

**RIGHTS, CAMERAS, ACTION! RECORDING THE  
POLICE: THE GAP BETWEEN MODERN TECHNOLOGY  
AND THE LAW, AND WHY THE UNITED STATES  
SHOULD NOT FOLLOW THE UNITED KINGDOM'S  
LEAD**

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**ABSTRACT**

As United States Federal Appeals Courts continue to hold that private citizens have a fundamental right, protected by the First Amendment, to record on-duty police officers, states must end their practice of charging these citizens with violating outdated wiretapping and eavesdropping laws. Advances in technology, particularly the proliferation of personal cell phones with audio and video recording capabilities, creates an urgency to reexamine these outdated laws. Laws that prohibit an individual's right to record, such as the United Kingdom's Counter Terrorism Act of 2008, go too far and will surely fail Constitutional scrutiny under recent Federal Appeals Court holdings. Moreover, any proposed legislation that seeks to strike a balance between the individual liberties espoused by the courts, and public safety and national security, ignores the fact that laws already exist which address these factors. Instead, Congress should amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968 – the federal wiretapping law – to create an exception allowing for the recording of on-duty police officers carrying out their official duties.

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### INTRODUCTION

On the evening of October 1, 2007, Simon Glik caught sight of Boston police officers in the process of arresting a young man.<sup>1</sup> Concerned that the officers were using excessive force, Glik began video recording the arrest with his cell phone while standing roughly ten feet away.<sup>2</sup> After the suspect was placed in handcuffs, the officers confronted Glik about his recording.<sup>3</sup> Upon learning that Glik was recording video and audio, the officers placed Glik under arrest for unlawful audio recording in violation of Massachusetts’s wiretap statute,<sup>4</sup> a crime that carries a maximum penalty of five years in prison, and a ten thousand dollar fine.<sup>5</sup> While using a cell phone to record such an event seems innocent enough, Glik’s experience is far from an isolated event.<sup>6</sup> In

<sup>1</sup> Glik v. Cunniff, 655 F.3d 78, 79 (1st Cir. 2011).

<sup>2</sup> *Id.* at 79–80.

<sup>3</sup> *Id.* at 80.

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

<sup>5</sup> MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (West 2012). “Except as otherwise specifically provided in this section any person who—willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years.” *Id.*

<sup>6</sup> See generally Adam Cohen, *A New First Amendment Right: Videotaping the Police*, TIME (May 21, 2012), <http://ideas.time.com/2012/05/21/a-new-first-amendment-right-videotaping-the-police/> (describing similar incidents involving a Maryland resident charged with violating state wiretap laws and threatened with sixteen years in prison for recording his own traffic stop, another Maryland resident arrested for recording his friend getting arrested, and two Mississippi teenagers who were arrested for recording police conducting an investigation near their apartment).

recent years, the number of individuals arrested for videotaping the police has grown exponentially.<sup>7</sup>

In the majority of these cases, the individual being arrested is not the person who prompted the police to respond to the scene in the first place. Instead, the individual being arrested merely came across ongoing police activity and began recording the interaction. While it is generally not illegal to videotape people without their consent in public places,<sup>8</sup> twelve states require consent from all parties prior to recording a conversation.<sup>9</sup> Consequently, private citizens who videotape on-duty police officers without their consent risk being arrested and charged with violating state wiretapping and eavesdropping laws.<sup>10</sup> Of these states, Illinois' eavesdropping law carries the harshest penalties.<sup>11</sup> In Illinois, the maximum penalty for eavesdropping on an oral conversation involving any law enforcement officer is a Class 1 felony,<sup>12</sup> which carries a maximum penalty of fifteen years in prison, a \$25,000 fine, or both for each offense.<sup>13</sup>

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<sup>7</sup> See, e.g., D.J. Pangburn, *Illinois Man Faces 75 Years in Prison for Recording Police*, DEATH AND TAXES (Sept. 1, 2011), <http://www.deathandtaxesmag.com/137745/illinois-man-faces-75-years-in-prison-for-recording-police/> (regarding an Illinois man charged with five counts of violating Illinois's eavesdropping law); see also Jonathan Turley, *Police Arrest Illinois Man for Videotaping Traffic Stop*, RES IPSA LOQUITUR ("THE THING SPEAKS FOR ITSELF") (Sept. 29, 2011), <http://jonathanturley.org/2011/09/29/police-arrest-illinois-man-for-videotaping-traffic-stop/> (regarding an Illinois man arrested who used his phone to videotape his encounter with a police officer during a routine traffic stop); see also Madison Ruppert, *A Disturbing Trend: Many Innocent American Arrested for Legally Filming On-Duty Public Servants*, ACTIVIST POST (July 30, 2011), <http://www.activistpost.com/2011/07/disturbing-trend-many-innocent.html> (describing various instances of citizens being arrested for videotaping on-duty police, including a man in Las Vegas who was beaten by police after he videotaped them on his property; a woman in Rochester, NY, who was forcibly removed from her property and arrested for videotaping police performing a traffic stop; and a priest in New Haven, CT, who was arrested for videotaping police activity inside of a small grocery store, to name a few).

<sup>8</sup> *Recording of Individuals Without Their Consent*, UTAH VALLEY UNIVERSITY, <http://www.uvu.edu/wrs/trainingmaterials/recording.html> (last updated Dec. 5, 2011).

<sup>9</sup> The twelve states with this requirement are: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. Steve Silverman, *7 Rules for Recording the Police*, GIZMODO (Apr. 10, 2012), <http://gizmodo.com/5900680/7-rules-for-recording-police>.

<sup>10</sup> Cohen, *supra* note 6.

<sup>11</sup> Jason Meisner, *Supreme Court Rejects Plea to Ban Taping of Police in Illinois*, CHICAGO TRIBUNE (Nov. 26, 2012, 7:44 PM), <http://www.chicagotribune.com/news/local/breaking/chi-supreme-court-rejects-plea-to-prohibit-taping-of-police-20121126,0,686331.story>.

<sup>12</sup> 720 ILL. COMP. STAT. 5/14-4(b) (2012).

<sup>13</sup> *Illinois Criminal Code and Laws*, ILLINOIS CRIMINAL DEFENSE LAWYER, <http://www.myllinoisdefenselawyer.com/illinois-criminal-code-and-laws/>.

Recently, the Seventh Circuit declared that Illinois' eavesdropping law "likely violates the First Amendment's free-speech and free-press guarantees."<sup>14</sup> While this is seen as a victory for recording proponents, the ruling from the Seventh Circuit does not expressly state that the Illinois law violates the First Amendment, only that it is "likely" that it violates the First Amendment.<sup>15</sup> Rather than definitively ruling on the constitutionality of the Illinois eavesdropping statute, the Court remanded the case and instructed the district court to grant a preliminary injunction enjoining the state of Illinois from applying the Illinois eavesdropping statute.<sup>16</sup> Nevertheless, the trend in the United States is shifting towards recognizing the recording of police by private citizens as a right protected by the First Amendment.<sup>17</sup>

As the courts move towards protecting citizen recording of on-duty police officers, the law is still unclear in many jurisdictions. As a result, the average citizen with a cell phone in their pocket who encounters a police investigation does not know whether they are legally permitted to record the encounter. Recently, the Supreme Court refused to take up the appeal of the Illinois case, leaving the Seventh Circuit's vague ruling in place.<sup>18</sup> While this has been portrayed by some as effectively upholding the Seventh Circuit decision,<sup>19</sup> the reality is that this issue remains unresolved.<sup>20</sup> Because most United States citizens own cell phones, it is inevitable that the number of individuals who encounter this issue will increase.<sup>21</sup> Moreover, this issue is not isolated to the United States.

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<sup>14</sup> *ACLU v. Alvarez*, 679 F.3d 583, 586–87 (7th Cir. 2012) (indicating that while the court believes the right to record is protected by the First Amendment, the ruling upholds the grant of a preliminary injunction not to enforce the law only, and remands the case for further consideration. The ACLU originally brought this case in an effort to obtain a preliminary injunction against enforcing the anti-recording law. The law itself, however, is still on the books and is awaiting further consideration).

<sup>15</sup> *Id.* at 587.

<sup>16</sup> *Id.* at 586.

<sup>17</sup> *See id.* at 587; *see also* *Glik v. Cunniff*, 655 F.3d 78, 85 (1st Cir. 2011) (reasoning that recording the police is akin to speech and protected by the First Amendment).

<sup>18</sup> *See* Meisner, *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* (stating that a ruling from the Supreme Court could have provided legal clarification to prosecutors).

<sup>21</sup> Studies show that 86 percent of the United States population owns cell phones. *See* Brian X. Chen, *Study: 85 Percent of U.S. Customers Own Cellphones*, WIRED (Oct. 15, 2010, 3:25 PM), <http://www.wired.com/gadgetlab/2010/10/pew-study/>. Moreover, a 2012 survey concluded that more than 50 percent of cell phone users own smart phones, which come with video and audio recording capabilities. *See* Amy Gahrn, *Survey Says Most U.S. Cell Phone Owners Have*

In October of 2012, in the wake of questionable police behavior during large protests in Madrid regarding cuts in government assistance programs, the Spanish government began drafting a law that would ban citizens from photographing or videotaping police on-duty.<sup>22</sup> It is unclear how the situation in Spain will play out. However the Spanish government's plan signifies how videotaping and photographing on-duty police is quickly becoming an issue that public officials around the world cannot ignore. Similarly, while the ultimate outcome in the United States is unknown at this point, one thing is certain: action must be taken.

When considering how legislatures in the United States should approach the issue of citizen recording of on-duty police officers, one argument for limiting the recording of on-duty police is that it promotes public safety and national security.<sup>23</sup> Although there is a strong argument in favor of this approach, any legislation that curtails citizens' ability to record on-duty police officers should be heavily scrutinized. A blanket law banning all recording of on-duty police officers, while eliminating the potential security risk that might arise, signifies an overstepping of the state's police power. Nowhere is this more clearly on display than the United Kingdom.<sup>24</sup>

Chapter 28, section 76 of the United Kingdom's 2008 Counter Terrorism Act (ACT) prohibits a person from taking photographs of members of the armed services, members of the intelligence service, or constables.<sup>25</sup> Application of this law has also restricted the videotaping of police in the United Kingdom.<sup>26</sup> The ACT was passed in the name of public safety and national security,<sup>27</sup> a reason some advocates in the

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*Smartphones; So What?*, CNN (Mar. 2, 2012, 10:05 AM), [http://articles.cnn.com/2012-03-02/tech/tech\\_mobile\\_smartphones-majority-pew-gahran\\_1\\_smartphone-cell-phone-android-phone?\\_s=PM:TECH](http://articles.cnn.com/2012-03-02/tech/tech_mobile_smartphones-majority-pew-gahran_1_smartphone-cell-phone-android-phone?_s=PM:TECH).

<sup>22</sup> Lauren Frayer, *Amid Protests, Spain Tries Banning Photos of Police*, NPR (Nov. 21, 2012, 3:00 PM), <http://www.npr.org/2012/11/21/165675687/amid-protests-spain-tries-banning-photos-of-police>; *Spain Considering Ban on Photographing, Filming Police On-Duty*, PRESSTV (Oct. 20, 2012, 5:40 AM), <http://www.presstv.ir/detail/2012/10/20/267716/spain-to-ban-filming-police-on-duty>.

<sup>23</sup> *ACLU v. Alvarez*, 679 F.3d 583, 611 (7th Cir. 2012) (Posner, J., dissenting).

<sup>24</sup> Counter Terrorism Act, 2008, c. 28, §76 (U.K.).

<sup>25</sup> See Counter Terrorism Act, 2008, c. 28, §76 (U.K.); Marc Vallée, *Documenting Dissent is Under Attack*, THE GUARDIAN (Feb. 12, 2009, 6:30), <http://www.guardian.co.uk/commentisfree/2009/feb/11/police-terrorism-photography-liberty-central>.

<sup>26</sup> Paul Lewis, *Woman 'Detained' for Filming Police Search Launches High Court Challenge*, THE GUARDIAN (July 21, 2009, 9:26), <http://www.guardian.co.uk/politics/2009/jul/21/police-search-mobile-phone-court>.

<sup>27</sup> Vallée, *supra* note 25.

United States cite as a rationale for upholding state laws banning citizen recording of on-duty police officers.<sup>28</sup> However, this blanket ban is ineffective in a technologically advanced society. Similar to the United States, just under half of the population of the United Kingdom owns a smartphone.<sup>29</sup> As a result, the ACT places a potential target on millions of citizens who are simply using their phone to take a picture, or record their surrounding for their own personal enjoyment.

While public safety and national security are certainly critical issues, any legislation proposed in the United States should hold true to the rulings from the First and Seventh Circuits declaring a citizen's right to record on-duty police officers as a fundamental right protected by the First Amendment. Consequently, any proposed legislation that curtails the public's right to record police must pass the strict scrutiny test reserved by the Supreme Court for laws that infringe upon fundamental rights, as the First and Seventh Circuit courts implied. Certainly, this would be easier if the Supreme Court were to weigh in and concur that the act of recording on-duty police is in fact a fundamental right. As this issue continues to make headlines, and more individuals are arrested, this is something the Supreme Court should confront sooner rather than later.

Part I of this note will provide a brief history of wiretapping and eavesdropping laws in the United States, highlighting Illinois' strict application, and focusing on the ineffectiveness of the modern application of the law in a technologically advanced society. Part II will analyze the United Kingdom's Counter-Terrorism Act of 2008, arguing that this approach is wrong for the United States. Finally, Part III will propose how the United States should move forward in this area of law, focusing on how society benefits from citizen recording, and how limitations would affect those benefits.

## I. THE LAW IN THE UNITED STATES

### A. BRIEF HISTORY OF WIRETAPPING AND EAVESDROPPING LAWS

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, better known as the federal wiretap

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<sup>28</sup> See *ACLU*, 679 F.3d at 611 (protecting the public is a legitimate rationale for prohibiting citizens from recording the police) (Posner, J., dissenting).

<sup>29</sup> Charles Arthur, *Half of UK Population Owns a Smartphone*, THE GUARDIAN (Oct. 31, 2011, 10:30), <http://www.guardian.co.uk/technology/2011/oct/31/half-uk-population-owns-smartphone>.

law.<sup>30</sup> Under the federal wiretap law, electronic surveillance is presumed to be illegal unless one of the following conditions is satisfied: one party lacked a reasonable expectation of privacy, one party consented to the recording, or a warrant allowing for the surveillance was properly obtained.<sup>31</sup> The purpose of the Wiretap Act was to ensure the public's privacy in oral and wire communications, while also indicating when these communications can be intercepted by law enforcement officials.<sup>32</sup>

In addition to federal legislation, states have passed their own wiretapping laws. According to legislative history of the federal wiretap law, state wiretapping laws are subject to the sole limitation that they be at least as restrictive as the federal version.<sup>33</sup> Therefore, states *are* authorized to pass more restrictive legislation, which is precisely what Illinois did.<sup>34</sup> Moreover, some state courts apply a restrictive interpretation of their statutes. For example, although Nevada's law does not explicitly require that all parties to a telephone conversation consent to a recording for the recording to be lawful, the Nevada Supreme Court held that the law requires just that.<sup>35</sup>

Generally, the state wiretapping laws, as well as the federal version, were enacted during a time when the notion of average citizens carrying cell phones that have recording capabilities was not in the realm of possibility.<sup>36</sup> Legislatures never contemplated that these laws would be enforced against private citizens recording on-duty police officers. The federal wiretap law, which served as a model for state wiretap laws, was passed to help law enforcement officials build cases against high profile criminals.<sup>37</sup> Current application of wiretap laws, however, goes beyond their original intent, placing otherwise law abiding citizen recorders in a

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<sup>30</sup> Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2002); *see also* Shana K. Rahavy, *The Federal Wiretap Act: the Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. L. 1, 88 (2003).

<sup>31</sup> *See* 18 U.S.C. §§ 2510 (2), 2511(2)(d), 2511 (2)(a)(ii)(A)–(B).

<sup>32</sup> Rahavy, *supra* note 30, at 88.

<sup>33</sup> S. REP. NO. 90-1097, at 98 (1968).

<sup>34</sup> Meisner, *supra* note 11.

<sup>35</sup> *See* Lane v. Allstate Ins. Co., 969 P.2d 938, 941 (Nev. 1998).

<sup>36</sup> *See* Celia Guzaldo Gamrath, *A Lawyer's Guide to Eavesdropping in Illinois*, 87 ILL. B.J. 362, 363 (1999) (stating that the Illinois eavesdropping statute was first codified in the Criminal Code in 1961); *see also* Rahavy, *supra* note 30 (stating that the Federal Wiretap Act was enacted in 1968); *see also* Simon Hill, *From J-Phone To Lumia 1020: A Complete History Of The Camera Phone*, DIGITAL TRENDS (Aug. 11, 2013), <http://www.digitaltrends.com/mobile/camera-phone-history/> (stating that cell phones did not have video recording capability until the mid-2000's).

<sup>37</sup> William Lee Adams, *Brief History: Wiretapping*, TIME (Oct. 11, 2010), <http://www.time.com/time/magazine/article/0,9171,2022653,00.html>.

legally vulnerable position. Consequently, individuals who record on-duty police in states with stringent wiretap laws on their books are frequently at risk of being arrested – a risk that in some states carries an unimaginably severe penalty.

#### B. HARSH APPLICATION: ILLINOIS' EAVESDROPPING LAW

Illinois' eavesdropping law is the most stringent law of its kind in the United States.<sup>38</sup> The law states that a person commits eavesdropping when he “knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all parties.”<sup>39</sup>

In 2000, the Illinois legislature amended this statute to increase the penalty for instances when an individual was eavesdropping an oral or electronic conversation between “any law enforcement officer, State’s Attorney, Assistant State’s Attorney, the Attorney General, Assistant Attorney General, or a judge, while in the performance of his or her official duties;” to a Class 1 Felony.<sup>40</sup> As a result, the penalty for “eavesdropping” on a police officer in the state of Illinois carries a maximum prison term of fifteen years, or roughly three times the length of the penalty for “eavesdropping” on an average citizen.<sup>41</sup> In its current form, the penalty for violating Illinois’ eavesdropping law is one of the harshest of its kind in the United States.<sup>42</sup>

What is unique about Illinois’ eavesdropping law is how easy it is for an uninformed citizen to violate it.<sup>43</sup> The law defines the word

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<sup>38</sup> See Deanna Isaacs, *The Accidental Poster Child: Courting Arrest to Protest Street-Art Laws, Chris Drew Stumbled into a More Serious Fight*, CHICAGO READER (Sept. 23, 2010), <http://www.chicagoreader.com/chicago/chris-drew-art-peddling-law-arrest-illinois-eavesdropping-act-aclu/Content?oid=2448923> (describing how, hypothetically, if you are standing on a street corner in Illinois with an activated recording device, and you record a conversation between two people talking openly near you, you might be charged with a first-class felony, which carries a penalty of up to 15 years in prison); see also Meisner, *supra* note 11.

<sup>39</sup> 720 ILL. COMP. STAT. 5/14-2(a)(1) (2010) (requiring that all parties to a conversation must consent to being recorded).

<sup>40</sup> *Id.* at 5/14-4(b); see also Gamrath, *supra* note 36, at 365.

<sup>41</sup> *Illinois Criminal Code and Laws*, *supra* note 13; 730 ILL. COMP. STAT. 5/5-4.5-30-2(a) (2010).

<sup>42</sup> See Isaacs, *supra* note 38 (indicating the penalty for violating Illinois’ eavesdropping law carries a maximum of 15 years in prison); see also Meisner, *supra* note 11 (stating that Illinois’ eavesdropping law is one of the harshest in the country).

<sup>43</sup> 720 ILL. COMP. STAT. 5/14-2(a)(1) (2010).

“conversation” to mean “any oral communication between [two] 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>44</sup> Therefore, all parties to a communication must consent to be recorded for a recording of that communication to be lawful.<sup>45</sup>

In recent years, a common use of this law has been to stop citizen recording of on-duty police officers.<sup>46</sup> Unfortunately, Illinois failed to factor in the proliferation of personal recording technology, and as a result, civilians are being prosecuted under an ill-conceived modification to a decades old law that simply does not work in modern society. Without more focused language, the number of these cases will continue to grow.

### C. A CHANGE OF COURSE

Despite an increasing number of citizens being charged with violating state eavesdropping laws, courts have played a minor role. This is due primarily to the fact that in most cases, criminal charges are ultimately dismissed before trial.<sup>47</sup> Within the past two years however, two federal appellate courts seized an opportunity to weigh in.<sup>48</sup> While the rulings by the First and Seventh Circuits have far from settled the debate, they serve as an important legal turning point in the ongoing debate over whether private citizens do in fact possess a Constitutionally protected right to record or photograph on-duty police officers.

The first court to weigh in was the First Circuit Court of Appeals. In August of 2011, in *Glik v. Cunniff*, the First Circuit ruled that private citizens have a fundamental right, protected by the First

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<sup>44</sup> *Id.* at 5/14-1(d).

<sup>45</sup> *Id.* at 5/14-2(a)(1).

<sup>46</sup> See *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012); see also DJ Pangburn, *Illinois Man Faces 75 Years in Prison for Recording Police*, DEATH AND TAXES (Sept. 1, 2011), <http://www.deathandtaxesmag.com/137745/illinois-man-faces-75-years-in-prison-for-recording-police/>; see also Jonathan Turley, *Police Arrest Illinois Man for Videotaping Traffic Stop*, JONATHANTURLEY.ORG (Sept. 29, 2011), <http://jonathanturley.org/2011/09/29/police-arrest-illinois-man-for-videotaping-traffic-stop/>; see also Madison Ruppert, *A disturbing trend: many innocent Americans arrested for legally filming on-duty public servants*, ACTIVIST POST (July 30, 2011), <http://www.activistpost.com/2011/07/disturbing-trend-many-innocent.html>.

<sup>47</sup> See e.g., *Glik v. Cunniff*, 655 F.3d 78, 78–79 (1st Cir. 2011).

<sup>48</sup> See *id.* at 88; see also *ACLU*, 679 F.3d at 608.

Amendment, to record on-duty police officers.<sup>49</sup> This was the first time a federal court had reached this conclusion. While courts had been grappling with this issue for years, in most cases, criminal charges were ultimately dismissed leaving appellate courts with no lower court decision to take up; this was also the case for Simon Glik.

Glik was initially charged with violating Massachusetts' wiretapping law.<sup>50</sup> Shortly after charges were filed, the Boston Municipal Court granted Glik's motion to dismiss on the grounds that there was no probable cause supporting a wiretap charge.<sup>51</sup> The court reasoned that because the law requires a *secret* recording, and the officers had admitted that Glik had used his cell phone openly and in plain view to record the interaction, there was no violation.<sup>52</sup> While seen as a victory for Glik, many issues were left unaddressed, namely the fact that an innocent civilian was forcibly detained by the police and forced to participate in the criminal justice system when the conduct he was arrested for was not actually a violation of the law. The trial court in *Glik* exposed the underlying problem in this area: uncertainty in the law.

In Glik's case, the police made a discretionary decision in the heat of the moment to arrest Glik. They did so under the belief that Glik's videotaping of their actions was a violation of the Massachusetts' wiretapping law, which ultimately the court determined was not the case.<sup>53</sup> This same scenario, in which an individual is arrested for suspicion of violating a state wiretap law only to have charges dropped, has become a common occurrence across the country.<sup>54</sup> What this trend highlights is that police are unclear on what the law is. This uncertainty

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<sup>49</sup> *Glik*, 655 F.3d at 80, 85.

<sup>50</sup> *Id.* at 80 (stating that Glik was charged with violating ch. 272, §99(C)(1) of the Massachusetts General Laws).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 79.

<sup>54</sup> See Steve Myers, *Charge to be dropped against photojournalist arrested for videotaping police*, POYNTER.ORG (Aug. 2, 2011, 1:11 PM), [http://www.poynter.org/latest-news/mediawire/141476/charges-to-be-](http://www.poynter.org/latest-news/mediawire/141476/charges-to-be-dropped-against-photojournalist-arrested-for-videotaping-police/)

[dropped-against-photojournalist-arrested-for-videotaping-police/](http://www.poynter.org/latest-news/mediawire/141476/charges-to-be-dropped-against-photojournalist-arrested-for-videotaping-police/); see also *Film Tha Police: Charges Dropped Against Woman Who Recorded Cops*, HYPERVOCAL (June 28, 2011), <http://hypervocal.com/news/2011/tape-tha-police-charges-dropped-against-woman-arrested-for-filming-cops/#>; Billy Cox, *Charges Dropped in North Port Video Arrest*, HERALD TRIBUNE (March 29, 2012, 6:54 PM), <http://www.heraldtribune.com/article/20120310/ARTICLE/120319941>; see also Sarah Wallace, *Teen Arrested After Videotaping Police Confrontation*, ABCLOCAL.GO.COM (Sept. 26, 2012), <http://abclocal.go.com/wabc/story?section=news/investigators&id=8826452>.

is perpetuated by the fact that charges are frequently dropped before these cases go to trial and a verdict is rendered, thus leaving no guidance from the court. Had Glik simply walked away from his ordeal happy with having these charges against him dismissed, his case would have been the same. Instead, Glik took additional action.

After criminal charges were dropped against Glik, he brought a civil suit against the City of Boston and the arresting officers, thus giving the court an opportunity to rule on this issue.<sup>55</sup> Reasoning that recording the police is akin to speech, the First Circuit held that citizens' "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>56</sup> The holding that citizen recording of police is akin to speech and press, and thus protected by the First Amendment, can be seen as the spark that started the legal shift against this type of enforcement of eavesdropping laws. Moreover, the court recognized the proliferation of individuals owning personal electronic devices with recording capabilities:

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.<sup>57</sup>

The First Circuit, however, did not grant an unlimited right to citizen's to record on-duty police. Instead the court expressly acknowledged that a citizen's right to record police is "not unqualified."<sup>58</sup> However, the First Circuit stopped short of identifying which type qualification would be justified.<sup>59</sup> Because the court identifies a citizen's right to record as a fundamental right protected by the First Amendment, it is safe to infer that it believes strict scrutiny would apply to any law passed that curtailed that right. Regardless, while this ruling represented a significant victory for proponents of citizen recording, its precedent is not controlling to other jurisdictions. Consequently, the majority of the country continued to lack legal guidance following *Glik*. However, in

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<sup>55</sup> *Glik*, 655 F.3d at 79.

<sup>56</sup> *Id.* at 85.

<sup>57</sup> *Id.* at 84.

<sup>58</sup> *Id.* at 85.

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

another sign that the tides were turning, the Seventh Circuit soon seized an opportunity to weigh in as well.<sup>60</sup>

Soon after the First Circuit's ruling in *Glik*, in *ACLU v. Alvarez*, the ACLU petitioned for a preliminary injunction barring the police from enforcing the Illinois eavesdropping law against citizen videographers.<sup>61</sup> In the weeks leading up to a NATO summit held in Chicago, the ACLU took the preemptive step of filing for an injunction against the Illinois' wiretap law.<sup>62</sup> Their rationale was that they believed it was in the public's interest for citizens to be allowed to record the massive protests that were expected, particularly the police interaction with the protestors.<sup>63</sup> The ACLU alleged that their planned audiovisual recording was protected by the First Amendment's right to free speech and press.<sup>64</sup> The underlying goal of this planned action by the ACLU was police accountability.<sup>65</sup> The ACLU planned on publishing the recordings online as well as through other forms of electronic media.<sup>66</sup> The district court denied the ACLU's petition.<sup>67</sup>

After the petition for a preliminary injunction was denied by the United States District Court for the Northern District of Illinois, the ACLU appealed to the Seventh Circuit, which reversed the lower court's ruling, and granted the injunction.<sup>68</sup> The majority for the Seventh Circuit held that the Illinois law likely violated the First Amendment.<sup>69</sup>

The main argument by the State of Illinois was that police officers retained a legitimate expectation of privacy while on-duty and allowing citizens to record their communications without their consent violated that expectation.<sup>70</sup> While the court did not deny the potential for on-duty police officers to have some level of expectation of privacy at some point, the court rejected this argument in this instance.<sup>71</sup> Instead, the Seventh Circuit reasoned that because the ACLU wished to "openly audio record police officers performing their duties in public places and

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<sup>60</sup> *ACLU v. Alvarez*, 679 F.3d 583, 583 (7th Cir. 2012).

<sup>61</sup> *See id.* at 586.

<sup>62</sup> *Id.* at 588.

<sup>63</sup> *See id.* at 595; *see also* Cohen, *supra* note 6.

<sup>64</sup> *ACLU*, 679 F.3d at 588.

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

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

<sup>67</sup> *Id.* at 589.

<sup>68</sup> *Id.* at 586.

<sup>69</sup> *Id.* at 586–87.

<sup>70</sup> *Id.* at 605.

<sup>71</sup> *Id.* at 594–95.

speaking at a volume audible to bystanders,” these privacy interests were not at issue, and thus punted on answering the question of when on-duty police officer might retain some expectation of privacy.<sup>72</sup>

After analyzing whether the law represented a form of content-based, or content-neutral restriction on speech – a distinction which dictates which level of scrutiny should be applied to the challenged law<sup>73</sup> – the court concluded that it did not matter whether strict scrutiny applied, as the law failed under an intermediate scrutiny analysis.<sup>74</sup> The court concluded that Illinois failed to identify a significant government interest that was served by the banning of citizen recording of on-duty police.<sup>75</sup> In the end, the Seventh Circuit held that the law restricted far too much speech, granted the preliminary injunction, and remanded the case for further proceedings.<sup>76</sup>

While this was seen as another victory for recording proponents, the court in *ACLU* stopped short of granting First Amendment protection to citizen recording of on-duty police, as the First Circuit did in *Glik*.<sup>77</sup> Instead, the Seventh Circuit left that ruling up to the lower court on remand.<sup>78</sup> Subsequently, defendant Anita Alvarez, in her capacity as Attorney General for the state of Illinois, sought a *writ of certiorari* from the United State Supreme Court, which was denied on November 26, 2012.<sup>79</sup> While effectively leaving the Seventh Circuit’s ruling in place, the Illinois law remains unchanged on the books.<sup>80</sup> As a result, the issue of whether citizens are permitted to videotape on-duty police remains unresolved in Illinois, and most states in the United States.

An important piece of dicta from *ACLU* came in the majority’s response to the dissent’s argument that allowing unregulated citizen recording of on-duty police officers could pose a potential safety hazard. The majority qualified its holding by stating that “[w]hile an officer [] cannot issue a ‘move on’ order to a person because he is recording, the police may order bystanders to disperse for reasons related to public

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<sup>72</sup> *Id.* at 605–06.

<sup>73</sup> *Id.* at 603–04.

<sup>74</sup> *Id.* at 604.

<sup>75</sup> *Id.* at 606.

<sup>76</sup> *Id.* at 608.

<sup>77</sup> *Id.*; *Glik v. Cunniff*, 655 F.3d 78, 85 (1st Cir. 2011).

<sup>78</sup> *ACLU*, 679 F.3d at 586.

<sup>79</sup> Meisner, *supra* note 11.

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

safety and order and other legitimate law-enforcement needs.”<sup>81</sup> In other words, the majority in *ACLU* was saying that there were already laws on the books that the police could utilize to ensure public safety. There was no need to criminalize citizen recording of on-duty police officers to further that interest.

Like *Glik*, *ACLU* was seen as a huge victory for citizen recording proponents. However, like *Glik*, *ACLU* did not settle the issue. The Seventh Circuit stopped short of stating that citizen recording of the police *is* protected by the First Amendment, and instead held that it is *likely* that the Illinois wiretap law violates the First Amendment.<sup>82</sup> Proponents have stated that they will continue their efforts to have the Illinois statute amended.<sup>83</sup>

The ultimate question that must be addressed is: if the Illinois wiretap law were to be struck down as unconstitutional, what would take its place? It is conceivable that the Illinois legislature could simply eliminate the provision that increases the penalty for eavesdropping on police and other public officials. This would leave in place a more general language statute that, while not specifically tied to recording on-duty police, could still be enforced in this way.<sup>84</sup> This is the issue not only in Illinois and Massachusetts, but across the entire country. Until the law on this issue is clear, the public will remain uninformed about what they are, and are not, permitted to do. Moreover, the police will be unclear about the law they are tasked with enforcing. This creates the potential for officers in the heat of an investigation to improperly enforce a law that does not apply, or fail to enforce a law that does apply. Either way, the potential for mistake will remain high until this issue is addressed.

#### D. LOOKING AHEAD

This analysis begs the questions: (1) should this issue be handled at the state level, creating the possibility of fifty different pieces of legislation aimed at achieving the same goal? or (2) should it be handled at the federal level, with a bright-line, across the board solution that

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<sup>81</sup> *ACLU*, 679 F.3d at 607.

<sup>82</sup> *Id.* at 586-87.

<sup>83</sup> Meisner, *supra* note 11.

<sup>84</sup> Massachusetts law does not have a specific application to law enforcement or other public officials, as the Illinois eavesdropping law does, yet it was still used to prosecute citizens for recording on-duty police. MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (West 2012).

eliminates the possibility of conflict? This note proposes that, because of the constitutional questions underlying this issue, federal legislative action is required to correct the misapplication of wiretap laws.

A possible objection is that a judicial solution is preferable to a legislative one. However, the Supreme Court's unwillingness to take up this issue, as evidenced by its refusal to grant *certiorari* in the *ACLU* case, illustrates the Court's desire to not get involved at this juncture of the debate. In waiting for the Court to act, there is no telling how long the public and the police might be left in the dark on the issue of citizen recording of on-duty police officers. With the number of arrests growing, the public simply cannot afford to wait much longer for an answer to this question. The question now becomes, what form should the legislative solution take?

## II. THE LAW IN THE UNITED KINGDOM

Many proponents of a ban on citizen recording of on-duty police officer proclaim that this ban is essential for promoting public safety and ensuring national security.<sup>85</sup> In a world where the threat of terrorism is a daily reality, this view cannot be ignored. However, blindly enacting laws in the name of public safety and national security fails to serve the public good.

### A. THE COUNTER TERRORISM ACT OF 2008

On July 7, 2005, bombs detonated on three different underground trains in London.<sup>86</sup> Shortly thereafter, a fourth bomb exploded on a London bus.<sup>87</sup> In total, fifty-six people were killed, and over 700 were injured,<sup>88</sup> making it the worst terror attack in the United Kingdom's history.<sup>89</sup> In response, seeking to address public concern over national security, the British government enacted new laws over the next

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<sup>85</sup> *ACLU*, 679 F.3d at 611–12 (Posner, J., dissenting).

<sup>86</sup> Human Rights Watch, *Briefing on the Counterterrorism Bill 2008* (July 8, 2008), <http://www.hrw.org/sites/default/files/reports/uk0708web.pdf>.

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

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

<sup>89</sup> Hugh Muir & Rosie Cowan, *Four Bombs in 50 Minutes—Britain Suffers Its Worst-Ever Terror Attack*, *THE GUARDIAN* (July 8, 2005, 9:06 AM), <http://www.guardian.co.uk/uk/2005/jul/08/terrorism.july74>.

several years which expanded upon existing counter-terrorism laws.<sup>90</sup> In 2008 the British government amended the law once again when it enacted the Counter-Terrorism Act of 2008 (ACT).<sup>91</sup>

Chapter 28, section 76 of the ACT expressly prohibits any person from “eliciting, publishing or communicating information about” members of the armed services, members of the intelligence service, or constables.<sup>92</sup> Any person found guilty of this offense could be sentenced to up to ten years in prison, as well as fined.<sup>93</sup> Application of the law has also restricted the videotaping of on-duty police officers in the United Kingdom.<sup>94</sup> The logic behind this provision is that terrorists could use photographs and video of the armed services or constables to study their patterns and ultimately to plot terror attacks.<sup>95</sup> While the law provides an affirmative defense for a person charged to prove that they had a “reasonable excuse for their action,” no examples are given to educate the public on what would be a reasonable excuse.<sup>96</sup> As the law is written and applied, it is a blanket ban on all citizen recording of the public officials listed.<sup>97</sup>

#### B. APPLICATION OF THE ACT SINCE ITS PASSAGE

This law was met with immediate opposition from both journalists and concerned citizens.<sup>98</sup> Photographers throughout the United Kingdom, both citizen and professional, saw the law as a direct attack on their individual and professional liberties.<sup>99</sup> The United Kingdom’s government responded by saying that law abiding citizens and journalists need not worry about being arrested.<sup>100</sup> This has not been the case.

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<sup>90</sup> See Terrorism Act, 2000, c.11 (U.K.); see also Terrorism Act, 2006, c.11 (U.K.).

<sup>91</sup> Human Rights Watch, *supra* note 86, at 1.

<sup>92</sup> Counter-Terrorism Act, 2008, c. 28, §76(1)(1)(a) (U.K.).

<sup>93</sup> *Id.* at §76(1)(3)(a).

<sup>94</sup> Lewis, *supra* note 26.

<sup>95</sup> See Jo Adetunji, *Photographers fear they are target of new terror law*, THE GUARDIAN (Feb. 11, 2009), <http://www.guardian.co.uk/media/2009/feb/12/photographers-anti-terror-laws>.

<sup>96</sup> Counter Terrorism Act, 2008, c. 28, § 76(1)(2) (U.K.).

<sup>97</sup> See *id.* at §76(1)(1) (U.K.); see also Lewis, *supra* note 26.

<sup>98</sup> Adetunji, *supra* note 95.

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

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

Since its enactment, scores of United Kingdom citizens, as well as foreign tourists, have been arrested or detained under this law,<sup>101</sup> and others are at risk of the same.<sup>102</sup> Proponents of the law could argue that it has been successful in helping prevent subsequent major terror attacks; however, there is evidence that this law has actually been a detriment to the United Kingdom.

Take the case of Klaus and Loris Matzka. The father and son were visiting London from Australia. The two, while out sightseeing, took some pictures of London's famous red double-decker buses.<sup>103</sup> To their surprise, they were soon approached by two policemen who forced them to delete the photographs "in the name of preventing terrorism."<sup>104</sup> Klaus Matzka stated that while he understood the need for some sensitivity in an era of terrorism, he had never had this type of experience in his life, and that this incident had likely "killed interest in any further trips to [London]."<sup>105</sup>

This is not an isolated tourist experience.<sup>106</sup> This could happen to anybody. The fact of the matter is that when tourists visit large cities, they tend to take pictures of famous landmarks, the same famous landmarks that historically have been the target of terrorist plots. Imagine visiting the Statute of Liberty, or the Washington Monument and being told that despite your efforts and personal expenses to visit these historic – and photogenic – landmarks that you were not allowed to take any photographs. And moreover, if we do see you taking photographs, we

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<sup>101</sup> See Paul Lewis, *Italian Student Tells of Arrest While Filming For Fun*, THE GUARDIAN (Dec. 15, 2009, 15:39), <http://www.theguardian.com/uk/2009/dec/15/italian-student-police-arrest-filming> [hereinafter Italian Student]; see also Lewis, *supra* note 26.

<sup>102</sup> See, e.g., Victoria Bone, *Is it a crime to take pictures?*, BBC NEWS (Feb. 16, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/7888301.stm](http://news.bbc.co.uk/2/hi/uk_news/7888301.stm); Oliver Laurent, *Jail for Photographing Police?*, BRIT. J. PHOTOGRAPHY (Jan. 28, 2009), <http://www.bjp-online.com/british-journal-of-photography/news/1644048/jail-photographing-police>; Henry Porter & Afua Hirsch, *Calling the police to account*, THE GUARDIAN (Feb. 16, 2009, 6:30 AM), <http://www.guardian.co.uk/commentisfree/2009/feb/16/protest-police-liberty-central>; Paul Joseph Watson, *UK Terror Law To Make Photographing Police Illegal*, PRISON PLANET (Jan. 28, 2009), <http://www.prisonplanet.com/uk-terror-law-to-make-photographing-police-illegal.html>.

<sup>103</sup> Matthew Weaver & Vikram Dodd, *Police Delete London Tourists' Photos 'To Prevent Terrorism'*, THE GUARDIAN (Apr. 16, 2009, 7:53 AM), <http://www.guardian.co.uk/uk/2009/apr/16/police-delete-tourist-photos>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Chris Irvine, *Police 'misusing anti-terrorism powers to stop tourists taking photos'*, THE TELEGRAPH (Dec. 3, 2009, 8:03AM), <http://www.telegraph.co.uk/news/uknews/law-and-order/6715886/Police-misusing-anti-terrorism-powers-to-stop-tourists-taking-photos.html>.

will arrest you for suspicion of terrorist activity. By any account, if this practice were to continue it would most certainly have a negative impact on tourism, which is vital to any major city. It does not work in the United Kingdom, and it would not work in the United States.

### C. WHY THE ACT WOULD FAIL IN THE UNITED STATES – LEGALLY

The United Kingdom's blanket ban approach would likely fail in the United States for two major reasons. First, the core principle behind the ACT is that it presumes guilt for anybody using a camera to record or photograph the police and other officials.<sup>107</sup> This approach flies in the face of how the criminal justice system functions in the United States, where suspected criminals are innocent until proven guilty. Second, in light of the holding by the Seventh Circuit in *ACLU*, like the eavesdropping law in Illinois, a law in the United States similar to the ACT would restrict far more speech than is necessary to promote any compelling state interests, namely the promotion of national security.<sup>108</sup>

#### *i. Presumption of Guilt vs. Presumption of Innocence*

A law that effectively places the burden on an individual to prove their innocence, instead of placing the burden on the State to prove their guilt, would likely violate our Constitutional right to due process.<sup>109</sup> However, this is exactly what the ACT does.<sup>110</sup> Since its enactment, the number of people arrested or detained for photographing public places in the United Kingdom has risen.<sup>111</sup>

Under the current law in the United Kingdom, a law abiding citizen who takes a photograph of their friends in a park, or in front of a landmark, and a police investigation was ongoing in the area, would potentially be at risk. Police, unaware of the innocent nature of the photograph being taken, could question the photographer, leading to an altercation. In the heat of the moment, with emotions riding high, police

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<sup>107</sup> Counter Terrorism Act, 2008, c. 28, § 76(1) (U.K.).

<sup>108</sup> *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012).

<sup>109</sup> See U.S. CONST. amend. V; see also U.S. CONST. amend. VI; see also U.S. CONST. amend. XIV.

<sup>110</sup> Counter Terrorism Act, 2008, c. 28, § 76(1)(2) (U.K.) (stating that for an individual charged under this section of the law it is a defense to prove that they had a reasonable excuse for their actions).

<sup>111</sup> See *Italian Student*, *supra* note 101; see also Lewis, *supra* note 26.

may arrest an otherwise “innocent” person. Moreover, under this law this person is subsequently denied their due process rights and is instead forced to make a case for why they should have been allowed to take a picture of their friends.<sup>112</sup> It seems farfetched, but that is precisely the point. A law making such a broad ban of otherwise innocent behavior simply does not mesh with society’s view of the role of the criminal justice system in the United States.

ii. *Going Too Far*

While the Seventh Circuit was vague in much of its holding in *ACLU v. Alvarez*, it was clear that Illinois eavesdropping law restricted far more speech than is required to achieve a significant government interest.<sup>113</sup> Applying that reasoning to the United Kingdom’s law, it is likely that the Seventh Circuit (at least) would reach the same conclusion – the law restricts too much.

The Illinois eavesdropping law, on its face, does not constitute an outright ban on recording the police.<sup>114</sup> Nevertheless, the court found that it went too far, and while it did not expressly strike down the law, it implied that the law likely violated the First Amendment, and therefore did not hold up against even an intermediate level of scrutiny. Because the ACT restricts far more speech than Illinois’ eavesdropping law, without giving adequate rationale behind how it protects national security (the presumptive significant state interest), the Seventh Circuit would almost surely reach the same conclusion it reached in *ACLU* and hold that the ACT would likely violate the First Amendment because it is too broad, and restricts too much. Furthermore, the Supreme Court’s refusal to grant *certiorari* signifies that it does not see any glaring Constitutional inaccuracies in the Seventh Circuit’s ruling. At the very least, it can be said that the Supreme Court does not expressly disagree with the assertion that Illinois’ eavesdropping law likely violates the First Amendment. Therefore, the Supreme Court, if faced with a federal law styled after the United Kingdom’s ACT, would likely strike it down as violating the First Amendment.

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<sup>112</sup> See Counter Terrorism Act, 2008, c. 28, § 76 (U.K.).

<sup>113</sup> *ACLU*, 679 F.3d at 608.

<sup>114</sup> 720 ILL. COMP. STAT. 5/14-2(a)(1) (1993) (stating that an eavesdropping violation occurs when all parties do not consent to being recorded, creating a potential, albeit strict, exception).

The same can be said in applying the holding of the First Circuit from *Glik v. Cunniff*. In *Glik*, the First Circuit went one step further than Seventh Circuit in the sense that it expressly stated that recording the police was protected by the First Amendment's right to freedom of speech and of the press.<sup>115</sup> Such a holding requires that a heightened level of scrutiny apply to any law curtailing this right.<sup>116</sup> Consequently, even if the First Circuit stopped short of applying strict scrutiny, *ACLU* tells us that such laws would likely fail under intermediate scrutiny as well.<sup>117</sup> Either way, a law similar to the ACT would face an uphill battle if it were enacted in the United States.

### III. HOW THE UNITED STATES SHOULD PROCEED

More and more frequently, otherwise law abiding individuals in the United States are being criminally charged under decades old wiretapping and eavesdropping laws for recording on-duty police officers.<sup>118</sup> Recent rulings by the First and Seventh Circuit Courts of Appeals illustrate how such application of wiretapping and eavesdropping laws likely violates the First Amendment.<sup>119</sup> The preceding analysis shows that a law similar to the ACT, which on its face is far more restrictive than Illinois' eavesdropping law, would likely fail a constitutional challenge under both the First and Seventh Circuit's reasoning. Moreover, even if the ACT could pass Constitutional scrutiny, the due process implications make it an improbable option for the United States. A more prudent approach would be amending the existing federal wiretap law to exclude on-duty police officers carrying out their duties in the public domain from the privacy protection afforded by the law, and relying on existing laws to address public safety and national security concerns.

While this note has focused primarily on the wiretapping and eavesdropping laws in Massachusetts and Illinois, the reality is that each state has its own unique wiretapping or eavesdropping law.<sup>120</sup> The severity of Illinois' eavesdropping law illustrates the significant impact

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<sup>115</sup> *Glik v. Cunniff*, 655 F.3d 78, 83 (1st Cir. 2011).

<sup>116</sup> *See id.* at 82.

<sup>117</sup> *ACLU*, 679 F.3d at 604.

<sup>118</sup> *See Cox*, *supra* note 54; *see also Glik*, 655 F.3d at 80.

<sup>119</sup> *See Glik*, 655 F.3d at 84; *see also ACLU*, 679 F.3d at 608.

<sup>120</sup> Charles H. Kennedy & Peter P. Swire, *State Wiretaps and Electronic Surveillance After September 11*, 54 *HASTINGS L.J.*, 971, 977 (2003).

these differences can have on people who are charged with violating these laws.<sup>121</sup> To reconcile this conflict amongst states, and uphold individual Constitutional rights, federal action is required. As such, Congress should amend 18 U.S.C. § 2511, the federal wiretap laws section on the interception and disclosure of wire, oral, or electronic communications, to include the following exception:

(2) (j) It shall not be unlawful under this chapter for a person to record on-duty police officers performing their official duties.

Additionally, the following new definition should be added 18 U.S.C. § 2510, the federal wiretap law's definition section:

(22) "record" means to photograph, videotape, audio record, or any combination thereof, another person's words or actions.

These proposed amendments will help harmonize the conflicting application of wiretapping and eavesdropping laws from state to state and ensure that individual Constitutional rights are upheld. Additionally, these amendments address important policy concerns that are implicated by laws that restrict citizen recording of on-duty police officers.

#### A. LEGAL BENEFITS

The passages of these proposed amendments will help harmonize the conflicting application of wiretapping and eavesdropping laws from state to state and will provide certainty to an uncertain area of law. The presumption that it is legal to record on-duty police officers will arm police officers with a better understanding of the law they are charged to enforce. Additionally, it will allow citizens who encounter questionable police activity in action to record this activity with the confidence that their act of recording is not presumably illegal.

These proposed amendments will hold true to the holdings of the First and Seventh Circuits by upholding an individual's right to record.<sup>122</sup> Moreover, these proposed amendments will provide much needed relief to an already overburdened criminal justice system. Because the overwhelming majority of charges under state wiretapping and

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<sup>121</sup> See Meisner, *supra* note 11; see also 720 ILL. COMP. STAT. 5/14-2(a)(1) (1993); see also 730 ILL. COMP. STAT. 5/5-4.5-30-2(a) (2010).

<sup>122</sup> See Glik, 655 F.3d at 82; see also *ACLU*, 679 F.3d at 597.

eavesdropping laws are ultimately dropped,<sup>123</sup> the resources expended by the procedural component of these cases can be diverted to more pressing issues.

Some authors have suggested that an amendment to the federal wiretapping law should include an exception to allow police to restrict recording when it would create or exacerbate a risk to public safety, or a threat to national security.<sup>124</sup> The problem with this recommendation is it ignores laws that are already on the books. In *ACLU v. Alvarez*, the Seventh Circuit held that while an officer cannot order a citizen recorder to “move on,” they do have the authority to order bystanders to disperse for reasons related to public safety.<sup>125</sup> In other words, police officers already possess the legal authority to deal with individuals whose behavior is posing an imminent safety risk during an active police investigation.<sup>126</sup> Therefore, there is no need to provide additional legal authority to address public safety.

The same is true for risks to national security. Laws aimed at protecting against risks to national security, especially in the post 9/11 world, are plentiful.<sup>127</sup> As a result, passing new legislation addressing this issue is unnecessary and would likely only further complicate an already complex area of law.

Moreover, the terms “public safety” and “national security” have the ability to encompass a broad range of police activity. It is arguable that almost every act of the police can be connected to “public safety” in some way. Carving out exceptions for these factors opens the door to extensive litigation. Furthermore, the experience in the United Kingdom since the implication of the ACT illustrates how restricting recording in the name of national security can have unexpected adverse effects.<sup>128</sup> As a result, the urge to carve out these exceptions should be resisted and the

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<sup>123</sup> See, e.g., *Glik*, 655 F.3d at 83; see also *ACLU*, 679 F.3d at 608.

<sup>124</sup> See, e.g., Marianne F. Kies, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV., 274, 274 (2011).

<sup>125</sup> *ACLU*, 679 F.3d at 607.

<sup>126</sup> See *id.*

<sup>127</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 STAT. 1298 (2011). This law encompasses a broad range of measures intended to ensure national security. Furthermore, this is just one example that illustrates how laws already exist to protect against risks to national security. An in depth analysis of this, and other laws is beyond the scope of this article.

<sup>128</sup> Weaver & Dodd, *supra* note 103. (describing how father and son visiting London from Australia were arrested for taking photographs of London’s famous red double-decker busses – a common tourist activity in London).

federal wiretap law should simply be amended to exclude on-duty police activity from protection by the law all together.

#### B. POLICY BENEFITS

In addition to the legal benefits articulated above, these proposed amendments to the federal wiretap law address two significant policy considerations: ensuring police accountability and protecting general notions of fairness.

When Simon Glik decided to use his cell phone to record on-duty police, he did not do so out of curiosity, he did it because he believed that the police were using overly aggressive tactics against a civilian.<sup>129</sup> This brings to mind the infamous video capturing Los Angeles officers using excessive force on Rodney King. Scenes of the officers beating a defenseless King led to an internal investigation, as well as disciplinary and criminal charges against the officers.<sup>130</sup> While most citizens are not inclined to actively seek out questionable police activity, these proposed amendments allow citizens who come across such activity in progress, as Simon Glik did, to act as a check on overly aggressive police. In its own way, citizen recording promotes public safety while at the same time, reduces public distrust in the police.

Additionally, allowing police the benefit of recording their interactions with individuals in the community, while denying that benefit to the public contradicts general notions of fairness. Recently, Milwaukee Wisconsin police released a dash-cam video showing a physical altercation between two Milwaukee police officers and a man named Jordan Cain.<sup>131</sup> Cain, who was charged with obstructing/resisting an officer and bail jumping, filed a complaint against the arresting officers alleging mistreatment.<sup>132</sup> Milwaukee Police Chief Edward Flynn claims that the video shows that the officers were acting in a reasonable manner under the circumstances.<sup>133</sup> While this case is ongoing, it seems

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<sup>129</sup> Glik v. Cunniff, 655 F.3d 78, 79–80 (1st Cir. 2011).

<sup>130</sup> *A Timeline of Events in Rodney King's Life*, CNN (June 17, 2012), <http://www.cnn.com/2012/06/17/us/rodney-king-timeline/index.html?iref=allsearch>.

<sup>131</sup> Don Walker, *Police release new details, videos in case of teen injured during arrest*, MILWAUKEE J. SENTINEL (Feb. 5, 2013), <http://www.jsonline.com/news/milwaukee/police-release-news-details-videos-in-case-of-teen-injured-during-arrest-508100e-189924101.html>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

reasonable to allow police to use the dash-cam footage to help refute the charges of mistreatment. Fairness demands it.

The same should be true in Simon Glik's case. So long as his actions did not interfere with police activity – which they did not<sup>134</sup> – under the reasoning of the Milwaukee police department, if the apprehended individual wished to bring charges against the Boston police department, he should be able to use Glik's video to prove his case. Under this view, individuals videotaping the police are simply providing authorities with a more complete version of what occurs during public interactions with the police.

#### IV. CONCLUSION

Despite the recent rulings by the First and Seventh Circuit Courts of Appeals favoring an individual's right to record on-duty police officers, people are still being criminally charged for videotaping the police.<sup>135</sup> As the number of individuals in the United States who have access to personal recording and photography equipment continues to grow, the issue of citizen recording of on-duty police is reaching a point of critical mass. In order to ensure that the public as well as the police – whose job it is to protect and serve the public – are clear on what constitutes a criminal violation of wiretapping and eavesdropping statutes, action must be taken.

While some suggest that public safety and national security is best served by severely curtailing an individual's ability to record on-duty police, as the United Kingdom did in response to terror attacks, this approach is misguided. With the legal trend in the United States supporting an individuals' First Amendment right to record on-duty police, Congress should take action and amend the federal wiretapping law to expressly state that its privacy protections do not extend to on-duty police officers carrying out their duties in public, thus codifying the individual's right to record expressed by the First and Seventh circuits. This action will harmonize an uncertain and overly complex area of law, while ensuring that important policy considerations are addressed.

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<sup>134</sup> Glik v. Cunniff, 655 F.3d 78, 84 (1st Cir. 2011).

<sup>135</sup> Emily Gurnon, *Little Canada Man Videotaped Sheriff's Deputies, and Got Charged For It*, PIONEER PRESS (Jan. 8, 2013, 12:01 AM), [http://www.twincities.com/localnews/ci\\_22333563/little-canada-man-videotaped-sheriffs-deputies-and-got](http://www.twincities.com/localnews/ci_22333563/little-canada-man-videotaped-sheriffs-deputies-and-got) (discussing a man who was charged for videotaping police take an individual into custody).