USA, Apr. 2011, at 7, available at [http://photos.state.gov/libraries/korea/397355/April\\_2011/Ethical-Policing-041311.pdf](http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf).

public may demand that the police solve it ‘no matter what they have to do,’ and so there is pressure to use unnecessary force.”<sup>287</sup>

The police officer wields immense power and this immense power should justify allowing law enforcement activity to be scrutinized. Generally, a uniformed police officer does not have a reasonable expectation of privacy while conducting official business because the officer is performing a service to the public.<sup>288</sup> One Maryland judge opined, “Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation.”<sup>289</sup> In addition, it is routine for an officer to videotape a traffic stop, with certain statutes specifically sanctioning this activity,<sup>290</sup> and an officer may tape other interactions with the public via a body-mounted video camera.<sup>291</sup> It would be anomalous for one who is deliberately taping a conversation to claim that the conversation is private.

Society’s general trust of police activity combined with police bravado means that, without a citizen recording, the officer’s testimony would be believable even if the officer is falsifying information. In fact, officer falsification is so commonplace that the Mollen Commission, charged with investigating the New York City Police Department, referred to officer falsification of evidence as “testilying.”<sup>292</sup> If falsification of evidence were to occur, a huge gulf may exist between the sights and sounds captured on videotape and a witness recounting what transpired.

A police studies professor explained, “Many police departments attempt to impose ethical standards and effective policing through policy, proscription, and punishment.”<sup>293</sup> However, many incidents of police and minority encounters remain uninvestigated, perhaps because there is no visual recordation of what happened. “A major shortcoming of this approach is that most police actions will never be reviewed and, as a practical matter, are unreviewable.”<sup>294</sup>

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<sup>287</sup> *Id.*

<sup>288</sup> See, e.g., *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at \*19 (Md. Cir. Ct. Sept. 27, 2010) (“[O]n a public highway in full view of the public[,] . . . the Troopers had [no] reasonable expectation of privacy in their conversation with the Defendant which society would be prepared to recognize as reasonable.”); *Lewis v. State, Dep’t of Licensing*, 139 P.3d 1078, 1084, 1086 (Wash. 2006) (“[C]onversations with police officers are not private. . . . [T]raffic stop conversations are not private[.]”); *Burton v. York County Sheriff’s Dep’t*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (“[T]he manner in which the employees of the Sheriff’s Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye.”); *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (“[P]laintiffs, as police officers on duty, searching a vehicle on a public street, cannot expect the same level of privacy as a private citizen in a private place.”). See also *supra* notes 232-33 and accompanying text.

<sup>289</sup> *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at \*35.

<sup>290</sup> See *supra* notes 79, 85, 115, 129, 150, 187 and accompanying text.

<sup>291</sup> Andrea Noble, *Police Now Armed with Video: Recording Can Protect Officer, Citizen Through Visual Proof*, WASH. TIMES, Feb. 25, 2013, <http://www.washingtontimes.com/news/2013/feb/25/police-now-armed-with-video/?page=all>.

<sup>292</sup> THE CITY OF N.Y. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 36 (1994) [hereinafter MOLLEN COMMISSION REPORT] (“[P]olice falsifications . . . [are] probably the most common form of police corruption . . . so common in some precincts that it has spawned its own word: ‘testilying.’”), available at [http://www.parc.info/client\\_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf](http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf).

<sup>293</sup> Eugene O’Donnell, *Fostering Ethical and Humane Policing*, EJOURNAL USA, Apr. 2011, at 9, available at [http://photos.state.gov/libraries/korea/397355/April\\_2011/Ethical-Policing-041311.pdf](http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf).

<sup>294</sup> *Id.*

Citizen taping can balance the deference, sometimes undue, given the police officer by the court and jury and provide an accurate portrayal of the incident. There may be a significant discrepancy between citizen recording and a police officer's recount of an incident. The Christopher Commission, which was charged with investigating the Rodney King incident, found the arrest report to be inconsistent with the videotape.<sup>295</sup> Jurors are likely to believe police officer testimony and are not likely to have experienced police corruption first-hand. Taping allows weighing the power of the police against the corrective power of the citizenry. Courts and oversight boards are inadequate to prevent police-inflicted harm, either intended or unintended.

The Mollen Commission description of officer falsification of evidence, testifying, is frightening because it weakens the foundations of the criminal justice system. The Mollen Commission found:

Police perjury and falsification of official records is a serious problem facing the Department and the criminal justice system – largely because it is often a “tangled web” that officers weave to cover for other underlying acts of corruption or wrongdoing. One form of corruption thus breeds another that taints arrests on the streets and undermines the credibility of police in the courtroom.<sup>296</sup>

The Mollen Commission found that falsification was widespread, “widely tolerated by corrupt and honest officers alike, as well as their supervisors.”<sup>297</sup> The justification for the falsification is that it is “‘doing God’s work’ – doing whatever it takes to get a suspected criminal off the streets.”<sup>298</sup>

One of the root causes of police corruption is what is sometimes referred to as the code of silence. This is “the silence of honest officers who fear the consequences of ‘rattling’ on another cop no matter how grave the crime.”<sup>299</sup> The Christopher Commission found that “the greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten ‘code of silence:’ . . . an officer does not provide adverse information against a fellow officer.”<sup>300</sup> The Mollen Commission found the New York City Police Department code of silence had not weakened since the Knapp Commission, the prior police investigative commission of more than twenty years earlier. “[T]he dishonest officers in the New York City Police Department still do not fear their honest colleagues. . . . The vast majority of honest officers still protect the minority of corrupt officers through a code of silence few dare to break.”<sup>301</sup> The honest officer may be secretly relieved when a civilian taping exposes lying by a corrupt officer. “[A]lthough patrol officers openly expressed disgust over corruption and hoped corrupt officers would

<sup>295</sup> INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 9 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT], available at [http://www.parc.info/client\\_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf](http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf). The arrest “report of the incident is inconsistent with the scenes captured on the Holliday videotape in terms of the number and location of baton blows, as well as the description of King’s ‘resistance.’” *Id.*

<sup>296</sup> MOLLEN COMMISSION REPORT, *supra* note 292, at 36. Falsification “typically occurs as a means to conceal other underlying acts of corruption or to conceal illegal steps taken for what officers often perceive as ‘legitimate’ law enforcement ends.” *Id.* at 37.

<sup>297</sup> *Id.* at 40.

<sup>298</sup> *Id.* at 41.

<sup>299</sup> *Id.* at 1.

<sup>300</sup> CHRISTOPHER COMMISSION REPORT, *supra* note 295, at 168.

<sup>301</sup> MOLLEN COMMISSION REPORT, *supra* note 292, at 51. “[I]t often appears to be strongest where corruption is most frequent.” *Id.* at 53. The Mollen Commission explained: “this is because the loyalty ethic is particularly powerful in crime-ridden precincts where officers most depend upon each other for their safety each day – and where fear and alienation from the community are the most rampant.” *Id.*

be fired, they nonetheless are highly reluctant to report corruption . . . .<sup>302</sup> The code of silence is part of the culture of a police department and is enforced by retaliation against an officer who does provide negative information about a fellow officer. An officer who fails to abide by the code is subject to being “ostracized and harassed” and may “become the target of [police] complaints.”<sup>303</sup>

The police culture is very much a product of the manner in which most police departments are managed. “Changing police attitudes can be especially challenging given that police departments are run on a military model that demands obedience to authority, the surrender of officers’ individuality, and the willingness to wield coercive power against others.”<sup>304</sup>

One must consider the pernicious intersection of testifying and the code of silence as the backdrop against which increased civilian taping of encounters with police officers occurs. For the officer, “[l]earning about the cultures of the communities police serve is not enough. Police departments also have cultures that need to be examined—and sometimes changed.”<sup>305</sup> Without the civilian tape, an officer might be tempted to falsify information concerning the encounter to make sure that what the officer perceives to be the right result is reached. Thus, a police officer charged with upholding the law would feel free to act outside the constraints of the law. The code of silence would make sure that the falsification remains undisclosed by fellow officers. However, audio recording is a powerful counterbalance to testifying and the code of silence. But for the prevalence of civilian recording, the police culture would dictate that the ends justify the means.

The following section analyzes civilian taping of encounters with police officers in light of eavesdropping statutes, First Amendment protection for taping, and police culture.

## V. ANALYSIS

A more recent version of the Rodney King incident is that involving Oscar Grant at the Fruitvale Bay Area Rapid Transit (BART) station in Oakland, California.<sup>306</sup> Early on January 1, 2009, transit police officers were reacting to reports of a fight aboard a train arriving at the Fruitvale station when they pulled a number of passengers, including Grant, from the train. As the incident unfolded, a number of passengers videotaped the encounter and captured an officer, Johannes Mehserle, fatally shooting Grant in the back.<sup>307</sup> At least one of those videos was posted online and Mehserle served less than a year after being convicted of involuntary manslaughter.<sup>308</sup> The online video spurred an aspiring filmmaker,

<sup>302</sup> *Id.* at 56. “It is not surprising that the honest cop wants corrupt cops off the job. The consequences of corruption for honest cops are grave: it taints their reputation, destroys their morale, and, most important, jeopardizes their very safety.” *Id.* at 57.

<sup>303</sup> CHRISTOPHER COMMISSION REPORT, *supra* note 295, at 170. “When an officer finally gets fed up and comes forward to speak the truth, that will mark the end of his or her police career.” *Id.*

<sup>304</sup> O’Donnell, *supra* note 293, at 10.

<sup>305</sup> Joseph D. McNamara, *Policing Diverse Communities*, EJOURNAL USA, Apr. 2011, at 5, available at [http://photos.state.gov/libraries/korea/397355/April\\_2011/Ethical-Policing-041311.pdf](http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf).

<sup>306</sup> “Fruitvale Station”: *Recreating a Tragic Loss of a Life*, CBSNEWS.COM (July 21, 2013, 10:51 AM), [http://www.cbsnews.com/8301-3445\\_162-57594533/fruitvale-station-recreating-a-tragic-loss-of-a-life/](http://www.cbsnews.com/8301-3445_162-57594533/fruitvale-station-recreating-a-tragic-loss-of-a-life/).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

Ryan Coogler, to make the movie, *Fruitvale Station*, which was released to the public in July 2013 after winning awards at the Cannes and Sundance film festivals.<sup>309</sup>

Surprisingly enough, the new BART police chief, Kenton Rainey, gave his full cooperation to Coogler's filming, allowing the murder scene to be filmed on the Fruitvale station platform where Grant was shot. Rainey commented, "When Ryan came to us, we really wanted to help in the making of this film, to help with the healing process" and added, "The story's going to be told."<sup>310</sup> After the movie was complete, Rainey viewed it with individuals from his command staff as a preventative measure. "It's important for us to understand what we're doing, so that another incident like this never happens again."<sup>311</sup>

The movie has resonated with black males near the age of Grant, shot at twenty-two years old.<sup>312</sup> At twenty-four, Hamza Farrah identifies with Grant: "it's frightening to think that the people who are sworn to protect and serve can also cause such great harm. Growing up he said he was taught by his elders to just listen and obey police officers and to not act 'black' around them."<sup>313</sup> Farrah sees *Fruitvale Station* as "very important to show."<sup>314</sup> He reasons, "It gives you a conscience of what's happening across the nation; from Trayvon Martin to the Oscar Grant story. It shows you that race still matters and that people are treated differently because of the color of their skin."<sup>315</sup>

The typical police officer's focus is to protect society, sometimes by arresting those accused of criminal activity. The police officer's interests while participating in the encounter are to gather evidence, promote the safety of all persons involved, conduct an efficient investigation, and gather evidence. The typical reader of this paper is from a fairly affluent community, relying on the police force to enforce the law against undesirable elements; however, someone not from an affluent community may hold a radically different view of police activity. Insight may be gained by viewing police activity from the extremes of a prosperous community, in which the police officer is trusted, and a high-crime community, where police are not trusted. Typical jurors may view a convicted criminal, or a person lacking formal education, or one from a low socio-economic background as less credible than a police officer and are used to the official framing of a civilian encounter with a police officer as recounted by the officer.

Citizen oversight is generally helpful, rarely harmful, and community policing has been implemented within the last few decades. The benefits of recording interactions with police officers are to encourage police accountability, promote use of justifiable police tactics, serve as the basis of deserved discipline against an officer engaging in misconduct, reduce harm to the individual, promote the free flow of discussion concerning police activities, educate the public, and prevent and deter police misconduct. Some 400 persons annually die as the result of police officer shootings,<sup>316</sup> yet many in non-minority

<sup>309</sup> *Id.* The movie received the Prize of the Future award during the Cannes Film Festival and the Grand Jury Prize and the Audience Award at the Sundance Film Festival. Ja'Nel Johnson, *Fruitvale Station Shines Light on Race, Police Accountability*, KVNONEWS.COM (Aug. 22, 2013), <http://www.kvnonews.com/2013/08/fruitvale-station/>. The Oscar Grant incident took place in California, an all-party consent state; however, the passengers who videotaped the incident did not run afoul of the California eavesdropping statutes because they were on a BART platform open to the public where an expectation of privacy, especially considering the many train passengers, would not have been objectively reasonable. See *supra* notes 160-63 and accompanying text.

<sup>310</sup> "Fruitvale Station": *Recreating a Tragic Loss of a Life*, *supra* note 306.

<sup>311</sup> *Id.*

<sup>312</sup> Johnson, *supra* note 309.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

communities remain unaware of incidents involving minorities and police officers, such as the Oscar Grant incident, without a videotape of such an incident. “[T]he cell phone footage of Oscar Grant’s killing, much like the video footage captured of Rodney King’s beating in 1991, has transformed police accountability.”<sup>317</sup> A criminal justice professor noted, “The important thing is that there are tens of millions of people, white Americans, who just don’t believe these things happen. To see it happen made it real for them. It transformed the public reaction to it.”<sup>318</sup>

Most citizens have video capability on their phones, which they carry with them, and many phones allow recorded videos to be posted online. It would be natural for a citizen to record an event in progress, such as one that involves a confrontation between another citizen and someone in authority, followed by the common practice of posting the video online. The video reinforces one’s memory of the event and provides evidence of events as they transpired. The video can furnish proof of the even where two individuals’ versions of the event differ. The video can exculpate a defendant. A video can provide graphic images and audio of police brutality, misconduct, and corruption.

The cell phone is not a new technology but its use as a recording device with access to the internet is fairly new. Technology, including the recording capabilities of cell phones, has blurred the distinction between an official member of the press and a public-minded citizen. Citizen-taping can capture newsworthy events when no professional journalist is present and the press often requests use of citizen-taped material to supplement news stories. Incidents videotaped by citizens, such as the Rodney King and Oscar Grant incidents, may be picked up by the press and covered in great detail. Without the videotapes of the Rodney King and Oscar Grant incidents, most would not have believed the violence of the confrontations and the incidents would not have made news.<sup>319</sup>

Taping is unique in that it memorializes the tension of the moment, capturing what was said, with the tone of voice and context intact. The self-authenticating character of taped information can corroborate one person’s version of events or perhaps shed light on an aspect of the incident not recalled by any participant or bystander. Without taping, it would be the civilian’s word against the officer’s, neither of which might be entirely accurate. Inaccuracy in recounting the event as it transpired may be due to the bias of the viewer, faulty memory, or deliberate falsification. In fact, in some instances a recording may show that there was no misconduct on the part of the police officer, who was innocently performing a law enforcement duty, and the officer can use the recording to show that there was no misconduct.<sup>320</sup> An attorney who hears a recording of the encounter

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> CHRISTOPHER COMMISSION REPORT, *supra* note 295, at 12.

<sup>320</sup> A videotape was the key in a United States Supreme Court case. *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, Scott was the police officer pursuing Harris in a vehicle chase. The chase ended when Scott rear-ended Harris’ vehicle to stop it. Harris was seriously injured and sued under 42 U.S.C. § 1983 alleging violation of his constitutional rights. *Id.* at 375. The federal district court denied Scott’s motion for summary judgment and the federal court of appeals affirmed. *Id.* at 376. The Court reversed based on a videotape of the chase that corroborated Scott’s version of the facts. *Id.* at 376, 378. Harris’ version of the facts was quite different in that “rather than fleeing from police, [Harris] was attempting to pass his driving test.” *Id.* at 378-79. In stark contrast, the videotape showed:

[Harris’] vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of



between the police officer and the potential client may be dissuaded from filing what the attorney gauges to be a frivolous lawsuit. A recording may serve other police officers by being the subject of officer training.

What would police activity be like without accountability overseen by citizens? One expert on police accountability opined, “It’s people of color who are the victims, for the most part, of police misconduct.”<sup>321</sup> The expert continued, “Race is at the center of policing. My view is that if we can fix police problems we can go a long way toward fixing our race problem in this country.”<sup>322</sup> Mistrust between a minority citizen and a police officer stifles effective policing. “Mistrust is created between citizens and the police when officers are not held accountable for wrongdoings.”<sup>323</sup> The effect of this mistrust is significant. “[P]olice depend on the public for their cooperation in dealing with crime and disorder, but when people don’t trust the police they don’t report crime and that hampers effective crime fighting.”<sup>324</sup>

For example, the Christopher Commission report recommended that an independent group monitor the Los Angeles Sheriff’s Department, resulting in the Special Counsel’s office.<sup>325</sup> The office “consists of a team of experts that has full authority to audit and monitor any aspect of the sheriff’s department operations.”<sup>326</sup> The Special Counsel follows the “auditor model” of citizen oversight, with a permanent, full-time staff, rather than the other model, with “a part-time, volunteer citizen review board focusing on specific complaints.”<sup>327</sup> The Special Counsel’s office has had a positive effect on the Los Angeles Sheriff’s Department: “The Special Counsel’s regular monitoring and reporting on civil suits against the sheriff’s office has reduced the number of lawsuits against the department and amounts of monetary settlements paid to complainants.”<sup>328</sup>

Taping would allow a check on the discretionary and often arbitrary power of a police officer, an example of which is the almost unbridled power of a police officer to pull over a vehicle for any traffic violation under *Whren v. United States*.<sup>329</sup> *Whren* allows a police officer to stop based on immutable and otherwise protected categories such as race.<sup>330</sup> Taping can limit the objectionable activities of an officer who used the alleged traffic violation as a pretext and made the stop for an improper motive.

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time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

*Id.* at 379-80 (footnote omitted).

<sup>321</sup> Johnson, *supra* note 309.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> Samuel Walker & Andrea Lorenz, *Policing the Police: Citizens Encourage Ethical Policing*, EJOURNAL USA, Apr. 2011, at 23, available at [http://photos.state.gov/libraries/korea/397355/April\\_2011/Ethical-Policing-041311.pdf](http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf).

<sup>326</sup> *Id.* “The Special Counsel, which continues today, has issued 29 semi-annual public reports that address the most critical issues related to police accountability: use of force, lawsuits against the department, personnel issues, the management of district stations and innumerable other issues.” *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that “probable cause to believe that petitioners had violated the traffic code . . . rendered the stop reasonable under the Fourth Amendment”).

<sup>330</sup> *Id.* at 813. “[T]he constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved.” *Id.* The Court added “that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally

The advances in technology have brought with them ready availability of videotaping to civilians who have used this technology, among other uses, to record police officer activity. This videotaping is often followed by the video being posted online. News programs clamor for viewers to upload videos they have taken. This has spurred a tension between technological capability to make a record and a police officer's perception that the taping wrongfully interferes with law enforcement or challenges the officer's authority. Technology has far outpaced the law, in effect tempting a civilian to tape activity occurring in a location open to the public, with the civilian least suspecting that taping could be illegal, and subjecting the civilian to imprisonment and fine. The civilian may further increase the chance of having criminal charges filed for the allegedly illegal taping by posting the video online and thus providing the prosecutor with evidence. With further advances in technology and without amendment to the eavesdropping statutes, the potential liability for a civilian taping a police officer engaged in official duties will only increase.

Citizens who audio record or videotape conversations run the risk of being arrested for violating eavesdropping statutes, even more so in the eleven states that require all party consent prior to taping. The risk is greater where the person being recorded is a police officer. This is so although several courts have found that the First Amendment protects gathering such information. The civilian fear of arrest for taping an encounter involving a police officer has a chilling effect on the civilian's gathering of information concerning law enforcement. The eavesdropping statutes in most jurisdictions carry a hefty prison term, or fine or both for their violation.

The person taping may be a participant in the conversation or a bystander. If the person is a participant, the legality of the taping typically turns on whether the taping is performed in a one-party or all-party consent jurisdiction. The action of taping provides the requisite consent in a one-party consent jurisdiction but not in an all-party consent jurisdiction. In an all-party consent jurisdiction, the participant taping may be able to escape liability if the eavesdropping statute only protects private or confidential conversations or those made with a reasonable expectation of privacy, especially where the conversation takes place in a location open to the public. If the person taping is a bystander, the requisite consent, from one party to the conversation in a one-party consent jurisdiction or all-party consent in an all-party consent jurisdiction, may be lacking. If the requisite consent is lacking, the bystander taping may be able to escape liability if the eavesdropping statute only protects private or confidential conversations or those made with a reasonable expectation of privacy, especially where the conversation takes place in a location open to the public.

Illinois, Massachusetts, and Oregon eavesdropping statutes afford the most expansive protection against a conversation being taped as they do not require a reasonable expectation of privacy as a threshold for the conversation being protected and require all-party consent. The Illinois statute necessarily views citizen recording at odds with effective policing and carries an enhanced prison term of more than double the prison term in other states for taping a police officer. Many other jurisdictions limit protection to those having a reasonable expectation of privacy.

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discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.*

A citizen may be limited in taping a conversation with a police officer in all-party consent states; however, the police officer does not usually have to abide by the same constraints. In addition, the police have ready access to being able to record their encounters with citizens and several states have an explicit statutory exemption from eavesdropping liability for a police officer taping such an encounter. The limitation of citizen taping obscures transparency in law enforcement and civilian oversight. This disparity in the legal right to tape an encounter between a citizen and a police officer creates a double standard, with the balance tipped in favor of the police officer.

Police officers may not be educated as to whether a citizen is permitted to tape a conversation involving a police officer and sometimes limits on police conduct are unclear. By the same token, a civilian may not understand whether the state eavesdropping statute applies to an encounter with a police officer, allowing the police officer to intimidate the civilian into stopping taping. Eavesdropping statutes differ from state to state and differ from the federal eavesdropping statutes, possibly leading to more confusion. Also, as discussed earlier in this paper, eavesdropping statutes of several states lack clarity and some have rarely been subject to court interpretation.

Given this inherent tension, it might be well to consider the players involved, the civilian, the police officer, and society, as viewed against a backdrop of fairness and justice. One could view the civilian as law-abiding, generally cooperative with police involvement, and willing to assist in apprehending someone who is breaking the law. The civilian's interests in taping an encounter with a police officer are to gather evidence, deter police misconduct, and participate in community policing efforts. This civilian views the lawbreaker as someone other than the civilian himself and might be shocked by the reach of criminal statutes on the books, especially where a criminal statute, such as an eavesdropping statute, is enforced against the civilian. Society has an interest in seeing criminal statutes enforced by police officers and is understandably dismayed when police misconduct is uncovered.<sup>331</sup> The associate producer of the movie *Fruitvale Station* explained that "people living in homogeneous environments may not interact with people of different backgrounds, which can instigate fear when all they see are negative stories in the news about people unlike them."<sup>332</sup>

## VI. AN EXEMPTION AUTHORIZING TAPING AN ENCOUNTER WITH A POLICE OFFICER

As discussed above, the United States Courts of Appeals for the First and Seventh Circuits recently found that the First Amendment protects civilian taping of encounters with police officers.<sup>333</sup> This may signal a trend of recognizing that the First Amendment protects civilian taping of their encounters with police officers. However, this movement in constitutional law may amount to little real protection for a civilian, such as Mannie Garcia, faced with a discretionary criminal charge of general applicability.

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<sup>331</sup> See generally MOLLEN COMMISSION REPORT, *supra* note 292; and CHRISTOPHER COMMISSION REPORT, *supra* note 295.

<sup>332</sup> Johnson, *supra* note 309. "[The movie *Fruitvale Station*] gives [Grant] back his sense of humanity. That's the whole point— to see it as a real three dimensional person instead of a statistic." *Id.*

<sup>333</sup> *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012), *on remand*, No. 10 C 5235, 2012 WL 6680341 (N.D. Ill. 2012) (granting the plaintiff's motion for summary judgment and a permanent injunction).

There should be an exemption in the eavesdropping statutes that guarantees the right of a civilian to audiotape a police officer. The following is suggested statutory language.<sup>334</sup>

It is lawful for a person not acting under color of law to record the conversation of a law enforcement officer who is performing a public duty in a public place and any other person who is having a conversation with that law enforcement officer if the conversation is at a volume audible to the unassisted ear of the person who is making the recording. For purposes of this subsection, "public place" means any place to which the public has access and includes, but is not limited to, streets, sidewalks, parks, and highways (including inside motor vehicles), and the common areas of public and private facilities and buildings.

Any person whose right to record under this section has been violated shall have a civil cause of action against the law enforcement officer who stopped, prevented, or resulted in the destruction of such recording and shall have the right to collect no less than \$1,000 nor more than \$2,500, together with a reasonable attorney's fee and other litigation costs reasonably incurred, personally from the law enforcement officer. In addition, the police officer shall be suspended from official duties for not less than seven nor more than twenty-one days without pay. An affirmative defense is that the law enforcement officer exhibited an expectation of privacy in the conversation that was reasonable under the circumstances or that the officer's actions prevented immediate and serious injury to the officer or bystanders.

Such an exemption clearly places a police officer on notice that a civilian does have the right to tape an encounter with a police officer. The exemption allows a civilian, whether a bystander or a party to the conversation, to tape the conversation of a uniformed police officer performing official duties in a location open to the public. In addition, the proposed legislation gives the civilian a private right of action against a police officer who fails to abide by the exemption. This penalty reinforces the civilian's right to tape and should be sufficiently onerous to dissuade a police officer from interfering with civilian taping. The right of action makes the police officer personally liable to pay the civilian a stipulated damages award and results in the officer's suspension from official duties without pay for a reasonable amount of time. Police officer liability automatically attaches should the police officer's actions result in destruction of the audiotape. Police officer liability under the private right of action is a presumption that can be rebutted by the police officer upon a showing that the officer did have a reasonable expectation of privacy, perhaps when discussing confidential information or dealing with a confidential informant or an undercover police officer, or the officer's actions prevented substantial injury to the police officer or bystanders.

## CONCLUSION

Given the reality of police culture and the civilian's easy access to recording, civilian recording is needed now more than ever. Title 42 U.S.C. § 1983 actions have been ineffective in checking police intimidation of civilian taping of encounters with police officers. Perhaps this is because the videos of such encounters have not been as dramatic as the Rodney King or the Oscar Grant incidents. Except for the individuals personally

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<sup>334</sup> The proposed statutory language borrows from the text of Illinois Senate Bill 1575 (SB 1575) introduced in 2013. S.B. 1575, 98<sup>th</sup> Gen. Assemb. 1st Reg. Sess. (Ill. 2013).

intimidated by police while taping, this police harassment has not struck a chord with the public. The difficulty of being successful in a § 1983 action may mean that protection for gathering newsworthy information should come from legislation designed specifically to protect newsgathering.

The prior section of this paper included a proposed exemption from civilian liability under the eavesdropping statutes; in addition, the proposed legislation would provide the civilian who is wrongly arrested a private right of action against the arresting police officer.

**APPENDIX A****United States**

One who “intentionally intercepts . . . any . . . oral . . . communication” is subject to five years imprisonment. 18 U.S.C.A. § 2511(1), (4) (West 2000 & Supp. 2014).

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

*Id.* § 2511(2)(d). Oral communication is defined as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 2510(2).

**Alabama**

The state defines eavesdrop as “[t]o overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication, except as otherwise provided by law.” ALA. CODE § 13A-11-30(1) (2006). Eavesdropping is a class A misdemeanor. *Id.* § 13A-11-31. It may be punished by not more than a year imprisonment or a fine of not more than \$6,000, or both. *Id.* §§ 13A-5-2(c), 13A-5-7(a)(1), 13A-5-12(a)(1). A defense is that “[h]e was a peace officer engaged in the lawful performance of his duties.” *Id.* § 13A-11-36. Research failed to locate case law interpreting “private communication.”

**Alaska**

The state eavesdropping statute states that “[a] person may not . . . use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation.” ALASKA STAT. ANN. § 42.20.310(a) (West, Westlaw through legislation effective April 24, 2014, passed during the 2014 2nd Reg. Sess. of the 28th Legislature). There are several definitions that help understand what is prohibited. “[O]ral communication’ means human speech used to communicate information from one party to another.” “[I]ntercept’ means the aural or other acquisition of the contents of an oral . . . communication through the use of any electronic, mechanical, or other device, including the acquisition of the contents by simultaneous transmission or by recording.” “[C]ontents’ includes information obtained from a private communication concerning the existence, substance, purport, or meaning of the communication, or the identity of a party of the communication.” “[P]rivate communication’ means an oral . . . communication uttered or transmitted by a person who has a reasonable expectation that the communication is not subject to interception.” *Id.* § 42.20.390(2), (7), (9), (11). Eavesdropping is a class A misdemeanor punishable by up to one year imprisonment, or up to a \$10,000 fine, or both. *Id.* §§ 12.55.015(a), 12.55.035(b), 12.55.135(a), 42.20.330.

Article 1, Section 22 of the Alaska Constitution provides: “The right of the people to privacy is recognized and shall not be infringed.” ALASKA CONST. art. 1, § 22.

In *State v. Glass*, 583 P.2d 872, 879 (Alaska 1978), the Alaska Supreme Court held “that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant” where the informant was sent into the suspect’s home wearing a body bug, which allowed officers located outside to record the conversation. *Id.* at 874. However, in later opinions, the Alaska Supreme Court found that a drunk driving suspect’s expectation of privacy was not reasonable and, thus, the suspect’s conversation was not protected under the Alaska Constitution from being secretly taped. *City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984) (finding that drunk driving suspect’s expectation of privacy was not reasonable where uniformed officer was performing official duties and, therefore, taped information was not inadmissible); *Palmer v. State*, 604 P.2d 1106, 1108 (Alaska 1979) (finding that drunk driving suspect’s expectation of privacy was not reasonable where the suspect was under arrest and in police headquarters undergoing breathalyzer and sobriety tests when he was secretly taped and, therefore, his right to privacy under the Alaska Constitution was not violated).

### Arizona

The state statute provides: “a person is guilty of a class 5 felony who . . . [i]ntentionally intercepts a conversation or discussion at which he is not present, or aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion.” ARIZ. REV. STAT. ANN. § 13-3005 (2010). “‘Oral communication’ means a spoken communication that is uttered by a person who exhibits an expectation that the communication is not subject to interception under circumstances justifying the expectation.” *Id.* § 13-3001.8. The statutes exempt “[t]he interception of any . . . oral communication by any person, if the interception is effected with the consent of a party to the communication or a person who is present during the communication.” *Id.* § 13-3012.9. The penalty for a class 5 felony is from six months to two and one half years imprisonment, “an amount fixed by the court not more than one hundred fifty thousand dollars,” or both. *Id.* §§ 13-702.D., 13-801.

### Arkansas

The state statute provides: “It is unlawful for a person to intercept a[n] . . . oral . . . communication, and to record or possess a recording of the communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.” ARK. CODE ANN. § 5-60-120(a) (West, Westlaw through end of 2014 Second Extraordinary Session). The same statute classifies a violation as a Class A misdemeanor. *Id.* § 5-60-120(b). One guilty of a Class A misdemeanor may be fined a maximum of \$2,500, or sentenced to a maximum of one year imprisonment, or both. *Id.* §§ 5-4-201(b), 5-4-104(d), 5-4-401(b). Research failed to locate case law interpreting “oral communication.”

### Colorado

The state statute provides: “Any person not visibly present during a conversation or discussion commits eavesdropping if he . . . [k]nowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto.” COLO. REV. STAT. ANN. § 18-9-304(1) (West, Westlaw current through the Second Regular Session of the Sixty-Ninth General Assembly (2014)). *See People v. Lesslie*, 24 P.3d 22, 28 (Colo. App. 2000) (“recognize[ing] that this criminal statute requires a case-by-case analysis as to whether the participants in the intercepted

conversations have a justifiable expectation of privacy and, in turn, whether they believe that their conversation is subject to interception”). The same statute classifies eavesdropping as a Class 1 misdemeanor. *Id.* § 18-9-304(2). “‘Oral communication’ means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying such belief . . . .” *Id.* § 18-9-301(8). See *People v. Lesslie*, 939 P.2d 443, 446 (Colo. App. 1996) (finding “conversation” or “discussion” synonymous with “oral communication”). One guilty of a Class 1 misdemeanor may be sentenced to a minimum of six months and a maximum of eighteen months, or a minimum fine of \$500 and a maximum fine of \$5,000, or both. § 18-1.3-501(1)(a).

### Connecticut

In Connecticut, eavesdropping, the “mechanical overhearing of a conversation,” is a class D felony. CONN. GEN. STAT. ANN. § 53a-189 (West, Westlaw through enactments of Public Acts of the 2014 February Regular Session of the Connecticut General Assembly effective on or before July 1, 2014). The Connecticut statutes define “[m]echanical overhearing of a conversation” as “the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” *Id.* § 53a-187(a)(2). The prison term for a class D felony is not more than five years (effective October 1, 2013) and the fine is not more than \$5,000; the court may impose imprisonment, or a fine, or both. *Id.* §§ 53a-28, 53a-35a(8), 53a-41(4). Research failed to locate case law interpreting “conversation.”

### Delaware

The state statute provides that “no person shall . . . [i]ntentionally intercept . . . any . . . oral . . . communication” and specifies that someone who eavesdrops has committed a class E felony and is subject to a fine of not more than \$10,000. DEL. CODE ANN. tit. 11, § 2402(a), (b) (West, Westlaw through 79 Laws 2014, ch. 388). Pursuant to that statute:

It is lawful . . . [f]or a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitutions or laws of the United States, this State or any other state or any political subdivision of the United States or this or any other state.

*Id.* § 2402(c)(4). “‘Oral communication’ means any oral communication uttered by a person made while exhibiting an expectation that such communication is not subject to interception and under circumstances justifying such expectation . . . .” *Id.* § 2401(13).

### Georgia

The state statute provides: “It shall be unlawful for . . . [a]ny person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place.” GA. CODE ANN. § 16-11-62 (West, Westlaw through Acts 343 to 346, 348 to 631, and 633 to 669 of the 2014 Regular Session). “‘Private place’ means a place where one is



entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance.” *Id.* § 16-11-60(3). The eavesdropping statute “does not prohibit one party to a conversation from secretly recording or transmitting it without the knowledge or consent of the other party.” *State v. Birge*, 241 S.E.2d 213, 213 (Ga. 1978). “[A]ny person violating any of the provisions of this part shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or a fine not to exceed \$10,000.00, or both.” § 16-11-69.

### Hawaii

The state statute provides that “any person who . . . [i]ntentionally intercepts . . . any . . . oral . . . communication . . . shall be guilty of a class C felony.” HAW. REV. STAT. § 803-42(a) (West, Westlaw through Act 235 [End] of the 2014 Regular Session of the Hawaii Legislature). Pursuant to that statute:

It shall not be unlawful under this part for a person not acting under color of law to intercept a[n] . . . oral . . . communication when the person is a party to the communication or when one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

*Id.* § 803-42(b)(3)(A). “‘Oral communication’ means any utterance by a person exhibiting an expectation that the utterance is not subject to interception under circumstances justifying that expectation . . .” *Id.* § 803-41. The prison term for a class C felony is not less than one year and not more than five years and the fine is not more than \$10,000; the court may impose imprisonment, or a fine, or both. *Id.* §§ 706-605, 706-640, 706-660.

### Idaho

The state statute provides:

any person shall be guilty of a felony and is punishable by imprisonment in the state prison for a term not to exceed five (5) years or by a fine not to exceed five thousand dollars (\$5,000), or by both fine and imprisonment if that person . . . [w]illfully intercepts . . . any . . . oral communication.

IDAHO CODE ANN. § 18-6702(1) (West, Westlaw through the 2014 Second Regular Session of the 62nd Idaho Legislature). Pursuant to that statute, “[i]t is lawful under this chapter for a person to intercept a[n] . . . oral communication when one (1) of the parties to the communication has given prior consent to such interception.” *Id.* § 18-6702(2)(d). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 18-6701(2).

### Indiana

The state statute provides:

(a) This section does not apply to a person who makes an interception authorized under federal law.

(b) A person who knowingly or intentionally intercepts, a communication in violation of this article commits unlawful interception, a Level 5 felony.

IND. CODE ANN. § 35-33.5-5-5 (West 2012 & Supp. 2014). *See* State v. Lombardo, 738 N.E.2d 653, 660 (Ind. 2000) (“[O]ur legislature did not intend to directly incorporate the Federal Wiretap Act statutory or case law into Indiana's Act but instead meant to exempt from its provisions federal law enforcement surveillance activities within Indiana's borders.”). Research failed to locate case law interpreting “communication.” Arguably, communication refers only to communication via the telephone or telegraph and not to face-to-face conversation. The title of article 33.5 is “Interception of Telephonic or Telegraphic Communications” and an Indiana statute, § 35-33.5-1-5 repealed effective July 1, 2012, contained the following definition:

“Interception” means the intentional:

- (1) recording of; or
- (2) acquisition of the contents of; a telephonic or telegraphic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article.

*Id.* § § 35-33.5-1-5 (repealed 2012).

### **Iowa**

The state statute provides:

Any person, having no right or authority to do so, . . . who by any electronic or mechanical means listens to, records, or otherwise intercepts a conversation or communication of any kind, commits a serious misdemeanor; provided, . . . one who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication . . . .

IOWA CODE ANN. § 727.8 (West 2014). Another state statute provides: “a person who does any of the following commits a class ‘D’ felony: . . . [w]illfully intercepts . . . a[n] . . . oral . . . communication.” *Id.* § 808B.2.1. Pursuant to the statute:

It is not unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

*Id.* § 808B.2.2.c. “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to

interception, under circumstances justifying that expectation.” *Id.* § 808B.1.8. “A class ‘D’ felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.” *Id.* § 902.9.1.

### **Kansas**

The state statute provides:

Breach of privacy is knowingly and without lawful authority:

.....

(3) entering with intent to listen surreptitiously to private conversations in a private place or to observe the personal conduct of any other person or persons entitled to privacy therein; [or]

(4) installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the person or persons entitled to privacy therein.

KAN. STAT. ANN. § 21-6101(a) (West, Westlaw through laws effective July 1, 2014, including Chapters 1 through 152 (End) of the 2014 Regular Session of the Kansas Legislature). That statute provides that breach of privacy is a class A nonperson misdemeanor. *Id.* § 21-6101(b). In addition, it defines “private place” as “a place where one may reasonably expect to be safe from uninvited intrusion or surveillance.” *Id.* § 21-6101. The statute has been interpreted to allow taping upon consent of one party to the conversation. In a 1984 case, the Kansas Supreme Court found that “any party to a private conversation may waive the right of privacy and the non-consenting party has no Fourth Amendment or statutory right to challenge that waiver.” *State v. Roudybush*, 686 P.2d 100, 108 (Kan. 1984). Further, the court held “that a face-to-face ‘private conversation’ between a police informer and a suspect is not an ‘oral communication’ as defined by K.S.A. 22-2514 and, thus, it is not necessary to obtain an ex parte court order to intercept such conversation if the informer knowingly consents to the interception.” *Id.* A class A nonperson misdemeanor is punishable by imprisonment for not more than one year, or a fine of \$2,500, or both. §§ 21-6602(a),(b), 21-6611(b).

For the purpose of obtaining a court order to intercept a conversation, “‘oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” § 22-2514(2).

### **Kentucky**

Pursuant to the state statute, “[a] person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time.” KY. REV. STAT. ANN. § 526.020(1) (West, Westlaw through the end of the 2014 legislation). That statute makes eavesdropping a Class D felony. *Id.* § 526.020(2). “[E]avesdrop’ means to overhear, record, amplify or transmit any part of a[n] . . . oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device.” *Id.* § 526.010. Research failed to locate case law interpreting “oral communication.”

### Louisiana

The state statute provides that “it shall be unlawful for any person to . . . [w]illfully intercept . . . any . . . oral communication.” LA. REV. STAT. ANN. § 15:1303.A (Westlaw through the 2014 Regular Session with Acts effective on or before December 31, 2014). That statute provides: “Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor.” *Id.* § 15:1303.B. That statute further provides:

It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a[n] . . . oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

*Id.* § 15:1303.C.(4). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 15:1302.(14).

### Maine

The state statute provides:

A person is guilty of violation of privacy if, except in the execution of a public duty or as authorized by law, that person intentionally:

. . . .

B. Installs or uses in a private place without the consent of the person or persons entitled to privacy in that place, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place; [or]

C. Installs or uses outside a private place without the consent of the person or persons entitled to privacy therein, any device for hearing, recording, amplifying or broadcasting sounds originating in that place that would not ordinarily be audible or comprehensible outside that place.

ME. REV. STAT. ANN. tit. 17-A, § 511.1 (Westlaw through legislation through the 2013 Second Regular Session of the 126th Legislature). That statute provides: “‘private place’ means a place where one may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms and similar places.” *Id.* § 511.2. The statute further provides: “Violation of privacy is a Class D crime.” *Id.* § 511.3. A class D crime is punishable by of imprisonment of less than one year, a fine of not more than \$2,000, or both. *Id.* §§ 1152.2, 1252.2, 1301.1-A.

The Supreme Judicial Court of Maine interpreted “private place” to require that “a person’s desire to keep private what transpires within that place must be a *justifiable expectation*, and, therefore, objectively reasonable.” *State v. Strong*, 60 A.3d 1286, 1291

(Me. 2013). The court found that “it is objectively unreasonable for a person who knowingly enters a place of prostitution for the purpose of engaging a prostitute to expect that society recognizes a right to be safe from surveillance while inside.” *Id.* Research failed to locate case law determining whether the statute has been interpreted to allow taping upon consent of one party to the conversation.

### Minnesota

The state statute provides that “any person who . . . intentionally intercepts . . . any . . . oral communication . . . shall be fined not more than \$20,000 or imprisoned not more than five years, or both.” MINN. STAT. ANN. §§ 626A.02.1 to 626A.02.4 (West, Westlaw through legislation of the 2014 Regular Session effective through July 31, 2014). That statute provides:

It is not unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state.

*Id.* § 626A.02.2.(d). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 626A.01.4.

### Mississippi

Mississippi statute sections 41-29-501 to 41-29-535 appear to prohibit taping of a private conversation. MISS. CODE ANN. §§ 41-29-501 to 41-29-535 (West, Westlaw through 2014 Regular (End) and First and Second Extraordinary (End) Sessions). Although the statutes provide exceptions from liability, research has not found any statute or case law interpretation of any statute affirmatively prohibiting such taping. In addition, it is unclear the activity to which the penalty provisions apply. The state statute provides:

(1) Any person who knowingly and intentionally possesses, installs, operates or monitors an electronic, mechanical or other device in violation of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to not more than one (1) year in the county jail or fined not more than Ten Thousand Dollars (\$10,000.00), or both.

(2) Any person who violates the provisions of Section 41-29-511 shall be guilty of a felony and, upon conviction thereof, shall be sentenced to not more than five (5) years in the State Penitentiary and fined not more than Ten Thousand Dollars (\$10,000.00).

*Id.* § 41-29-533. The state statute allows a private individual to disclose an intercepted oral communication if the interception was authorized:

A person who receives, by any means authorized by this article, information concerning a[n] . . . oral . . . communication . . . intercepted

in accordance with the provisions of this article may disclose the contents of such communication . . . while giving testimony under oath in any proceeding held under the authority of the United States, of this state, or of a political subdivision of this state.

*Id.* § 41-29-511(3).

The state statute excepts from liability:

A person not acting under color of law who intercepts a[n] . . . oral . . . communication if the person is a party to the communication, or if one (1) of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this state, or for the purpose of committing any other injurious act.

*Id.* § 41-29-531(e). “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. *Id.* § 41-29-501(j).

### Missouri

The focus of sections 542.400-542.422 appears to be the prohibition against taping a telephone conversation, except as authorized pursuant to those statutes, or taping a face-to-face conversation using a microphone transmitting the conversation elsewhere. MO. ANN. STAT. §§ 542.400-.422 (West, Westlaw through emergency legislation approved through July 14, 2014, of the 2014 Second Regular Session of the 97th General Assembly). Thus, the statutes do not appear to prohibit a participant from taping a face-to-face conversation using a handheld tape recorder. The statutes contain a definition of “oral communication” and a few tangential references to oral communication; otherwise, most of the references are to “wire communication.” Oral communication means “any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 542.400(8). A state statute provides that:

1. Except as otherwise specifically provided in sections 542.400 to 542.422, a person is guilty of a class D felony and upon conviction shall be punished as provided by law, if such person:

(1) Knowingly intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire communication; [or]

(2) Knowingly uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when such device transmits communications by radio or interferes with the transmission of such communication; provided, however, that nothing in sections 542.400 to 542.422 shall be construed to prohibit the use by law enforcement officers of body microphones and transmitters in undercover investigations for the acquisition of evidence and the protection of law

enforcement officers and others working under their direction in such investigations.

....

2. It is not unlawful under the provisions of sections 542.400 to 542.422:

....

(2) For a person acting under law to intercept a wire or oral communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.

(3) For a person not acting under law to intercept a wire communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act.

*Id.* § 542.402.

Any investigative officer or law enforcement officer who, by any means authorized by sections 542.400 to 542.422, has lawfully obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents to the extent such use is necessary to the proper performance of his official duties.

*Id.* § 542.406(2). Another statute contains a reference to oral communication in the context of the requirement of taping an authorized interception. *Id.* § 542.410(1).

Arguably, with the few slight references to oral communication discussed above, the criminal sanctions for taping in these statutes refer only to communication via the telephone and to one not a party to the conversation taping a face-to-face conversation. Research failed to discover other statutory or case law prohibitions against taping a face-to-face conversation.

### Nebraska

The state statute provides that “it is unlawful to . . . [i]ntentionally intercept . . . any . . . oral communication.” NEB. REV. STAT. ANN. § 86-290(1) (Westlaw through End of 2013 Regular Session). That statute provides that “any person who violates this subsection is guilty of a Class IV felony.” *Id.* That statute further provides:

It is not unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state.

*Id.* § 86-290(2)(c). The penalty for a Class IV felony is not more than “five years imprisonment, or ten thousand dollars fine, or both.” *Id.* § 28-105(1). “Oral communication means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 86-283.

## Nevada

The state statute provides:

[A] person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording . . . by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

NEV. REV. STAT. ANN. § 200.650 (West, Westlaw through the 2013 77th Regular Session and the 27th Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2013)). One who “willfully and knowingly” violates the statute commits a category D felony. *Id.* § 200.690(1).

A category D felony is a felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 4 years. In addition to any other penalty, the court may impose a fine of not more than \$5,000, unless a greater fine is authorized or required by statute.

*Id.* § 193.130(2)(d). Research failed to locate case law interpreting “private conversation.”

Certain Nevada state statutes govern the procedure for obtaining a court order to tape an oral communication. *Id.* §§ 179.410-.515. Pursuant to those statutes, “[o]ral communication” means any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation.” *Id.* § 179.440.

## New Jersey

The state statute provides: “[A]ny person who . . . [p]urposely intercepts . . . any . . . oral communication . . . shall be guilty of a crime of the third degree.” N.J. STAT. ANN. § 2A:156A-3 (West, Westlaw through laws effective through L.2014, c. 22 and J.R. No. 3). “Oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 2A:156A-2(b). Another state statute provides an exception for:

A person not acting under color of law to intercept a[n] . . . oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is intercepted or used for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.



*Id.* § 2A:156A-4. A crime of the third degree is punishable by imprisonment of between three and five years, a fine of not more than \$15,000, or both. *Id.* §§ 2C:43-2, -3, -6.

### New Mexico

Section 30-12-1 makes interference with communications a misdemeanor. N.M. STAT. ANN. § 30-12-1 (West, Westlaw through laws of the 2nd Regular Session of the 51st Legislature (2014), effective May 21, 2014). That statute does not contain the term “oral communication” and has been interpreted to be inapplicable to a face-to-face conversation. *State v. Hogervorst*, 566 P.2d 828, 834 (N.M. Ct. App. 1977) (“[The statute] pertains to telephone conversations or telegraph messages[] . . . [not] a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation.”). Sections 30-12-2 to 30-12-10 contain the term “oral communication” and set the basis for obtaining a court order allowing interception of an oral communication. Section 30-12-11 provides a civil cause of action to someone whose oral communication has been wrongly intercepted. None of these statutes define oral communication.

Research failed to discover other statutory or case law prohibitions against taping a face-to-face conversation. Arguably, the criminal sanction for interfering with communications in section 30-12-1 refers only to communication via the telephone or telegraph and not to face-to-face conversation.

### New York

“A person is guilty of eavesdropping when he unlawfully engages in . . . mechanical overhearing of a conversation . . .” N.Y. PENAL LAW § 250.05 (Westlaw through L.2014, chapters 1 to 208, 210, 213, 214, 217 to 221, 227 to 231, 233, 235 to 247, 261, 267, 290, 294, 297, 302, 304, 306, 309, 316, 322, 324). The statute makes eavesdropping a class E felony. *Id.* A class E felony is punishable by a minimum of one year and a maximum of four years imprisonment, or not more than the greater of five thousand dollars or “double the amount of the defendant's gain from the commission of the crime,” or both. *Id.* §§ 60.01(3), 70.00(2, 3), 80.00(1). “‘Mechanical overhearing of a conversation’ means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” *Id.* § 250.00(2). One court found that “absent a reasonable expectation of privacy, the recording of conversations, *per se*, is not illegal” and the defendant had no reasonable expectation of privacy in “conversations . . . heard through a hole in the floor, and tape recorded.” *People v. Kirsh*, 575 N.Y.S.2d 306, 307 (App. Div. 1991). Other than *Kirsh*, research failed to discover statutory or case law interpretation of “conversation” or “discussion.”

### North Carolina

The state statute provides that “a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person . . . [w]illfully intercepts . . . any . . . oral . . . communication.” N.C. GEN. STAT. ANN. § 15A-287(a) (West 2014). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 15A-286(17). A Class H felony is punishable by imprisonment, or fine or both. *Id.* §§ 15A-1340.17, -1361, -1362.

### North Dakota

The state statute provides that “[a] person is guilty of a class C felony if he . . . [i]ntentionally intercepts any . . . oral communication by use of any electronic, mechanical, or other device.” N.D. CENT. CODE ANN. § 12.1-15-02(1) (West, Westlaw through the 2013 Regular Session of the 63rd Legislative Assembly). That statute makes it a defense to criminal liability that “(1) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception, and (2) such communication was not intercepted for the purpose of committing a crime or other unlawful harm.” *Id.* § 12.1-15-02(3). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 12.1-15-04(5). A class C felony carries “a maximum penalty of five years’ imprisonment, a fine of ten thousand dollars, or both.” *Id.* § 12.1-32-01(4).

### Ohio

The state statute provides: “No person purposely shall . . . [i]ntercept . . . a[n] . . . oral . . . communication.” OHIO REV. CODE ANN. § 2933.52(A) (West, Westlaw through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014)). That statute makes its violation a felony of the fourth degree. *Id.* § 2933.52(C). That statute excepts from its application:

A person who is not a law enforcement officer and who intercepts a[n] . . . oral . . . communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act.

*Id.* § 2933.52(B). “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.” *Id.* § 2933.51(B). A felony of the fourth degree is punishable by imprisonment for six through eighteen months, or a maximum fine of \$5,000, or both. *Id.* §§ 2929.13(A), 2929.14(A)(4), 2929.18(A).

### Oklahoma

The state statute provides that:

any person is guilty of a felony and upon conviction shall be punished by a fine of not less than Five Thousand Dollars (\$5,000.00), or by imprisonment of not more than five (5) years, or by both who:

1. Willfully intercepts . . . any . . . oral . . . communication.

OKLA. STAT. ANN. tit. 13, § 176.3 (West, Westlaw through chapters of the Second Regular Session of the 54th Legislature (2014) effective July 1, 2014).

It is not unlawful pursuant to the Security of Communications Act for:

....

5. a person not acting under color of law to intercept a[n] . . . oral . . . communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless the communication is intercepted for the purpose of committing any criminal act.

*Id.* § 176.4. “‘Oral communication’ means any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstance justifying such expectation.” *Id.* § 176.2(12).

### **Rhode Island**

The state statute provides: “[a]ny person . . . who willfully intercepts . . . any . . . oral communication . . . shall be imprisoned for not more than five (5) years.” R.I. GEN. LAWS ANN. § 11-35-21(a) (West, Westlaw through Chapter 104 of the January 2014 session). That statute provides:

It shall not be unlawful under this chapter for:

....

(3) A person not acting under color of law to intercept a[n] . . . oral communication, where the person is a party to the communication, or one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in the violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

*Id.* § 11-35-21(c). Although “oral communication” is not defined in that statute, a criminal procedure statute defines “[o]ral communications” as “any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation . . .” *Id.* § 12-5.1-1(10).

### **South Carolina**

Under the state statute, one who “intentionally intercepts . . . any . . . oral . . . communication” commits a felony. S.C. CODE ANN. REGS. § 17-30-20 (2014). “It is lawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.” *Id.* § 17-30-30(C). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation . . .” *Id.* § 17-30-15(2).

### **South Dakota**

The state statute provides that it is a class 5 felony if one “[n]ot present during a conversation or discussion, intentionally and by means of an eavesdropping device overhears or records such conversation or discussion . . . without the consent of a party to such conversation or discussion.” S.D. CODIFIED LAWS § 23A-35A-20 (Westlaw through the 2014 Regular Session and Supreme Court Rule 14-10). “Eavesdropping device” means

“any electronic, mechanical, or other apparatus which is intentionally used to intercept a wire or oral communication . . . .” *Id.* § 23A-35A-1(6). “Oral communication” means “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 23A-35A-1(10). A class 5 felony is punishable by imprisonment for a maximum of five years; in addition, a maximum fine of \$10,000 may be imposed. *Id.* § 22-6-1.

### Tennessee

The state statute provides that “a person commits an offense who . . . . [i]ntentionally intercepts . . . any . . . oral . . . communication.” TENN. CODE ANN. § 39-13-601(a)(1) (West, Westlaw from laws from the 2014 Second Reg. Sess., eff. through June 30, 2014). That statute provides:

It is lawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication, where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.

*Id.* § 39-13-601(b)(5). One who violates § 39-13-601(a)(1) commits a Class D felony. *Id.* § 39-13-602. Research failed to discover statutory or case law interpretation of “oral communication.”

### Texas

The state statute provides that “[a] person commits an offense if the person . . . intentionally intercepts . . . a[n] . . . oral . . . communication.” TEX. PENAL CODE ANN. § 16.02(b) (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature). That statute excepts from criminal liability:

[A] person not acting under color of law [who] intercepts a[n] . . . oral . . . communication, if:  
 (A) the person is a party to the communication; or  
 (B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

*Id.* § 16.02(c). That statute further makes violation of the statute a felony of the second degree. *Id.* § 16.02(f). A violation is punishable as follows:

(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years.  
 (b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed \$10,000.

*Id.* § 12.33. “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.” TEX. CODE CRIM. PROC. ANN. art. 18.20(2) (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature).

### Utah

The state statute provides that “[a] person commits a violation of this subsection who . . . intentionally or knowingly intercepts . . . any . . . oral communication.” UTAH CODE ANN. § 77-23a-4(1)(b) (West, Westlaw through 2014 General Session). That statute provides that:

A person not acting under color of law may intercept a[n] . . . oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.

*Id.* § 77-23a-4(7)(b). A violation of the statute is a third degree felony. *Id.* § 77-23a-4(10)(a). A third degree felony is punishable by not more than five years imprisonment, or a fine of not more than \$5,000, or both. *Id.* §§ 76-3-201(2), 76-3-203(3), 76-3-301(1). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception, under circumstances justifying that expectation . . .” *Id.* § 77-23a-3(13).

### Vermont

This state has no statute prohibiting eavesdropping. However, the Vermont Supreme Court has interpreted the search and seizure provision of Chapter I, Article 11 of the Vermont Constitution to prohibit a police officer from secretly taping a suspect’s conversation where the suspect has a reasonable expectation of privacy. *State v. Geraw*, 795 A.2d 1219, 1221-22 (Vt. 2002) (stating that a suspect had a reasonable expectation of privacy in the home but not in a parking lot).

### Virginia

The state statute provides that “any person who . . . [i]ntentionally intercepts . . . any . . . oral communication . . . shall be guilty of a Class 6 felony.” VA. CODE ANN. § 19.2-62(A) (West, Westlaw through the End of the 2014 Reg. Sess. and the End of the 2014 Sp. Sess. I). That statute provides: “It shall not be a criminal offense under this chapter for a person to intercept a[n] . . . oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.” *Id.* § 19.2-62(B)(2). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations . . .” *Id.* § 19.2-61. A class 6 felony is punishable by:

[A] term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.

*Id.* § 18.2-10(f).

### **West Virginia**

The state statute provides that “it is unlawful for any person to . . . [i]ntentionally intercept . . . any . . . oral . . . communication.” W. VA. CODE ANN. § 62-1D-3(a) (West, Westlaw through laws of the 2014 Second Extraordinary Session). That statute provides: “Any person who violates subsection (a) of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary for not more than five years or fined not more than ten thousand dollars or both fined and imprisoned.” *Id.* § 62-1D-3(b). That statute further provides:

It is lawful under this article for a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state.

*Id.* § 62-1D-3(e). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 62-1D-2(h).

### **Wisconsin**

One who “[i]ntentionally intercepts . . . any . . . oral communication” commits a Class H felony. WIS. STAT. ANN. § 968.31(1) (West, Westlaw through 2013 Act 380, published 4/25/2014). That statute provides that:

It is not unlawful . . . [f]or a person not acting under color of law to intercept a[n] . . . oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

*Id.* § 968.31(2). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation.” *Id.* § 968.27(12). The punishment for a Class H felony is “a fine not to exceed \$10,000 or imprisonment not to exceed 6 years, or both.” *Id.* § 939.50(3).

### **Wyoming**

The state statute provides that “no person shall intentionally . . . [i]ntercept . . . any . . . oral . . . communication.” WYO. STAT. ANN. § 7-3-702(a) (West, Westlaw through the 2014 Budget Sess.). That statute does not prohibit “[a]ny person from intercepting an oral . . . communication where the person is a party to the communication or where one (1) of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious

act.” *Id.* § 7-3-702(b). “[A]ny person who violates this section is guilty of a felony punishable by a fine of not more than one thousand dollars (\$1,000.00), imprisonment for not more than five (5) years, or both. *Id.* § 7-3-702(f). “‘Oral communication’ means any oral communication uttered by a person who reasonably expects and circumstances justify the expectation that the communication is not subject to interception . . . .” *Id.* § 7-3-701(a)(xi).

