

## Recording Police Officers - Just Say Cheese...

Police officers, like many citizens, are often camera-shy.<sup>1</sup> We all know that “Officers dislike being recorded in embarrassing situations and may be concerned that dissemination of their images may put them at risk of retaliation.”<sup>2</sup> Public perception is that officers are also accustomed “to substantial deference in the construction of official reports, and many would prefer to be in a position to draft their perceptions of their actions without competing digital records. It’s well known that police officers often view private digital image capture as a challenge to their authority.”<sup>3</sup> What does that mean – well they don’t like to have their picture taken. These perceptions and attitudes, combined with the technological explosion in hand-held recording devices during the last thirty years,<sup>4</sup> has led to a crossroads in which there must be a balance between officers’ interests in privacy and safety and a societal need for a check against police abuses of power.<sup>5</sup> While citizens should be permitted to record law enforcement officials in the line of duty without the express consent of such officials, such rights cannot be without limitation. For example, citizens should not be allowed to make such recordings in a physically intrusive manner or in a manner that will otherwise interfere with or compromise the ability of the officials to perform their law enforcement duties.<sup>6</sup>



Indeed, the published court decisions on the topic weigh in favor of transparency.<sup>7</sup> “The use of modern technology to record and review the activities of public bodies should marshal pride in our open system of government[,] not muster suspicion against citizens who conduct the recording.”<sup>8</sup> Complicating matters, though, is the existence of state wiretapping statutes that criminalize the recording of communications without the knowledge or consent of all parties to the communication. Approximately a dozen states currently have such laws.<sup>9</sup> While some of these laws can be construed to exempt some recording of police activity,<sup>10</sup> most do not contain any express basis for such an exemption.<sup>11</sup>

Police officers, relying on such wiretapping laws, arrest citizens who have recorded officers without their consent, sometimes after the citizens have used such recordings to support complaints against the police.<sup>12</sup> Some states have interpreted such laws to preclude such prosecutions because the public exercise of authority by police officers cannot support a reasonable expectation of privacy.<sup>13</sup> A Maryland court recently dismissed wiretapping charges brought against a motorcyclist who recorded officers on a highway with a camera hidden in his helmet, commenting that, in the “rapid information technology era in which we live, it is hard to imagine that either an offender or an officer would have any reasonable expectation of privacy with regard to what is said between them in a traffic stop on a public highway.”<sup>14</sup> In New Jersey, courts have held that police officers cannot assert wiretap claims against media “testers,” minorities hired by news outlets to drive expensive cars, who recorded their racial profiling in a highway stop.<sup>15</sup> Pennsylvania courts have also excluded recordings of law enforcement officials exercising authority in public settings from the consent

requirement because of the absence of any legitimate expectation of privacy required for protection under the relevant statute.<sup>16</sup> Even more emphatically than its sister jurisdictions, Washington courts have refused to “transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity.”<sup>17</sup>

Other states, however, have upheld prosecutions of citizens who recorded police during the performance of their public duties. The leading case on this issue, Commonwealth v. Hyde, is from Massachusetts.<sup>18</sup> During a traffic stop, the defendant recorded police officers because he believed they were harassing him because he had long hair. He later filed a formal complaint, in support of which he submitted the recording of the traffic stop. While the department was conducting an internal investigation, the officers brought a criminal complaint against the defendant under the Massachusetts wiretapping statute on the grounds that he had not obtained their consent before recording them.<sup>19</sup> The internal investigation eventually exonerated the officers, and the defendant was convicted of violating the wiretapping statute. On appeal, the Supreme Judicial Court affirmed the conviction, and determined that “the Legislature intended . . . strictly to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge.”<sup>20</sup> Writing in dissent, Chief Justice Marshall observed that George Holliday, the man who recorded the Rodney King beating, would have been exposed to criminal charges had he been in Massachusetts.<sup>21</sup> Since Hyde, police in Massachusetts have continued to rely on that Commonwealth’s wiretapping law, and have arrested bystanders who have recorded arrests on cell phones.<sup>22</sup> Massachusetts courts have upheld the conviction of a freelance journalist who photographed and tape-recorded police officers at a political rally,<sup>23</sup> and refused to dismiss a case against a defendant who, “during his arrest, transport and booking . . . secretly tape recorded the entire incident.”<sup>24</sup> The legislature in Illinois recently amended a law to target the recording of police officers.<sup>25</sup> The ACLU subsequently sued to invalidate the ban, though the suit was eventually dismissed for lack of standing.<sup>26</sup> In states that have not yet resolved how to apply their wiretap statutes, courts have allowed arresting officers who seek to suppress recordings of their actions to invoke qualified immunity to shield their arrests from subsequent damages actions.<sup>27</sup>

In addition to wiretapping statutes, some states have broader criminal laws that give law enforcement officials substantial enforcement discretion. Recently, police officers in Philadelphia arrested a man who filmed the arrest of his neighbor on a cell phone for “obstructing an investigation.”<sup>28</sup> Similarly, police in St. Louis arrested a photographer for “interfering” with an officer when she recorded an arrest of protesters at a health care rally.<sup>29</sup> Other photographers and reporters have been arrested on similar charges in Arkansas,<sup>30</sup> Florida,<sup>31</sup> Idaho,<sup>32</sup> Illinois,<sup>33</sup> Louisiana,<sup>34</sup> Nevada,<sup>35</sup> New Jersey,<sup>36</sup> New Mexico,<sup>37</sup> Ohio,<sup>38</sup> and Oklahoma.<sup>39</sup>

In the end, it is not in the benefit of law enforcement agencies and officials to appear to hide behind a wall of secrecy concerning the public performance of their duties. Such acts will erode the confidence law enforcement officers ask the public to place in them. “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>40</sup>

Almost 2000 years ago Juvenal asked: “*Sed quis custodiet ipsos custodes?*” Who will watch the keepers themselves is still a question of critical importance, and the need of a proper solution is never more acute than when the rights of the individual are involved. A declared purpose of the federal constitution is to

“secure the Blessings of Liberty” to the people and their posterity, and under our philosophy of government the rights guaranteed by the constitution of the people are jealously guarded. Curtailment of them is to be permitted only to the extent necessary to maintain the fine balance between the rights of the individual and the rights of society.<sup>41</sup>

Accordingly, we must strive to seek an appropriate balance between protecting officers and enabling them to perform their duties without interference, and ensuring a degree of transparency to enable the public to retain their confidence in those whose sworn duty is to serve and protect. Training is critical to ensure the protection of officers and departments. With the majority of the population carrying a recording device of some sort, officers need to be aware that at any time their actions could be videotaped and, therefore, they must act accordingly each and every time they interact with the public. So long as law enforcement officers act appropriately while in the performance of their duties, there is no reason to fear the video recorder. In fact, my advice is to just say “Cheese”...

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<sup>1</sup> Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 357 (2011).

<sup>2</sup> Id. (footnote omitted).

<sup>3</sup> Id. (footnote omitted).

<sup>4</sup> See, e.g., 2009 (5) AELE Mo. L. J. 201, 201 (noting change in cost, size, weight, quality, storage system, magnification, capability, and external application enhancements in hand-held video cameras in last thirty years).

<sup>5</sup> Dina Mishra, *Undermining Excessive Privacy for Police: Citizen Tape Recording To Check Police Officers’ Power*, 117 Yale L.J. 1549, 1550 (2008).

<sup>6</sup> Id.

<sup>7</sup> Unfortunately, many trial court-level decisions do not gain widespread publication, and are not available publicly. Therefore, media summaries and cursory references by other courts are sometimes all that are available as reference points.

<sup>8</sup> Tarus v. Borough of Pine Hill, 916 A.2d 1036, 1051 (2007).

<sup>9</sup> See Cal. Penal Code § 632; Del. Code Ann. tit. 11, § 1335(a); Fla. Stat. Ann. § 934.03(2)(d); Haw. Rev. Stat. Ann. § 711-1111(1)(d)-(e); 720 Ill. Comp. Stat. Ann. 5/14-2(a)(1); Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3); Mass. Gen. Laws ch. 272, §99(C)(1), (3); Mich. Comp. Laws Ann. § 750.539c-d; Mont. Code Ann. § 45-8-213(1)(c); N.H. Rev. Stat. Ann. § 570-A:2(I); 18 Pa. Cons. Stat. Ann. § 5704(4); Wash. Rev. Code Ann. § 9.73.030(1).

<sup>10</sup> See, e.g., Wash. Rev. Code Ann. § 9.73.030(1) (protecting only “private” oral communications); State v. Flora, 845 P.2d 1355 (Wash. Ct. App. 1992) (holding that police officers’ conversations during arrests are not “private”).

<sup>11</sup> 720 Ill. Comp. Stat. Ann. 5/14-2(1); Mass. Gen. Laws ch. 272, §99(C); Mont. Code Ann. § 45-8-213(1)(c); but see 720 Ill. Comp. Stat. Ann. 5/14-3(i) (exempting recordings made with reasonable suspicion that party to conversation will commit crime).

<sup>12</sup> *Pervasive Image Capture and the First Amendment*, supra note 1, at 358-59.

<sup>13</sup> The U.S. Supreme Court has explained that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” Katz v. U.S., 389 U.S. 347, 351 (1967). In a concurring opinion in the same decision, Justice Harlan noted that a person must have an actual expectation of privacy, and that expectation has to be one that society is prepared to recognize as reasonable. Insofar as conversations conducted in the open are not protected from being heard, “the expectation of privacy under [such] circumstances would be unreasonable.” Id. at 361 (Harlan, J, concurring) (citing Hester v. U.S., 265 U.S. 57 (1924)).

<sup>14</sup> State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at \*17 (Md. Cir. Ct. Sept. 27, 2010) (Plitt, J.). The court in Graber continued its analysis by noting that: “One can turn on a television and watch a myriad of high speed police chases and other law enforcement activities, such as the television show ‘Cops.’ These law enforcement activities[,] recorded as they occur, often with the approval of[,] and sometimes even with the encouragement of[,] law enforcement agencies. Law enforcement agencies have ‘ride along’ programs. Law enforcement agencies issue press releases and have press conferences where they often relate to the media and the public accounts of their law enforcement activities, including information obtained via various kinds of recording.” Id. at \*17-18.

<sup>15</sup> Hornberger v. ABC, Inc., 799 A.2d 566, 594-95 (N.J. Super. Ct. 2002) (concluding that police did not have expectation of privacy during traffic stop filmed through arrangement with ABC).

<sup>16</sup> See, e.g., Agnew v. Dupler, 717 A.2d 519, 523-24 (Pa. 1998) (finding no reasonable expectation of privacy for police conversations in the squad room, which could be overheard without amplification); Commonwealth v. Henlen, 564 A.2d 905, 907 (Pa. 1989) (holding that suspect who submitted recording of interview by state trooper in complaint against trooper could not be prosecuted for violating wiretap statute); Jones v. Gaydula, No. 85-1859, 1989 U.S. Dist. LEXIS 15419 (E.D. Pa. Dec. 22, 1989) (Shapiro, J.) (police officer had no reasonable expectation of privacy when an individual whom he arrested recorded his interview with the police despite being asked to stop). Pennsylvania officers, though, still invoke that Commonwealth’s wiretap statute against those citizens who antagonize them by recording them. See, e.g., Kelly v. Borough of Carlisle, 622 F.3d 248, 258 (3d Cir. 2010) (“[A]t the time of Kelly’s arrest, it was clearly established that a reasonable expectation of privacy was a prerequisite for a Wiretap Act violation. Even more to the point, two Pennsylvania Supreme Court cases – one almost 20 years old at the time of Kelly’s arrest – held that covertly recording police officers was not a violation of the Act. Finally, it was also clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects.”)

<sup>17</sup> Flora, 845 P.2d at 1358 (public officers performing official function on public thoroughfare and within sight and hearing of passersby do not enjoy privacy interest); see also Johnson v. Hawe, 388 F.3d 676, 685 (9<sup>th</sup> Cir. 2004) (quoting Flora and ruling that police officers do not have an expectation of privacy when performing an official function on a public thoroughfare); Alford v. Haner, 333 F.3d 972, 976 (9<sup>th</sup> Cir. 2003) (citing Flora and noting that “[t]ape recording officers conducting a traffic stop is not a crime in Washington”), rev’d on other grounds, Devenpeck v. Alford, 543 U.S. 146 (2004); Lewis v. Dep’t of Licensing, 139 P.3d 1078, 1084 (Wash. 2006) (citing Flora and Alford with approval and holding that “traffic stop conversations are not private for purposes of the privacy act”).

<sup>18</sup> Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001).

<sup>19</sup> Id. at 964-65.

<sup>20</sup> Id. at 967.

<sup>21</sup> Id. at 971-72 (Marshall, C.J., dissenting).

<sup>22</sup> See, e.g., Daniel Rowinski, Police Fight Cell Phone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance, Bos. Globe, Jan. 12, 2010, at 1, available at 2010 WLNR 610060 (describing arrests in Massachusetts of civilians recording police officers in 2007 and 2008).

<sup>23</sup> Commonwealth v. Manzelli, 864 N.E.2d 566, 568 (Mass. App. Ct. 2007).

<sup>24</sup> Gouin v. Gouin, 249 F. Supp. 2d 62, 79 (D. Mass. 2003) (internal quotation marks omitted).

<sup>25</sup> Compare People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986) (holding that wiretap statute did not forbid recording police officers) with 720 Ill. Comp. Stat. Ann. 5/14-1(d) (superseding Beardsley and defining “conversation” as “any oral communication . . . regardless of whether one or more of the parties intended their communication to be of a private nature”).

<sup>26</sup> ACLU v. Alvarez, No. 10-C-5235, 2010 U.S. Dist. LEXIS 115354, at \*6, 10-11 (N.D. Ill. Oct. 28, 2010) (Conlon, J.).

<sup>27</sup> See, e.g., Skoog v. County of Clackamas, 469 F.3d 1221, 1225, 1235 (9<sup>th</sup> Cir. 2006) (applying Oregon law) (granting qualified immunity to officer for seizure of plaintiff’s camera for filming officer and “juvenile decoy” seeking to purchase tobacco).

<sup>28</sup> Cell Phone Picture Called Obstruction of Justice: Man Arrested for Shooting Photo of Police Activity, NBC10.com, July 25, 2006 (quoting the photographer’s mother) (internal quotation marks omitted),

<http://web.archive.org/web/20060821200354/http://www.nbc10.com/news/9574663/detail.html>. The police also told the suspect “that he broke a[n imaginary] new law that prohibits people from taking pictures of police with cell phones.” Id.; cf. Williamson v. Mills, 65 F.3d 155, 157-59 (11<sup>th</sup> Cir. 1995) (applying Florida law) (reversing district court’s grant of qualified immunity to officer who arrested, and seized the film of, demonstrator for photographing undercover officers).

<sup>29</sup> Dueling Protesters Disrupt Carnahan Forum on Aging, St. Louis Post-Dispatch, Aug. 7, 2009, at A1, available at <http://sweetness-light.com/archive/seiu-thugs-beat-up-town-hall-protester>.

<sup>30</sup> See Stacy Hudson, Maumelle Reporter Cleared of Charges, Arkansas Democrat-Gazette, Dec. 16, 2007, at 9 (discussing arrest of reporter who took picture of house fire in Little Rock, though charges were later dropped, and arresting officer was placed on temporary restricted duty), summary available at <http://lynchatlarge.wordpress.com/2007/12/>.

<sup>31</sup> Witness, photojournalist allege police confiscated cameras, available at <http://www.rcfp.org/newsitems/index.php?i=11910> (recounting allegations that police forced witnesses to ground at gunpoint, destroyed one cell phone, and confiscated others used to record officers shooting and killing a suspect on a public street).

<sup>32</sup> Charges dropped against photographers in Idaho and New Mexico, available at <http://www.rcfp.org/newsitems/index.php?i=1013> (detailing arrest of photographer attempting to take pictures of exhumation of body in murder case).

<sup>33</sup> David Heinzmann, Photographer Finds Himself in Hot Water with Police, Chi. Trib., Nov. 20, 2008, at 26, available at [http://articles.chicagotribune.com/2008-11-20/news/0811190782\\_1\\_crime-scenes-false-alarm-police-shooting](http://articles.chicagotribune.com/2008-11-20/news/0811190782_1_crime-scenes-false-alarm-police-shooting) (discussing two separate arrests of freelance photographer in Chicago who took photos and video of purported crime scenes from neighboring property with permission of owners despite orders from police not to)

<sup>34</sup> Sonia Smith, Photographer Arrested at Crime Scene, Baton Rouge Advoc., Jan. 18, 2009, at B2 (detailing arrest of photographer at crime scene for interfering with homicide investigation).

<sup>35</sup> Photographers arrested during rioting, imprisoned overnight, available at <http://www.rcfp.org/newsitems/index.php?i=1919> (noting destruction of cameras and arrest of two photographers who took pictures of police beating suspected rioters).

<sup>36</sup> Photographer arrested for taking pictures at accident scene, available at <http://www.rcfp.org/newsitems/index.php?i=1663> (describing arrest of photographer as he tried taking pictures of fatal car accident).

<sup>37</sup> Charges dropped against photographers in Idaho and New Mexico, available at <http://www.rcfp.org/newsitems/index.php?i=1013> (noting arrest of photojournalist arrested while trying to photograph scene of fatal car accident).

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<sup>38</sup> Clashes with officials lead to arrest, confiscation of film, available at <http://www.rcfp.org/newsitems/index.php?i=1582> (describing confiscation of film and arrest of reporter who was reporting on fire, riot, and hostage crisis at state prison; reporter charged with misconduct in an emergency and resisting arrest).

<sup>39</sup> Journalist sues state police over arrest at accident scene, available at <http://www.rcfp.org/newsitems/index.php?i=1516> (noting arrest of photographer who was taking pictures at accident scene; photographer charged with obstructing the work of emergency personnel trying to free a person pinned in car wreckage).

<sup>40</sup> Graber, 2010 Md. Cir. Ct. LEXIS 7, at \*35.

<sup>41</sup> State v. McCray, 297 A.2d 265, 266 (Md. Ct. App. 1972) (citing *Juvenalis Et Persius*, published by Gulielmus Pickering, London, 1835, *Satira*, VI, p. 140, line 347. Juvenal (Decimus Iunius Iuvenalis), a Roman satirist and poet, circa A.D. 60-140; Preamble to the Constitution of the United States) (footnotes omitted).