Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity

JESSE HARLAN ALDERMAN[1]

1. Jesse Harlan Alderman is an attorney in the Administrative Law Department at Foley Hoag LLP in Boston and a former reporter for The Associated Press. J.D., Boston College Law School, *summa cum laude*, M.S., Columbia University Graduate School of Journalism, B.A., Tufts University, *summa cum laude*. Thanks Dad.

I. INTRODUCTION

After a wave of high profile arrests of smartphone-toting citizens whose only crime was recording police officers in the exercise of their public duties, constitutional challenges to state wiretapping laws that prohibit

such activity has reached two circuit courts of appeals.[2] In 2011, the U.S. Court of Appeals for the First Circuit issued its opinion in *Glik v. Cunniffe*, holding that not only did the First Amendment right to record police exist, but, despite a paucity of case law, this right was so "self-evident" to be considered of longstanding vintage.[3] In 2012, the U.S. Court of Appeals for the Seventh Circuit followed suit in *Alvarez v. ACLU*.[4] Like the First Circuit, the Seventh Circuit located the right to record police within the compass of the First Amendment's protection of the inextricably related constellation of rights to gather, disseminate, and receive information of public importance.[5] The court enjoined enforcement of Illinois's notably draconian eavesdropping statute as applied to civilian recordation of police officers in the public exercise of their official duties, over the dissent of conservative Judge Richard A. Posner.[6]

This Article examines the several unanswered legal questions that remain in the wake of *Glik* and *Alvarez*. Though *Glik* and *Alvarez* hold sway only within their respective jurisdictions, it seems likely that the right to record public police activity will be treated as universal. Opinions of the Ninth and Eleventh Circuits contain terse recognition dicta of such a First Amendment liberty, while no courts have rendered an opinion to the contrary.[7] Indeed, the U.S. Supreme Court denied a petition for certiorari from the Cook County State's Attorney's office in *Alvarez*.[8] However, there remain questions regarding the definition of the right and its placement in existing

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2. *See, e.g.*, Jacob Sullum, *Eavesdropping Law Shields Officials*, CHI. SUN TIMES, Sept. 27, 2011, http://www.suntimes.com/news/otherviews/7905816-452/eavesdropping-law-shields-officials.html (describing the arrest of Michael Allison for recording conversations with police officers at court hearing); Douglas Stanglin, *Woman Arrested in Her Yard While Videotaping Police*, USA TODAY, June 23, 2011, http://content.usatoday.com/communities/ondeadline/post/2011/06/woman-in-her-front-yard-arrested-while-videotaping-police-at-a-traffic-stop-at-curb/1#.UZ0FPb_vzjA (describing the arrest of Emily Good for filming officers engaged in traffic stop from her driveway); Daniel Rowinski, *Police Fight Cellphone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, BOS. GLOBE, Jan. 12, 2010, http://www.boston.com/news/local/massachusetts/articles/2010/01/12/police_fight_cellphone_recordings/ (recounting the arrest of Simon Glik for recording the arrest of a man on Boston Common and several other similar arrests under the Massachusetts wiretap statute).

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

4. ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

5. *Alvarez,* 679 F.3d at 595-603; *Glik*, 655 F.3d at 82-84.

6. *Alvarez*, 679 F.3d at 608-14.

7. Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the First Amendment right to "record matters of public interest"); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (also recognizing the First Amendment right to "record matters of public interest").

8. Tal Kopen, *Supreme Court Won't Hear Police Recording Case*, POLITICO, Nov. 26, 2012, *available at* http://www.politico.com/blogs/under-the-radar/2012/11/supreme-court-wont-hear-police-recording-case-150290.html (last visited Jan. 28, 2013).

First Amendment jurisprudence. Similarly, it has been left unsettled whether the right is one that will be susceptible to vindication in civil rights actions pursuant to 42 U.S.C. § 1983 ("§ 1983").

Part II of this Article provides summaries of the *Glik* and *Alvarez* opinions and recites the key arguments in Judge Posner's dissent. Part III identifies four unanswered questions that remain unsettled in the wake of the *Glik* and *Alvarez* holdings. Part III.A. examines whether future courts analyzing the issue will be persuaded by Judge Posner's dissent and determines that the dissent—while a thought provoking commentary—is too divorced from cognizable First Amendment jurisprudence to be persuasive. Part III.B. asks which constitutional standard of review future courts will apply when laws that interfere with the right to record public police activity are challenged. After analysis of the Seventh Circuit's justification for application of "intermediate scrutiny," this Part concludes that more substantial constitutional arguments militate in favor of testing these challenges under "strict scrutiny." Part III.C. acknowledges that both *Glik* and *Alvarez* only stand for the proposition that "open" recordation of police is safeguarded by the First Amendment. After a brief summary of states that prohibit at least some forms of surreptitious recording of police, Part II.C. proposes that an open-surreptitious dichotomy in the enforcement of wiretapping laws, as applied to recorders of police, is untenable, and criminalization of surreptitious recording of police officers performing their public duties should fail even under the more deferential intermediate scrutiny calculus. Finally, Part III.D. examines whether the right to record police is "clearly established" under the First Amendment, a finding that, if made by future courts, would vitiate qualified immunity from civil liability for government actors who violate the right.

II. FIRST AND SEVENTH CIRCUIT OPINIONS DEFINING A FIRST AMENDMENT RIGHT TO RECORD POLICE IN THE PERFORMANCE OF THEIR PUBLIC DUTIES

A recitation of the important holdings in *Glik* and *Alvarez* is provided in Parts A and B of this Section. Judge Posner's dissent in *Alvarez* is discussed in Part C.

A. *GLIK V. CUNNIFFE*

In August 2011, the U.S. Court of Appeals for the First Circuit was the first court to establish a positive First Amendment right to record official

police activity in public.[9] On the evening of October 1, 2007, a young attorney named Simon Glik was walking in Boston Common, which the First Circuit aptly described as "the oldest city park in the United States and the apotheosis of a public forum."[10] In the distance, three police officers were arresting another man.[11] Glik approached and heard another bystander say: "You are hurting him, stop."[12] He took from his pocket the most ubiquitous symbol of modern America: his cell phone.[13]Activating the camera application, he stood at a ten-foot distance and recorded video footage of the arrest.[14]After placing the suspect in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures."[15] The officer asked if Glik's cell phone recorded audio, which Glik answered affirmatively.[16] Glik was then arrested for unlawful interception of an oral communication in violation of the Massachusetts wiretap statute, disturbing the peace, and aiding in the escape of a prisoner (this being the "non-escaped" prisoner who, like Glik, was carted off to booking).[17] The arrest led to the first of two circuit court declarations in favor of a First Amendment right to film public police activity in less than a year, and not just reams of bad press for the City of Boston but $170,000 to settle Glik's subsequent civil rights suit.[18] Though untold hundreds—or thousands—of citizens have been ar-

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9. Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011). The First Amendment of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

10. *Glik*, 655 F.3d at 79, 84. *See* Declan McCullagh, *Boston Admits It: Cell Phone Photography Is Not a Crime*, CNET NEWS, Mar. 27, 2012, *available at* http://news.cnet.com/8301-31921_3-57405594-281/boston-admits-it-cell-phone-photography-is-not-a-crime/ (last visited Dec. 30, 2012).

11. *Glik*, 655 F.3d at 79. The three Boston police officers were John Cunniffe, Peter J. Savalis, and Jerome Hall-Brewster. *Id.* at 78. Glik brought suit against them in their individual capacities and against the City of Boston pursuant to 42 U.S.C. § 1983, which creates a private cause of action for vindication of one's civil rights when violated by anyone acting under color of law. *Id.* at 79.

12. *Glik*, 655 F.3d at 79.

13. *Id.* at 80.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Glik*, 655 F.3d at 80. *See* MASS. GEN. LAWS ch. 272 § 99(B)(4) (2008) (defining "interception" to mean "to secretly hear, secretly record, or aid another to secretly hear or record the contents of any wire or 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"); *Id.* § 99(C)(1) (prohibiting the willful "interception . . . of any wire or oral communication"). The statute imposes maximum penalties of $10,000 in fines and five years in prison, or both. *Id.*

18. *Glik*, 655 F.3d at 82-84. *See* ACLU v. Alvarez, 679 F.3d 583, 595-603 (7th Cir. 2012); McCullagh, *supra* note 10.

rested for the same spurious "wiretapping offense," this time they messed with a defense attorney.[19]

Glik successfully defended the charge in court.[20] A municipal judge ruled that Glik could not have contravened the wiretap statute by holding his phone in plain view, where the statute plainly proscribes only "secret" interception of a conversation without the consent of all parties to that communication.[21] The municipal judge also laid the groundwork for the First Circuit's holding that Glik's recording found shelter in the Constitution, writing that the "officers were unhappy that they were being recorded during an arrest . . . does not make a lawful exercise of a First Amendment right a crime."[22] Glik then filed an internal affairs complaint with the Boston Department, which was never investigated.[23]

Undeterred, Glik filed a civil rights action against the officers and the City of Boston under § 1983.[24] The defendants filed a motion to dismiss.[25] The defendants first argued that the First Amendment does not protect Glik's acts of audio-recording police officers in the pursuit of their public duties.[26] In the alternative, the defendants argued that they were entitled to qualified immunity from civil liability because even if protected by the constitution, the right was not "clearly established" at the time of violation.[27] This argument falls under the qualified immunity doctrine, in which all federal circuits impose essentially the same standard barring claims under § 1983 unless (i) the right at issue was "clearly established" at the time of the alleged civil rights violation, and (ii) "a reasonable defendant would have understood that his conduct violated the plaintiff['s] constitutional rights."[28] Here, had the right to record police been of new vintage, and not clearly enshrined in the law, the individual officers would not be liable.

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19. *See* Sullum, *supra* note 2; Stanglin, *supra* note 2; Rowinski, *supra* note 2 (examples of arrests).

20. *See* Mass. v. Glik, No. 0701 CR 6687, slip op. at 2-3 (Boston Mun. Ct. Jan. 31, 2008).

21. *Id. See* MASS. GEN. LAWS ch. 272 §§ 99(B)(4) & (C)(1) (2008). *See also* Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001) (holding the wiretap statute extends protection from non-consensual, surreptitious recording to all "members of the public, including . . . police officers or other public officials interacting with members of the public").

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

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 80-81.

27. *Glik*, 655 F.3d at 81. *See* Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 286-89 (2012) (discussing qualified immunity doctrine).

28. *Glik*, 655 F.3d at 81.

1. The First Amendment

On the first point, the First Circuit held unambiguously that there is a constitutionally protected right to videotape police carrying out their duties in public.[29] The First Circuit held that this constitutional protection is located in the First Amendment's broad prohibition against government efforts "limiting the stock of information from which the public may draw."[30] Under the aegis of the First Amendment's clause safeguarding "freedom . . . of the press," the court held that the Constitution protects the interconnected rights of citizens "to gather news from any source by means within the law" and, concomitantly, "to receive information and ideas."[31] The court elaborated that filming police officers in the exercise of their public duties promotes the "cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"[32] Such political speech has long been recognized to form the core of the First Amendment.[33] In no small measure did the unique status of police officers influence the court's holding. It wrote: "This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties."[34] The court further noted that its prior opinion affirming an unpublished opinion of the U.S. District Court for the District of Massachusetts in *Iacobucci v. Boulter* stood for the proposition that "the videotaping of public officials is an exercise of First Amendment liber-

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29. *Id.* at 82.

30. *Id.* It is critical to note that this somewhat amorphous right—to gather, disseminate and receive information—is drawn from the First Amendment's guarantee of "freedom of press." *Id.* at 82; ACLU v. Alvarez, 679 F.3d 583, 585 (7th Cir. 2012). There is no distinction between the press rights of the institutional media and the speech rights of ordinary citizens. The U.S. Supreme Court has held that the freedom of the press is coextensive with the rights afforded under the constitution to the general public and provides no special privileges to members of the professional media. Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."). In this context, the point is significant, given that mobile devices with recording capability and the advent of social media sites, like Facebook and YouTube, are, perhaps unwittingly, turning individual members of the general population into "citizen journalists" and eroding the distinction between the professional class of reporters and the average person.

31. *Glik*, 655 F.3d at 82.

32. *Id.*

33. *Id.*

34. *Id.* The court cited with favor *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035-36 (1991), in which the Court "recognized a core First Amendment interest in 'the dissemination of information relating to alleged government misconduct.'" The court also favorably cited *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) for the proposition that public scrutiny of police "will have a salutary effect on the functioning of government more generally." Gilk, 655 F.3d at 82-83.

ties."[35] There, a "citizen journalist" initiated a § 1983 claim after his arrest for refusing to heed a police officer's demand to stop filming members of a historic district commission in a hallway outside a public meeting.[36] Although *Iacobucci* was decided largely on Fourth Amendment grounds, the *Glik* court made much of dicta accompanying the denial of the officer's claim of qualified immunity.[37] In so deciding, the First Circuit affirmed that the journalist's acts were "peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights."[38]

The court offered the inescapable caveat that, like all First Amendment rights, filming public police activity is subject to content-neutral and reasonable time, place, and manner restrictions.[39] The court stated it was not necessary to probe the fringe of such permissible restrictions where Glik's exercise of protected activity fell so comfortably within the scope of constitutional protection.[40] The court noted that Glik filmed police officers (i) peacefully, (ii) in a public forum where First Amendment rights are most robust, (iii) at a safe remove from the officers, and (iv) without molesting the performance of their duties.[41] Moving from constitutional pedagogue to schoolroom scold, the court reminded that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights," and, therefore, "restraint . . . must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces."[42]

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35. *Glik*, 655 F.3d at 83 (citing Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999)).

36. *Id.*

37. *Id.*

38. *Id.* The Court stated that its recognition of a First Amendment right to film police officers in public accords with jurisprudence in other jurisdictions. *Id.* at 83 (citing Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the First Amendment right to "record matters of public interest")); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Demarest v. Athol/Orange Cmty. Television, Inc., 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (holding it was "highly probable" that recordation of public official on the street outside his home was protected by the First Amendment); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972) (seizure of television camera at crime scene held to be unlawful "prior restraint" under First Amendment); Connell v. Town of Hudson, 733 F. Supp. 465, 471-72 (D.N.H. 1990) (rejecting the police chief's assertion of qualified immunity from § 1983 claim for preventing freelance photographer from taking pictures of accident scene).

39. *Glik*, 655 F.3d at 84. *See generally* Cox v. New Hampshire, 312 U.S. 569 (1941) (holding government cannot regulate content of speech without infringing the First Amendment but may impose reasonable time, place, and manner restrictions).

40. *Glik*, 655 F.3d at 84.

41. *Id.*

42. *Id.*

2. Qualified Immunity from § 1983 Civil Liability

Regarding the officers' assertion of qualified immunity, the First Circuit readily determined that the First Amendment right violated by the officers was "clearly established." Thus, the officers' affirmative defense of qualified immunity was rejected.[43] The court, while noting that "the 'clearly established' inquiry does 'not require a case directly on point,'" concluded that *Iacobucci* gave the officers fair warning that their particular conduct was unconstitutional.[44] Turning the relative paucity of case law on the subject to its advantage, the court—quite cleverly—observed that the "brevity" of the discussion in other tangentially relevant court opinions "speaks to the fundamental and virtually self-evident nature of the First Amendment's protection in this area."[45] The court distinguished arguably contrary persuasive authority from the Third Circuit in *Kelly v. Borough of Carlisle*.[46] There, the Third Circuit held that the right to film police officers in the administration of their public duties was not "clearly established," however, on a set of markedly distinct facts from *Glik*.[47] For one, the § 1983 plaintiff, Kelly, filmed the officer during a traffic stop in which he was a passenger in the detained automobile.[48] Second, he recorded the officer from a "video camera in his lap . . . allegedly without [the officer's] knowledge or consent."[49] In short, compared to Glik's conspicuous recording in a public forum, Kelly's recording was arguably clandestine and in the somewhat *sui generis* context of a traffic stop of the camera operator.[50] Echoing the same point, the First Circuit concluded "*Kelly* is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on Boston Common in the circumstances alleged."[51]

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43. *Id.* at 85.
44. *Id.* at 84.
45. *Glik*, 655 F.3d at 85.
46. *Id.*; *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 251-52 (3d Cir. 2010).
47. *Glik*, 655 F.3d at 85; *Kelly*, 622 F.3d at 251-52.
48. *Kelly*, 622 F.3d at 251-52.
49. *Id.* at 251. According to the facts recited by the Third Circuit, the recording was almost certainly surreptitious. *Id.* at 251-52. At the end of the stop, the officer informed Kelly that he was recording their conversation, as was Department policy, at which point he claimed he "noticed" that Kelly was also recording the encounter on the device in his lap. *Id.*
50. *Id.* at 262.
51. *Glik*, 655 F.3d at 85. Glik also claimed that his Fourth Amendment rights were violated because the officers lacked probable cause to effectuate his arrest. *Id.* at 86-87. The Court held that, indeed, the officers lacked the requisite probable cause. As stated, Massachusetts wiretap statute criminalizes "an interception . . . of any wire or oral communication," and, in turn, "interception" is defined to mean "to *secretly* hear, *secretly* record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to the communication." MASS. GEN. LAWS ch. 272, §§ 99(B)(4) & (C)(1) (emphasis added). Likewise, the Massa-

B. *ACLU V. ALVAREZ*

Where the *Glik* opinion was the first, the U.S. Court of Appeals for the Seventh Circuit's ruling in *ACLU v. Alvarez* was the splashiest.[52] In a split-decision, the Seventh Circuit (over the dissent of the notable Judge Richard A. Posner) enjoined, as violative of the First Amendment, enforcement of the Illinois eavesdropping statute as applied to open audio recordings of police officers in the performance of their public duties.[53]

1. The Illinois Eavesdropping Statute

Prior to recitation of the court's holding, it is critical to note—as the Seventh Circuit acknowledged—that Illinois's eavesdropping statute was the most draconian in the nation and to place that designation in the proper context.[54] Every state except Vermont, as well as the U.S. Congress, has

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chusetts Supreme Judicial Court held that a recording is not "secret" within the definition provided by the wiretap statute where the recorder "held the tape recorder in plain sight." Commonwealth v. Hyde, 750 N.E.2d 963, 971 (Mass. 2001). *Cf.* Commonwealth v. Rivera, 833 N.E.2d 113, 125 (Mass. 2005) (stating the defendant's unawareness of security cameras did not render recording "secret" where cameras were "in plain sight"). In *Glik*, from the face of the facts alleged in the criminal complaint no less, the officers admitted Glik was "openly recording them" and, what's more, acknowledged their actual notice of his recording by the statement of one of the officers that Glik had "taken enough pictures." *Glik*, 655 F.3d at 87. The Court stated that it was of no consequence that cell phones could be used for other functions aside from audio recording, such as traditional photography, holding that no affirmative evidence is needed that a device held in plain sight is capable of audio recording. *Id.* at 88. The Court was clear that a "recording made with a device known to record audio and held in plain view" is demonstrably not "secret." *Id.* Holding that the absence of probable cause was not even arguable, the Court concluded Glik's Fourth Amendment rights were "clearly established," thus depriving the officers of qualified immunity on the Fourth Amendment claim. *Id.*

52. *See generally* ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012). The decision received significant media coverage. *See, e.g.*, Jason Keyser, *Court Strikes Blow To Illinois Eavesdropping Law*, THE ASSOC. PRESS, May 8, 2012, http://www.huffingtonpost.com/2012/05/09/court-strikes-blow-to-ill_0_n_1502475.html; *Illinois Eavesdropping Law Reversed: Court Sides With ACLU Over Police Recordings*, THE HUFFINGTON POST, May 9, 2012, http://www.huffingtonpost.com/2012/05/09/illinois-eavesdropping-la_n_1500272.html.

53. *See generally Alvarez*, 679 F.3d at 583.

54. *Id.* at 595 n.4, (citing Jesse Harlan Alderman, *Police Privacy in the iPhone Era? The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 533-45 (2011)). Illinois's statute is the only statute in the country that prohibits recording of police officers without all-party consent even when (i) the recording is open, and (ii) the officers' lack a reasonable expectation of privacy. *Id.* at 489-96 & app. 1 (collecting state statutes). While Oregon's statute also prohibits open recording of police, even when there exists no reasonable expectation of privacy, the Oregon counterpart provides an exemption for "unconcealed" recordings at "public events" or when the recorded parties are informed that they are being recorded. *Id.*

adopted a statute criminalizing some forms of nonconsensual interception of oral communications by use of electronic recording devices.[55] Emerging decades before the digital era, these are referred to by the antiquated, yet enduring, label "wiretapping" statutes because of the physical line that had to be intercepted to record conversations before videotape, digital cameras, and smartphones.[56] The various state laws and their federal counterpart often depart from the other one based on three critical distinctions:

> (1) whether criminal punishment requires a surreptitious or otherwise concealed recording or whether open recording is still prohibited;
>
> (2) whether the consent of one party to the conversation, typically the recording party, insulates the recorder from criminal liability, or whether the interception remains illicit absent the consent of all parties to the communication; and
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> (3) whether the statute's penalties apply when the party recorded owns no "reasonable expectation of privacy . . . ."[57]

Most statutes mirror the federal statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), which is a one-party consent statute that only criminalizes interception where the recorded party objectively owns a "reasonable expectation of privacy."[58] Therefore, most

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The Oregon law, while by no means exemplary, provides escape hatches clearly unavailable in the Illinois eavesdropping statute. *See id.*

55. Alderman, *supra* note 54, at 489-96 & app. 1.

56. *See id.*; *see also* MASS. GEN. LAWS ch. 272 § 99 (2008).

57. Alderman, *supra* note 54, at 489-96 & app. 1. In *Katz v. United States*, in a concurring opinion eclipsing even the majority's watershed ruling that individuals own a personal privacy right in the contents of conversations that they shelter from public inspection, Justice Harlan introduced the enduring principle of a "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 351-52, 361 (1967). The concurrence established a two-tiered test for constitutional protection of personal conversations under the Fourth Amendment. *Id.* at 361 (Harlan, J., concurring). The test required "first that a person have exhibited an actual [subjective] expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* It has been said that Justice Harlan's "reasonable expectation of privacy" test is the "touchstone" of Fourth Amendment jurisprudence. Cal. v. Ciraolo, 476 U.S. 207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'"). For a broader conversation on the origins and applications of the "reasonable expectation of privacy" doctrine and its applicability to public police activity, see Alderman, *supra* note 54, at 489-519.

58. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510-2522 (2008)). Title III criminalizes "interception" of an "oral communication," and defines "oral communication" as a statement "uttered

state statutes, like Title III, do not collide with an individual First Amendment right to record police in the public performance of their duties.[59] First, the consent of the recorder draws the act outside the scope of proscribed activity. As such, if the recorder is a party to the conversation, and not a third party observer, recordation is permissible. Second, it is well settled, if not axiomatic, that police do not own an objective expectation of privacy in the exercise of their official duties in the public sphere; therefore, in most cases, these laws protect the recordation rights at issue in this Article.[60] On the other side of the conversation, in *Lopez v. United States*, the Supreme Court held that a civilian's statements to law enforcement agents typically lack a reasonable expectation of privacy because agents could repeat them or testify to them later.[61]

However, there are a handful of state laws that depart from this majority construct.[62] Massachusetts, where Simon Glik was arrested, is a notable exception, (i) prohibiting recordation even where the parties do not own a reasonable expectation of privacy in the communication, and (ii) requiring all-party consent.[63] Illinois, unlike Massachusetts, goes a step further by punishing (as a felony no less) (i) both secret *and* open recording, (ii) without all-party consent, and (iii) regardless of whether the recorded party owns a reasonable expectation of privacy.[64] Thus, the statute's criminal

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by a person exhibiting an expectation that such communication is not subject to interception in circumstances justifying such expectation." 18 U.S.C. § 2510(2) (2008).

59. *See* ACLU v. Alvarez, 679 F.3d 583, 595 n.4; (7th Cir. 2012); Alderman, *supra* note 54, at 489-511 & app. 1.

60. *See* Lopez v. United States, 373 U.S. 427, 437-39 (1963); Beckamer v. McCarthy, 468 U.S. 420, 438 (1984) ("[T]he typical traffic stop is public."); Hornberger v. Am. Broad Co., 799 A.2d 566, 595 (N.J. Super Ct. App. Div. 2002) (stating police officers *qua* police officers lack reasonable expectation of privacy in conversations made within earshot of suspects or civilians and do not possess "personal privacy interests" public performance of their duties). *See also* Commonwealth v. Henlen, 564 A.2d 905, 906-07 (Pa. 1989); Alderman, *supra* note 54, at 514-19.

61. *Lopez*, 373 U.S. at 437-39.

62. *See* Alderman, *supra* note 54, at 489-96 & app. 1 (discussing states that criminalize various recordings of police fulfilling their public duties).

63. MASS. GEN. LAWS ch. 272 § 99(B)(4); Commonwealth v. Hyde, 750 N.E.2d 963, 967 (Mass. 2001) (holding the wiretap statute extends protection from non-consensual, surreptitious recording to all "members of the public, including . . . police officers or other public officials interacting with members of the public").

64. Generally, the statute makes it a class 4 felony to use an "eavesdropping device" to record "all or any part of any conversation" unless all parties to the conversation give their consent. 720 ILL. COMP. STAT. § 5/14-2(a)(1) (Sate Bar Edition 2012). The statute defines the term "conversation" as "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." *Id.* at § 5/14-1(d). The operative definition of eavesdropping device is "any device capable of being used to hear or record oral conversation," even if the conversation takes place face-to-face. *Id.* at § 5/14-(1)(a).

penalties, without exception, reach any civilian who records public police activity without prior consent of the officer.[65] In contrast to Massachusetts, where constructive notice in the form of "plain sight" recording conclusively establishes that the recording is not within the ambit of the statute's prohibition on "secret" recording, Illinois proscribes any recording absent affirmative evidence of "surrounding circumstances indicating that the party knowingly agreed to the surveillance."[66] Somewhat remarkably, the statute elevates the offense to a class 1 felony—with a possible prison term of four to fifteen years—if any of the recorded parties is performing duties as a law enforcement officer.[67] This, in the magnanimous words of the Seventh Circuit, makes Illinois's statute "the broadest of its kind."[68]

2. The ACLU *"Test Case"*

In *Alvarez*, the ACLU floated its challenge as a clear "test case."[69] The organization filed suit pursuant to § 1983 against Anita Alvarez, the State's Attorney for Cook County, which includes Chicago—Illinois's most populous city.[70] The ACLU sought declaratory and injunctive relief, enjoining enforcement of the eavesdropping statute against participants in the organization's "police accountability program."[71] Under that prospective program, the ACLU averred that volunteers endeavored to record police without their consent (i) in the performance of their public duties, (ii) in public places, (iii) when "the officers are speaking at a volume audible to the unassisted human ear," and (iv) "where the manner of recording is otherwise lawful."[72] The ACLU argued that the accountability program was protected by the First Amendment but nonetheless prohibited by the eavesdropping statute.[73]

The State's Attorney filed a motion to dismiss contending that the ACLU lacked standing and failed to state a violation of the First Amendment.[74] The district court granted the motion to dismiss, concluding that

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65. ACLU v. Alvarez, 679 F.3d 583, 608. (7th Cir. 2012).

66. *Id.*; People v. Ceja, 789 N.E.2d 1228, 1241 (Ill. 2003).

67. 720 ILL. COMP. STAT. § 5/14-4(b) (State Bar Edition 2012). In a startling asymmetry, the statute carves out exceptions for police who intercept communications in a wide array of public encounters, including "traffic stops" and "requests for identification." *Id.* at § 5/14-3(h).

68. *Alvarez*, 679 F.3d at 595 n.4.

69. *Id.* at 586.

70. *Id.*

71. *Id.*

72. *Id.* at 588.

73. *Alvarez*, 679 F.3d at 588.

74. *Id.* Initially, the district court ordered dismissal without prejudice, holding that the ACLU lacked standing because it did not adequately allege a credible fear of prosecution. *Id.* at 591. The ACLU cured the jurisdictional defect by filing an amended complaint, adding as named plaintiffs ACLU employees that would be involved in the recording of

"[t]he ACLU has not alleged a cognizable First Amendment injury" because the "right to audio record" is not protected speech within the shelter of the First Amendment.[75] Apparently, without awareness of the unbroken line of cases articulating clear protection for the right to gather and receive information under the "press" clause of the First Amendment, the court characterized the ACLU's claim as "an unprecedented expansion of the First Amendment."[76] Since, in the district court's view, the ACLU alleged no injury-in-fact, it ruled that the group lacked standing to sue.[77]

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officers and providing more detail about the threat of prosecution. *Id.* On appeal, the State's Attorney argued again that the ACLU's amended complaint still did not raise a credible threat of prosecution. *Id.* at 592. The Seventh Circuit snuffed this argument, pointing out that (i) the statute incontrovertibly precludes the ACLU's proposed activity, and (ii) prosecutors, including those in Ms. Alvarez's office, brought no fewer than twelve criminal cases against defendants for allegedly filming police in public. *Id.* at 592-93 & n.2. The Cook County prosecutions identified by the court were: "People v. Drew, No. 10-cr-46 (Cook Cnty., Ill., Cir. Ct.), People v. Moore, No. 10-cr-15709 (Cook Cnty., Ill., Cir. Ct.), and People v. Tate, No. 11-cr-9515 (Cook Cnty., Ill., Cir. Ct.)," and the others were: "People v. Thompson, No. 04-cf-1609 (6th Cir., Champaign Cnty., Ill.); People v. Wight, No. 05-cf-2454 (17th Cir., Winnebago Cnty., Ill.); People v. Babarskas, No. 06-cf-537 (12th Cir., Will Cnty., Ill.); People v. Allison, No. 09-cf-50 (2d Cir., Crawford Cnty., Ill.); People v. Parteet, No. 10-cf-49 (16th Cir., DeKalb Cnty., Ill.); People v. Biddle, No. 10-cf-421 (16th Cir., Kane Cnty., Ill.); People v. Fitzpatrick, No. 10-cf-397 (5th Cir., Vermillion Cnty., Ill.); People v. Lee, No. 08-cf-1791 (12th Cir., Will Cnty., Ill.); and People v. Gordon, No. 10-cf-341 (11th Cir., Livingston Cnty., Ill.)."; *Id.* at 593 n. 2.2.

75. *Alvarez*, 679 F.3d at 589, 591.

76. *Id.* at 589.

77. *Id*. The well-settled standard for Article III standing requires a plaintiff in federal court to meet the burden of showing "he is [i] under threat of suffering 'injury in fact' that is concrete and particularized; [ii] the threat must be actual and imminent, not concrete or hypothetical; [iii] it must be fairly traceable to the challenged action of the defendant; and [iv] it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* at 590 (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)). The majority disagreed with the lower court judge's conclusion that the ACLU failed to allege a recognizable injury. *Id.* at 591-93. Dissecting her rationale, the court discovered that she relied on a thin reed of dicta in Potts v. City of Lafayette, 121 F.3d 1106, 1111 (7th Cir. 1997), wherein the court stated, "there is nothing in the Constitution which guarantees the right to record a public event" in denying the challenge of an onlooker denied entry to a Ku Klux Klan rally because his video camera fit within a police ban on objects that could be used as a "weapon or projectile." *Alvarez*, 679 F.3d at 591-93. The judge, however, overlooked the court's immediately subsequent statement, explaining that, though the weapons ban implicated protected First Amendment interests, "[t]he right to gather information may be limited under . . . valid time, place, or manner regulation." *Id.* at 591-92. The judge's conflation of a permissible time, place, and manner restriction for a categorical rule that "audiovisual recording is wholly unprotected," exemplified a shocking dereliction of elementary First Amendment principles. *Id.* at 592. *See also id.* at 595 ("Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments.'" (quoting Burstyn v. Wilson, 343 U.S. 495, 502 (1952))).

3. The First Amendment

A two-judge majority of a Seventh Circuit panel—Judges Diane Sykes and David Hamilton—disagreed with the district court.[78] In an unmistakable rebuke, the court chided the State's Attorney's "extreme position" that "openly recording what police officers say while performing their duties in traditional public fora—streets, sidewalks, plazas, and parks—is *wholly unprotected* by the First Amendment."[79] The court held that the "expansive reach" of Illinois's statute cannot be reconciled with the First Amendment's protection of any "medium of expression" used to "gather and disseminate information."[80]

i. The Right to Gather, Disseminate, and Receive Information

Like the First Circuit before it, the gravamen of the *Alvarez* court's holding is that audiovisual recording of police in public infringes the protected First Amendment interest of the public to gather and disseminate information and concomitantly to receive such information and facilitate engagement in matters of democratic importance.[81] Unlike the First Circuit, the Seventh Circuit supports its holding with a lengthy exegesis, replete with insightful analysis of precedent and a somewhat supererogatory attempt at divination of the amendment's original intent.[82] To begin, the court short-circuited the speech-conduct dichotomy that would parse the "making" of an audiovisual recording as an unprotected "act," insufficiently tinged with a *modus operandi* of "expression."[83] The court wrote:

> The 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. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making*

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78. *Id.* at 585.

79. *Id.* at 594.

80. *Alvarez*, 679 F.3d at 586, 595, 601.

81. *Id.* at 595-96. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 191 (1983).

82. *Alvarez*, 679 F.3d at 599-600. The court examined several texts, finding *inter alia* that prominent Whig commentators believed the First Amendment ensured "all honest Magistrates . . . have their Deeds openly examined, and publicly scann'd" and colonial writers exhorted the "right of the people to be informed of their governors' conduct so as to shape their own judgments on 'Public Matters' and be qualified to choose their representatives." *Id.* (citations omitted).

83. *Id.* at 595-96.

> the recording is wholly unprotected . . . By way of simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns . . . Put differently, the eavesdropping statute operates at *the front end of the speech process* by restricting the use of a common, indeed ubiquitous, instrument of communication. Restricting the use of an audio or audiovisual recording device suppresses the speech just as effectively as restricting the dissemination of the resulting recording.[84]

Next, the majority placed in proportion the magnitude of the First Amendment interests imperiled by the eavesdropping statute.[85] The court stressed that the statute compromised "'our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[86] Like the First Circuit, the court cautioned that the First Amendment "goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[87] At bottom, the court summarized the First Amendment interest at stake as "gathering news and information . . . about the affairs of government"—a cardinal purpose recognized throughout First Amendment jurisprudence.[88]

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84. *Id.* (emphasis supplied). In an analogy incongruously equating the merit of *documenting* the acts of public officials performing their duties—noble or nefarious—with the merit of corporate *spending* on electioneering as controversially extended First Amendment protection by the Supreme Court, the majority argued that the same reasoning supporting campaign-finance jurisprudence applies to recording police. *Id.* ("The [Supreme] Court held long ago that campaign-finance regulations implicate core First Amendment interests because raising and spending money *facilitates* the resulting political speech."). *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2011).

85. *Alvarez*, 679 F.3d at 602. The court wrote: "[I]t should be clear now that [the statute's] effect on First Amendment interests is far from incidental . . . The law's legal sanction is directly leveled against the expressive element of an expressive activity." *Id.* at 602-03.

86. *Id.* at 597 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

87. *Id.* (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)); *see* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

88. *Id. See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("Nor is it suggested that news gathering does not qualify for First Amendment protection, without some protection for seeking out the news, freedom of press could be eviscerated."). The Seventh Circuit also acknowledged the *Branzburg* Court's instruction that the "institutional press 'has no special immunity from the application of general laws.'" *Alvarez*, 679 F.3d at 598 (quoting Ass'd Press v. NLRB, 301 U.S. 103, 132-33 (1937)). The Seventh Circuit also addressed the *Branzburg* Court's caveat that an expansive judicially administered right to gather information would "present practical and conceptual difficulties of a high order" but found the express statement that the right to gather information was deserving of "some protection" to be of paramount importance. *Id.* (quoting *Branzburg*, 408 U.S. at 703-04).

ii. Intermediate Scrutiny

Having framed the issue as one within the compass of the First Amendment, the *Alvarez* court endeavored to assign the level of scrutiny to apply to the statute. The inquiry turned on the familiar proposition that "content-based" regulations are subject to "strict scrutiny," whereas "content-neutral" legislation receives the more deferential standard of "intermediate scrutiny."[89] The ACLU argued that the statute is content-based because it discriminates *among* speakers by allowing—without a search warrant or some lesser approval by a neutral magistrate—uniformed police officers to record civilians in a broad variety of encounters, while imposing an absolute ban on civilian recordation of those same conversations.[90] The argument relies on the "preferred speaker" doctrine, which forbids government from "taking the right to speak from some and giving it to others . . . ."[91] The court found the doctrine inapposite, however, stating that it only applies "when the government discriminates among *private* speakers, not when it facilitates its own speech."[92] In the end, the majority only offered that it was *inclined* to conclude that the Illinois eavesdropping statute was content-neutral, without definitively resolving the matter.[93] The court stated, however, that regardless of the content-neutral status, the challenged provisions of the statute would fail even intermediate scrutiny as applied to the ACLU's accountability program.[94]

As a threshold matter, the court had to settle among several formulations of the intermediate scrutiny test in free-speech cases.[95] After analyzing the standard applied by the Seventh Circuit in various contexts, including commercial speech and speech-forum challenges, the court enumerated the essential elements of intermediate scrutiny: "(1) content neutrality . . . [;] (2) an important public-interest justification for the challenged regulation;

89. *Alvarez*, 679 F.3d at 603-04. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (stating laws "that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to strict scrutiny, whereas "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.") (citation omitted).

90. *Alvarez*, 679 F.3d at 603-04.

91. *Id.* (quoting Citizens United v. FEC, 130 S. Ct. 876, 899 (2011)).

92. *Id.* at 604. The majority expressed concern with the statute's exemption for live broadcasts "by radio, television, or otherwise," which appears to subordinate some private speakers in preference for others, while also violating the principle that the institutional press is accorded no special entitlements. *Id.* at 588. However, it declined to address the issue because it was not at issue in the ACLU's challenge. *Id.*

93. *Id.*

94. *Id.* at 604. For criticism of the application of the more lenient intermediate scrutiny standard in lieu of strict scrutiny, see *infra* notes 220-253 and accompanying text.

95. *Alvarez*, 679 F.3d at 604-05.

and (3) a reasonably close fit between the law's means and its ends." This last element requires "that the burden on the First Amendment rights must not be greater than necessary to further the important governmental interest at stake."[96]

Addressing the second prong, the court analyzed the public-interest justification for the eavesdropping statute.[97] The objective proffered by the State's Attorney was the protection of "conversational privacy."[98] The court noted that "the protection of personal conversational privacy serves First Amendment interests" because fear of disclosure would have a chilling effect on private conversations.[99] However, the court rightfully observed that there were no privacy interests of constitutional dimension involved in the challenge.[100] The court borrowed from Fourth Amendment jurisprudence to expose the fallacy of the purported "privacy" interest.[101] The court explained that with regard to the species of communications sought to be recorded by the ACLU (open recordation of "official" conversations spoken at an audible volume), the parties lacked any "reasonable expectation of privacy."[102] As noted by Justice Harlan's seminal concurrence in *Katz v. United States*, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[103]

The State's Attorney offered three other phlegmatic justifications for the eavesdropping statute's ban: "to [1] encourage that civilians candidly speak with law enforcement, including those conversations conditioned on confidentiality; [2] limit opportunities of the general public from gaining access to matters of national and local security; and [3] reduce the likelihood of provoking persons during officers' mercurial encounters."[104] The Seventh Circuit surgically dismissed these putative justifications.[105] The court emphasized again that the statute ensnares communications within "earshot" of the public, in no way chilling confidential police conversations, which can occur in a secure location protected from snoops and recorders by legitimate trespass and property laws.[106] Likewise, matters of national or local security would not be trumpeted at audible decibels for

96. *Id.* at 605.
97. *Id.* at 605-06.
98. *Id.* at 605.
99. *Id.* at 605.
100. *Alvarez*, 679 F.3d at 605-07.
101. *Id.*
102. *Id.*; *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see supra* notes 57-60 and accompanying text.
103. *Alvarez*, 679 F.3d at 607. *See Katz*, 389 U.S. at 361; *see supra* notes 57-60 and accompanying text.
104. *Alvarez*, 679 F.3d at 607.
105. *Id.* at 607-08.
106. *Id.*

bystanders to hear, and if they were, they certainly are not deserving of, or would necessarily lose, their sensitive character.[107] Lastly, the court stated that invalidation of the eavesdropping statute as applied to filming police in public in no manner "immunizes behavior that obstructs or interferes with effective law enforcement or the protection of public safety."[108] The panoply of disturbing-the-peace and obstruction-of-justice-type offenses, to say nothing of trespassing and harassment laws, is available to restrain those who, in connection with recording, physically interfere with an arrest or other police operation.[109]

Moving to the third prong of intermediate scrutiny, the majority, noting that the Illinois legislature is entitled to draft legislation that protects conversational privacy above the floor provided by the Fourth Amendment, nonetheless concluded that by criminalizing recordation of *any* conversation—without limiting the statute's reach to those conversations bearing indicia of privacy—"the State has severed the link between the eavesdropping statute's means and its end."[110] Likewise, the court further praised the unique First Amendment value of recording at issue, writing: "audio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes."[111] The statute thus evinces no tailoring to its supposed purpose where it punishes audio recording that does not implicate a cognizable privacy interest.[112] As a result, the majority reversed and remanded the decision of the district court with instructions to,

> enter a preliminary injunction enjoining 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 . . . .[113]

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107. *See id.*
108. *See id.*
109. *See Alvarez*, 679 F.3d at 607.
110. *Id.* at 606.
111. *Id.* at 607.
112. *Id.*
113. *Id.* at 608.

As a postscript, on November 26, 2012, the U.S. Supreme Court denied the State's Attorney's petition for certiorari[114]

iii. Judge Posner's Dissent in *Alvarez*

While Judge Richard A. Posner is often acknowledged as one of the country's most brilliant and intellectually curious jurists, a discerning reader would be excused for finding his dissent in *Alvarez* short of that measure.[115] Judge Posner began by parsing the right at issue in the case, not as one of "freedom of speech" generally but "more precisely, freedom to publish or otherwise disseminate other people's speech."[116]

Judge Posner's first substantive argument appears to arise from a vague concern for judicial comity, even where, as here, constitutional rights are implicated.[117] He wrote:

> [o]ur ruling casts a shadow over electronic privacy statutes of other states as well, to the extent that they can be interpreted to require the consent of at least one party to a conversation to record it even though the conversation takes place that in a public place [sic], if the conversation could nevertheless reasonably be thought private by the parties.[118]

By way of example, Judge Posner applied the majority's interpretation to California's wiretapping statute that, like a supermajority of states not including Illinois, provides an exception to all-party consent where the parties may "reasonably expect that the communication may be overheard or recorded."[119] He then surmised that "[t]o read the statute literally would exclude all private communications because any private conversation *can* be overheard and recorded, even if it is a conversation in a closed room."[120] Therefore, he determined that the majority's conferral of a right to film officers in the public performance of their official duties is so broad that it could invalidate statutes, such as California's, that extend protection to ob-

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114. Tal Kopen, *Supreme Court Won't Hear Police Recording Case*, POLITICO (Nov. 26, 2012), *available at* http://www.politico.com/blogs/under-the-radar/2012/11/supreme-court-wont-hear-police-recording-case-150290.html (last visited Jan. 28, 2013).

115. *See, e.g.*, Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2010, at 78, http://www.newyorker.com/archive/2001/12/10/011210fa_fact_macfarquhar (mostly laudatory profile of judge portrayed as prolific, conservative, but also iconoclastic).

116. *Alvarez*, 679 F.3d at 608 (Posner, J., dissenting).

117. *Id.* at 609.

118. *Id.*

119. *Id.*

120. *Id.*

jectively "private" conversations.[121] To illustrate his alarm, he resorted to a tactic of *reductio ad absurdum*, expressing deep concern for the civilian speaking to a police officer on a sidewalk "in a low voice" or in a closed room susceptible to sophisticated eavesdropping equipment.[122]

Next, Judge Posner ping-ponged his understanding of the original scope of the First Amendment, which is strikingly limited and divorced from the deep well of modern jurisprudence.[123] He argued, without citation, that the architects of the Bill of Rights only intended the First Amendment to preclude prior restraint, not subsequent criminal prosecution for exercising speech rights: "The relevant provision . . . merely forbids Congress to abridge free speech, which as understood in the eighteenth century means freedom only from censorship (that is, suppressing speech, rather than just punishing the speaker after the fact)."[124]

One of Judge Posner's more robust arguments was that the majority's ruling could imperil the common law constellation of "invasion of privacy" torts.[125] He wrote:

> A person who is talking with a police officer on duty may be a suspect whom the officer wants to question; he may be a bystander whom the police are shooing away from the scene of a crime or an accident; he may be an injured person seeking help; he may be a crime victim seeking police intervention; he may be asking for directions; he may be arguing with a police officer over a parking ticket; he may be reporting a traffic accident. In many of these encounters the person conversing with the police officer may be very averse to the conversations being broadcast on the evening news or blogged throughout the world. In some instances such publicity would violate the tort right of privacy, a conventional exception to freedom of speech as I have noted. This body of law is endangered by today's ruling.[126]

Moving to another line of dissent, Judge Posner argued that the majority's opinion "may cause state and federal judicial dockets . . . to swell because it will unwittingly encourage police officers to shoo away bystanders . . ." newly emboldened to record their every observation of officers.[127]

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121. *Alvarez*, 679 F.3d at 609-10 (Posner, J., dissenting).
122. *Id.* at 610.
123. *Id.* at 610-11.
124. *Id.* at 610.
125. *Id.*
126. *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting).
127. *Id.* at 612.

Judge Posner pontificated that this will cause police to "freeze" during their duties and inhibit officers from extracting information and communicating effectively "in the line of duty."[128] However implausible, he provided the hypothetical example of an informant trying to provide information to an officer while inhibited by the recording of a journalist who persistently places himself within earshot.[129] Thus, Judge Posner warned that the majority has endangered public safety.[130]

Magnifying his "Chicken Little" tactics to society writ large, Judge Posner returned to his forceful advocacy for "private talk in public places."[131] He argued that publication of conversations intended by ordinary citizens to be private, whether or not occurring in public with a police officer on duty, will chill conversational freedom and spontaneity. However, he did not dispute that police "may have no right to privacy in carrying out official duties in public."[132] But, he argued, "the civilians they interact with do[,]" and it is these hypothetical masses whose commensurate rights are infringed by lawful recordation of police.[133] Turning somber, the judge, along the same analytical lines, argued the majority's decision "gives passersby the right to memorialize and publicize (on Facebook, on Twitter, on YouTube, on a blog)" the "agonized plea for help[]" of a rape or shooting victim.[134] Taken as whole, he concluded that such a reading of the First Amendment has too "baleful" an effect on the conversational privacy and that the Illinois eavesdropping statute therefore satisfies constitutional inspection.[135]

III. Unanswered Questions

This Section raises four distinct questions that remain unsettled in the aftermath of *Glik* and *Alvarez*. These are discussed in turn.

A. WILL OTHER COURTS BE PERSUADED BY JUDGE POSNER'S DISSENT?

As of 2013, only the First and Seventh Circuit Courts of Appeals have established a First Amendment liberty to openly record police officers in the public performance of their official duties.[136] Put differently, what the

128. *Id.* at 611.
129. *Id.* at 613.
130. *Id.*
131. *Alvarez*, 679 F.3d at 613 (Posner, J., dissenting).
132. *Id.*
133. *Id.*
134. *Id.* at 614.
135. *Id.*
136. *Alvarez*, 679 F.3d 583 (majority opinion); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011).

Constitution now protects in Indiana, Illinois, Massachusetts, and Maine remains potentially vulnerable to an adverse ruling in Iowa, Idaho, Michigan, and Mississippi. As similar cases reach the bench in other jurisdictions, or the U.S. Supreme Court, which will hold the most persuasive currency: the majority interpretation in *Glik* and *Alvarez* or Judge Posner's dissenting argument? Judge Posner's *gravitas* may attract jurists to springboard off the kernels of legal argument in his short dissent.[137] However, a more likely outcome is that Judge Posner's dissent will be roundly ignored, and courts confronting this issue of first impression will be persuaded by the sound persuasive reasoning of the *Glik* and *Alvarez* majorities. For the reasons that follow, it seems probable that other courts will agree that Judge Posner's dissent is too thinly reasoned, too analytically inconsistent, and too divorced from longstanding First Amendment jurisprudence to be persuasive.

1. The Right is Not Placed in a Recognized Constitutional Framework

Read as a whole, Judge Posner's dissent suffers from a failure to tether his dissatisfaction with the outcome to any recognized legal framework.[138] Rather than defining the right at issue in the ACLU's challenge and applying the appropriate standard of review, whether it be rational basis, intermediate or strict scrutiny, or some other cognizable balancing calculus, Judge Posner's dissent reads like a diary of loosely associated musings.[139] As discussed below, Judge Posner devoted one sentence to defining—incorrectly—the right imperiled by the eavesdropping statute but declines to address which test of constitutionality should be imposed or to apply any such test.[140] By the judge's formulation, enjoining the eavesdropping statute, even in the narrow circumstances of the case, would have too chilling

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137. *See* MacFarquhar, *supra* note 115.

138. *See Alvarez,* 679 F.3d at 608-14 (Posner, J., dissenting). Not all speech—or infringement thereof—is created equal in First Amendment jurisprudence, with different standards applying to different categories of speech, while even certain narrow categories of speech are unprotected. *See, e.g.*, Republican Party of Minnesota. v. White, 536 U.S. 765 (2002) (speech rights of political candidates); Virginia. State Bd. of Pharmacy v. Virginia. Citizens Consumer Council*,* 425 U.S. 748 (1976) (commercial speech); Miller v. California, 413 U.S. 15 (1974) (obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech that incites violence); United States v. O'Brien, 391 U.S. 367 (1968) (expressive conduct); New York Times v. Sullivan, 376 U.S. 254 (1964) (press rights); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Near v. Minnesota, 283 U.S. 697 (1931) (prior restraint). The majority placed the right at issue within the press clause of the First Amendment's protection of the right to gather and disseminate information and denominated the Illinois eavesdropping statute as a content-neutral ban on such speech deserving of intermediate scrutiny. *Alvarez*, 679 F. 3d at 594-96. Judge Posner makes little attempt to define that right at issue and apply a cognizable form of constitutional scrutiny. *Id.* at 608-14.

139. *Id.*

140. *Id.* at 608.

an effect on the privacy not of the officer but of civilian conversants.[141] If the judge has decided to subordinate all other inquiry and has determined that protecting conversational privacy is a "rational basis" to uphold the statute, he did not state as much.[142] Nor did he justify why the alleged infringement of the right to record matters of public import should merit this lesser "rational basis" degree of scrutiny reserved for laws that do collide with constitutionally protected values.[143]

2. The First Amendment Protects More Than Prior Restraint

Perhaps his dissent applied no accepted test for the constitutionality of a statute because the judge sees no constitutional collision at all.[144] In framing the issue, he did posit that the First Amendment only protects citizens from prior restraint.[145] While this has been demonstrably rejected by the entire canon of First Amendment law, Judge Posner nonetheless declined to

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141. *Id.* at 613.

142. *Id.* at 608-14. Nor does Judge Posner place the "conversational privacy" of citizens (which is incidentally captured by recording of police) in a constitutional framework. *Alvarez*, 679 F.3d at 608-14 (Posner, J., dissenting). He does not state whether this privacy interest is protected by the Fourth Amendment or, as "conversation," the First Amendment. *Id.* He simply states that the governmental objectives proffered by the State's Attorney have "social value." *Id.* at 614.

143. *Id.* at 608-14. Putting aside the procedural incompleteness of his dissent, First Amendment jurisprudence is rife with examples where the protected activity of one person has an ancillary (and adverse) effect on others, whether it be their constitutional right to privacy, their concomitant right to speak, or merely "social values." Without balancing the constitutional values in a recognized form of judicial review under the principles of *stare decisis*, Judge Posner's dissent seems to suggest that a court balancing a constitutional right against competing "social values" served by extinguishing that right is determinative. *Alvarez*, 679 F.3d at 614. By this reasoning, the Ku Klux Klan must be criminally punished for espousing their worldview because society places little value in their message, and their conduct is deeply offensive to the majority. So too may corporations face prohibition of speech advocating their preferred political candidates because the vast resources they can devote to their message has a socially deleterious effect on the related ability of individuals to publicize their political speech. More to the point of conversational privacy, under Justice Posner's interpretation, newspapers could face daily arrest when any given article publishes third-party statements that an individual had subjectively hoped to keep "private." All of these are "rationally based" results in a simple "social value" balancing, yet all of these results are demonstrably unconstitutional. *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2003) (declaring First Amendment right of corporations to contribute unrestricted amounts of donations to political candidates); Bartnicki v. Vopper, 532 U.S. 514, 534-35 (2001) (upholding right of press to publish conversations lawfully obtained by publisher, but unlawfully obtained in violation of the Fourth Amendment in the first instance); *Brandenburg*, 395 U.S. at 444 (holding that Ku Klux Klan speech cannot be proscribed unless it incites imminent violence).

144. *Alvarez*, 679 F.3d at 610-11 (Posner, J., dissenting).

145. *Id.*

even apply his own test.[146] Certainly, if the ACLU is protected from prior restraint, the eavesdropping statute should be reviewed to ensure that it does not, in fact, impose such a restraint.[147] At least a non-frivolous argument could be made that it does and that Justice Posner's declaration that a pattern of subsequent punishment cannot amount to a "prior restraint" contradicts various Supreme Court authority.[148] In short, the dissent fails for refusing to apply any standard of review. More fatally, the analysis is so divorced from longstanding precedent—and the principle of *stare decisis,* which impels the court to apply heightened scrutiny to any law that impairs the right to gather, disseminate, and receive information—that stands in sharp contrast to the judge's unsubstantiated and bare interpretation of the First Amendment.[149] In light of these jurisprudential flaws, Judge Posner certainly has contributed meaningful commentary to the debate but not persuasive authority that future courts can rely upon without disrupting decades of First Amendment jurisprudence.[150]

3. The Right at Issue is Imprecisely Defined and Analyzed

A survey of Judge Posner's specific arguments reveals further flaws. To begin, he misstated the right at issue, characterizing it not as "freedom of speech" but "more precisely, freedom to publish or otherwise disseminate other people's speech."[151] In fact, the judge's description is *less* precise because he put at issue more than the facts on hand in the ACLU's challenge.[152] The ACLU, in its complaint and briefing papers, clearly delineated the conduct that it argued was jeopardized by enforcement of the eavesdropping statute.[153] The very deliberate proposal of its police accountability program was to: "Openly audio record[] police officers without their consent when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise law-

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146. *Id.*

147. *Id.*

148. Potere, *supra* note 27, at 309-12. *See* Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (holding law that forbade "nearly every practicable, effective means" of communicating about labor disputes to be unconstitutional "prior restraint" even though designed to create "subsequent punishment").

149. *Compare Alvarez*, 679 F.3d at 610-11 (Posner, J., dissenting), *with* Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Burstyn v. Wilson, 343 U.S. 495, 502 (1952).

150. *See supra* note 138.

151. *Alvarez*, 679 F.3d at 608 (Posner, J., dissenting).

152. *Id.* at 588.

153. *Id.*

ful." The ACLU will focus on policing in public forums during expressive activities.[154]

The ACLU did not state that its purpose is to "publish or otherwise disseminate" its recordings.[155] While, of course, the Constitution protects dissemination in equal measure (under the aegis of the "press clause"), the right at issue in the case was the physical act of "recording."[156] The majority rightfully called this act of recording the "front end" of a process that enables essential First Amendment rights (just as banning note-taking or paint brushes would impair First Amendment rights).[157] The majority is correct, and its refusal to decouple the physical "act" of recording from its significance under the "press" clause of the First Amendment is sound.[158] Nonetheless, as Judge Posner should have pointed out, the physical act of recording—regardless of its necessity to effectuate the core constitutional function of dissemination of information—is not without its own First Amendment significance.[159] Even in isolation, the act of recording is expressive.[160] And "expressive conduct"—an act, like burning a draft card that is infused with elements of speech—is too of constitutional dimension and deserving of at least heightened scrutiny.[161] Recording a police officer sends a message trained at deterrence.[162] It says that the recorder disapproves of misconduct, as does society writ large, and refuses to countenance bad behavior.[163] It speaks in favor of accountability just as a closed circuit camera that is not rolling tape still communicates a message to putative shoplifters.[164] The judge ignored this expressive conduct line of cases, further distancing his dissent from First Amendment precedent.[165]

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154. *Id.*

155. *See id.* at 608.

156. *See Alvarez*, 679 F.3d at 588.

157. *Id.* at 596.

158. *Id.*

159. O'Brien v. United States, 391 U.S. 367, 377 (1968).

160. *See id.*

161. *Id.*

162. *See* Commonwealth v. Hyde, 750 N.E.2d 963, 976 (Mass. 2001) (Marshall, CJ., dissenting) ("[The public's role as watchdog] cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording—secretly recording on occasion—an interaction between a citizen and a police officer.").

163. *See id.*

164. *See id.*

165. As for Judge Posner's grave admonition that "[t]he invalidation of a statute on constitutional grounds should be a rare and solemn judicial act, done with reluctance under compulsion of clear binding precedent or clear constitutional language or . . . an overwhelming gut feeling, that the statute has intolerable consequences" ACLU v. Alvarez, 679 F.3d 583, 609 (7th Cir. 2012) (Posner, J., dissenting), a similar warning is conspicuously missing from the judge's recent opinion invalidating Illinois's statute prohibiting the carrying of a loaded gun outside of the home as violative of the Second Amendment. Moore v. Madigan, 702 F.3d 933 (2012).

4. The Dissent Admits the Eavesdropping Statute is Too Draconian and Proposes an Unrealistic Exception

Even before offering support for the constitutionality of the statute, Judge Posner began by arguing against himself, writing: "Maybe [the eavesdropping statute is] too strict in forbidding nonconsensual recording even when done in defense of self or others, as when the participant in a conversation records it in order to create credible evidence of blackmail, threats, other forms of extortion, or other unlawful activity as in *Glik* . . . ."[166] Putting aside that Simon Glik recorded officers making an arrest in a public park—precisely the type of recording for which the ACLU credibly feared prosecution in Illinois—the judge's reasoning is wanting.[167] Say an ACLU member is barred from recording unless she satisfies one of these exceptions proposed by Judge Posner. And, say an officer approaches her and threatens arrest unless she pays a $50 bribe. Must she openly take out her recording device and ask the officer to repeat himself so that she may document this "credible evidence of blackmail"?[168] Surely, as Judge Posner would have it, she would be a lawbreaker had she recorded the officer before the proffer of a bribe illuminated his mal intent.[169] Should the store clerk be required to turn a security camera on only after percipiently witnessing an act of shoplifting? Likewise, the waiter who recorded presidential candidate Mitt Romney's "47 percent" comments—one of the most discussed events of the 2012 presidential campaign and a paradigmatic example of the salutary contribution to our national dialogue of unscripted recordings of public officials—had no advance knowledge that his recordation would alter a presidential election.[170] Nor did George Holliday have prior warning that he would introduce police brutality into the national consciousness—and with it, produce irreplaceable inculpatory evidence—

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166. *Alvarez*, 679 F.3d at 609 (Posner, J., dissenting).

167. *See Alvarez*, 679 F.3d at 588; Glik v. Cunniffe, 655 F.3d 78, 84. (1st Cir. 2011).

168. *Alvarez*, 679 F.3d at 609 (Posner, J., dissenting).

169. *See id.*

170. *Romney "47 percent" Dubbed Best Quote of 2012*, THE ASSOC. PRESS, Dec. 10, 2012, *available at* http://www.cbsnews.com/8301-250_162-57558154/romney-47-percent-dubbed-best-quote-of-2012/ (last visited Jan. 26, 2013). Presidential candidate Mitt Romney, unknowingly recorded at a fundraiser on May 7, 2012 in Boca Raton, Florida, was captured on video saying:

> There are 47 percent of the people who will vote for [President Barack Obama] no matter what . . . who are dependent upon government, who believe that they are victims. . . . These are people who pay no income tax. . . . and so my job is not to worry about those people. I'll never convince them that they should take personal responsibility and care for their lives.

Id.

when he set up a camcorder on his balcony that would later capture the beating of Rodney King.[171] The memorialization of the unguarded actions of public officials offers the public a rare glimpse into the truth of what is being done in its name and with its money. Judge Posner's narrow exception offers insufficient and impracticable protection of that precious right.

5. A First Amendment Right to Record Police in Public Does Not Imperil Statutes That Criminalize Recordation Conversations Where Both Parties Own a Reasonable Expectation of Privacy

Getting to the substance of his argument, Judge Posner took us down the proverbial slippery slope to argue that the majority's police exception will somehow swallow the rule (in most states) that protects parties from eavesdropping unless they "reasonably expect that the communication may be overhead or recorded."[172] He argued that the holding will not protect conversations where "conversants reasonably assume that no one is listening."[173] The argument must fail. The judge puzzlingly conflated a subjective desire for privacy ("reasonably assume no one is listening") with the Supreme Court's "reasonable expectation of privacy standard," an objective measure that turns on whether the parties' expectation of privacy is one that "society is prepared to recognize as 'reasonable.'"[174] Moreover, nothing in the *Glik* and *Alvarez* opinions immunized the recordation of *private* citizens in circumstances proscribed even by the notably broad Illinois eavesdropping statute.[175] The constitutional right in *Alvarez* was narrowly extended to allow recordation and dissemination of "public officials performing their official duties in public."[176] Nothing more. The judge's concern for the viability of more appropriately constrained state statutes is unfounded.[177]

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171. Joel Rubin, Andrew Blankstein & Scott Gold, *Twenty Years After the Beating of Rodney King, the LAPD is a Changed Operation*, L.A. TIMES, Mar. 3, 2011, http://articles.latimes.com/2011/mar/03/local/la-me-king-video-20110301.

172. *Alvarez*, 679 F.3d at 609 (Posner, J., dissenting).

173. *Id.* at 610.

174. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan's concurrence established a two-tiered inquiry that determined "first that a person have exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.*

175. *See Alvarez*, 679 F.3d at 588; *Glik*, 655 F.3d at 79, 84.

176. *See Alvarez*, 679 F.3d at 588; *Glik*, 655 F.3d at 79, 84.

177. The majority also noted that Justice Posner's concern was for state statutes markedly less expansive. *See Alvarez*, 679 F.3d at 607-08. After calling the Illinois statute a "national outlier," the court explained that:

> Most state electronic privacy statutes apply only to *private* conversations; that is, they contain (or are construed to include) an expectation-of-privacy requirement that limits their scope to conversations that carry a reasonable expectation of privacy. Others apply only to wiretapping,

6. There is no Fourth Amendment Right to Privacy in the Contents of a Conversation Between a Citizen and a Police Officer Acting in His Official Capacity

As a matter of law, the Fourth Amendment does not protect the conversations for which Judge Posner is so concerned.[178] As the judge acknowledged, police officers *qua* police officers do not own a personal privacy expectation in their official acts under prevailing judicial interpretations.[179] The value he elevated—above First Amendment principles—is the conversational privacy of the citizen interacting with the officer.[180] However, this privacy interest is not one of constitutional dimension. In the seminal *Katz* case, the Supreme Court stated flatly 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."[181] In a case directly on point, *Lopez v. United States*, the Supreme Court held that a civilian's statements to a law enforcement agent lacked reasonable expectation of privacy from interception because the agent could repeat them or testify to them later.[182] The likelihood—and objective expectation—that a police communication will be publicly reported dilutes the objective reasonableness of a privacy expectation.[183] It is a mainstay of the police officer's obligation to the public to accurately document and report communications made in an official capacity, whether via a log of activity, an arrest report, an application for a search warrant, or a status conference with other officers.[184] Under open records laws, these reports are almost universally available to the public and media, as they are intended to serve as a medium of transparency.[185] Moreover, police routinely—in fact, frequently—testify in criminal trials as to the contents of conversations with the members of the public. Just as the Supreme

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> and some ban only surreptitious recording. Indeed, the California statute discussed in the dissent is explicitly limited to 'confidential' communications, a term specifically defined to exclude the kind of communications at issue here. If the Illinois statute contained a similar limitation, the link to the State's privacy justification would be much stronger.

Id. (internal citations omitted).

178. *See supra* note 60 and accompanying text.

179. *Alvarez*, 679 F.3d at 613 (Posner, J., dissenting).

180. *Id.*

181. Katz v. United States, 389 U.S. 347, 351-52 (1967).

182. Lopez v. United States, 373 U.S. 427, 437-39 (1963). *See also* Wishart v. McDonald, 500 F.2d 1110, 1113-14 (1st Cir. 1974) ("[t]he right of privacy . . . may be surrendered by public display.").

183. *See Lopez*, 373 U.S. at 437-39; *Katz*, 373 U.S. at 351-52.

184. *See Lopez*, 373 U.S. at 437-39.

185. *See* Kee v. City of Rowlett, 247 F.3d 206, 217 n.21 (5th Cir. 2001) (enumerating six nonexclusive factors to weigh subjective expectation of privacy which include, *inter alia*, "the potential for the communications to be reported").

Court has held that a member of the public could not objectively expect to send financial information to his bank without surrendering the privacy right attached to that information, the exchange of information to an officer for official police purposes is tantamount to a public disclosure.[186] Judge Posner is properly concerned for the social value of "privacy," particularly for those citizens bold enough to take the risk of cooperating in dangerous police investigations or unfortunate enough to be the victims of crime. However, the information provided in these conversations lacks constitutionally protected character; if the person is talking to an officer in an official capacity, the contents of the conversation must be reasonably expected to be publicly disclosed by the officer at some point or in some manner.[187] As such, *Glik* and *Alvarez* do not collide with the Fourth Amendment. To the extent that there is "social value" in keeping certain communications with police private, a law that prohibits all recordation of such communications, without exception, sweeps too broad to withstand a tailoring analysis under intermediate or strict scrutiny.[188]

7. A Positive First Amendment Right to Record Public Police Activity Does Not Jeopardize Arrests for Filming Police in Derogation of Other Laws

As Judge Posner strenuously protested, there is indeed "social value" in keeping certain conversations with police private.[189] While these conversations lack Fourth Amendment protection—because information willingly shared with public authorities reasonably should be expected to be used in subsequent public proceedings—there are manifold reasons why they sometimes *should* nonetheless remain "private."[190] Chief among these might be protecting the identities of confidential informants, safeguarding the repugnant details of sexual crimes, and preserving the integrity of ongoing criminal investigations. However, it is simply not the case, as Judge Posner wrongfully suggested, that affording a positive First Amendment liberty to record citizen interactions with police in the exercise of their public duties sacrifices the police's ability to keep private sensitive information. The

186. *See* United States v. Miller, 425 U.S. 435 (1976).

187. *See Katz*, 389 U.S. at 351-52.

188. ACLU v. Alvarez, 679 F.3d 583, 607-08 (7th Cir. 2012) That is not to say that there are no laws that can infringe upon the time, place, and manner of the exercise of this right or that everything shared with law enforcement is categorically public. Certainly, national security laws and laws protecting the secrecy of grand juries, for instance, are valid and not in derogation of the Constitution, even though the First Amendment right to disseminate information of public importance is curtailed in these narrow circumstances.

189. *Id.* at 611.

190. *See supra* notes 178-87 and accompanying text.

right defined by the *Glik* and *Alvarez* courts is qualified.[191] Though the private character of the conversations are not endowed with superior—or for that matter, any—Fourth Amendment rights, recorders of public police activity may not reach into private places in derogation of property, trespassing, and other laws intended to protect privacy and keep order in society.[192] As the District Court judge stated in *Glik*, the exercise of this First Amendment right, like all First Amendment rights, must be "peaceful [and] not performed in derogation of any law."[193] A recorder may not, as in Judge Posner's alarmist example about sophisticated bugging equipment, trespass upon the possessory rights of the police departments.[194] A recorder may not invade the interior of a police cruiser or break-and-enter into a police station to exercise the right conferred by *Glik* and *Alvarez*.[195] By way of analogy, while a newspaper has a right to gather and publish news, it may not break into the police department to steal the information.[196] The front-end speech right is qualified, and privacy (as a social and law enforcement, not constitutional matter) will be appropriately protected by the permissible enforcement of property and other laws.

Lastly, a note about Judge Posner's reliance on Justice Harlan's poetic defense of conversational privacy in *United States v. White*.[197] Judge Posner selectively quoted the venerable Justice Harlan, out of context, to argue that allowing the unfettered recordation of police in the public performance of their official duties "might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious and defiant discourse—that liberates daily life."[198] The argument and quotation in Justice Harlan's dissent comes in markedly different context, and Judge Posner's rental of the evocative language is disingenuous.[199] Justice Harlan's dissent offered a defense of the rights of *private discourse* to be free from *official* state eavesdropping.[200] That is the exact converse of recordation of public police activity.[201] Moreover, disclosure of the public and taxpayer-funded conduct of public servants in no way threatens the spontaneity, frivolity, and impetuousness of private life that Justice Harlan rightfully warned was at peril by govern-

191. *See Alvarez*, 679 F.3d at 607; Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011).
192. *Glik*, 655 F.3d at 83-84.
193. *Id.* at 83 (quoting Iacobucci v. Boulter, 193 F.3d 14, 18 (1st Cir. 1999)).
194. *See Alvarez*, 679 F.3d at 608-09 (Posner, J., dissenting).
195. *Id.* at 607; *Glik*, 655 F.3d at 84.
196. *See* Bartnicki v. Vopper, 532 U.S. 514, 534-35 (2001).
197. United States v. White, 401 U.S. 745, 787-89 (1971).
198. *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting) (quoting *White*, 401 U.S. at 745, 787-89 (Harlan, J., dissenting)).
199. *White*, 401 U.S. at 787-89.
200. *Id.*
201. *See id.*

ment-bugging of ordinary citizens.[202] The mechanical conversations of a citizen and an officer on duty cannot be plausibly said to "liberate[] daily life" with frivolity and defiance.[203]As throughout his dissent, Judge Posner improperly cloaked public police activity in the "social value" attendant to private-party conversations of a genuinely private character.[204] Judge Posner's reference to tamed spring breaks and the danger of web cams similarly conflated the relationship of society as a whole with eavesdropping in the age of ubiquitous recording devices, with the limited—and salutary—right to film police performing their official duties in public spaces.[205]

8. The First Amendment Right Does Not Eliminate the Common Law "Invasion of Privacy" Torts

Next, Judge Posner's argument that the ruling threatens to eviscerate the tort of invasion of privacy is puzzling.[206] Invasion of privacy is actually an umbrella term that encompasses a variety of common law tort actions, many of which are no longer recognized or possess diminished currency in several jurisdictions.[207] It appears that Judge Posner fears a threat to the cause of action for "giving publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) *is not of legitimate concern to the public*."[208] To say nothing of the Supremacy Clause of the Constitution, the argument that the *Alvarez* ruling threatens the existence of this tort defies logic.[209] When within the boundaries outlined by the majority holding—that is, a recording (i) in public, and (ii) of police in the public execution of their

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202. *See id.*

203. *Id.* at 787-89.

204. *See* ACLU v. Alvarez, 679 F.3d 583, 611 (7th Cir. 2012) (Posner, J., dissenting).

205. *See id.* (citing Lizette Alvarez, *Spring Break Gets Tamer as World Watches Online*, N.Y. TIMES, Mar. 16, 2012, http://www.nytimes.com/2012/03/16/us/spring-break-gets-tamer-as-world-watches-online.html; Jeffrey Rosen, *The Web Means the End of Forgetting,* N.Y. TIMES, July 25, 2010, http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all).

206. *See id.* at 612-13 (Posner, J., dissenting).

207. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A-E (1977) ("(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other; (2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other's name or likeness, as stated in § 652C; or (c) unreasonable publicity given to the other's private life, as stated in § 652D; or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.").

208. RESTATEMENT (SECOND) OF TORTS § 652D (emphasis supplied).

209. *See id.*

duties—the subject matter of the recording is not private.[210] The matter publicized is "of legitimate concern to the public."[211] The performance of public officials is not a private species of conduct; it is a public concern.[212] It's tautological, but where the elements are not satisfied, the tort cannot be endangered.

9. The First Amendment Right Will Not Inhibit Effective Law Enforcement

Judge Posner's scare tactic that the open recording of police activity will inhibit effective law enforcement is long on hyperbole, but short on reasoning.[213] First, nothing in the majority's holding prohibits a charge in the nature of obstruction of justice or disorderly conduct.[214] Moreover, the concern is unwarranted. A security camera has never been blamed for inhibiting the duties of bank or mall security guards—who exercise quasi-law enforcement functions. The public (i.e., not "under cover" or behind-closed-doors) duties of a police officer call on no skill, right, or obligation, that is impaired when filmed. Here, Judge Posner would prefer to ignore the overbreadth of a statute to raise hypothetical alarm.[215] Lastly, and perhaps most frustratingly, Judge Posner acknowledged, rightfully, that in many instances the recording of police in public creates a more accurate evidentiary record of actual criminal activity.[216] This aids law enforcement in the investigation by enabling police to apprehend and in the prosecution of wrongdoers by creating probative and valuable evidence at trial.[217] Although inhibiting the work of law enforcement is a cardinal concern of the dissent, Judge Posner wishes to suppress accurate and potent inculpatory evidence from use at criminal trials.[218] By criminalizing the act of recording police in public, Judge Posner bars the fruit of that act.[219] More times than not, that recording will assist law enforcement, not hinder it. Isn't vindication of the victim's rights at trial more important than the theoretical "baleful" effect on conversational privacy that Judge Posner so regrets?

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210. *See id.*
211. *See id.*
212. *See id.*
213. ACLU v. Alvarez*,* 679 F.3d 583, 614 (7th Cir. 2012) (Posner, J., dissenting).
214. *Id.* at 607.
215. *Id.* at 613-14.
216. *Id.* at 614.
217. *See id.*
218. *Alvarez,* 679 F.3d at 614 (Posner J., dissenting).
219. *See id.*

B. WHICH CONSTITUTIONAL STANDARD OF REVIEW WILL FUTURE COURTS APPLY?

While courts are unlikely to follow the Posner dissent, what level of constitutional scrutiny will be applied? The Seventh Circuit, in *Alvarez*, with some equivocation, essentially concluded that that the lesser burden of intermediate scrutiny applied to the Illinois eavesdropping statute.[220] The First Circuit, in *Glik*, though positively declaring the existence of the right to film public police activity, did not have occasion to weigh the appropriate standard of review in the case, an interlocutory appeal of a denial of the police officers' claim of qualified immunity.[221] The question remains unanswered: will other courts apply strict or intermediate scrutiny in challenges to respective state statutes that punish the recording of police officers in the public exercise of their duties?

1. The Content-Based vs. Content-Neutral Distinction

Strict scrutiny is applied to government regulation that differentially burdens speech based on its content, that is, laws that discriminate depending on the "message, ideas [or] subject matter" of the speaker.[222] Intermediate scrutiny is applied to laws that are content-neutral.[223] Content-neutral laws are those that infringe on a category of speech but do not make distinctions based on message or viewpoint.[224] For instance, a ban on all billboards is content-neutral, while a ban on billboards in favor of Republican political candidates is content based, and egregiously so.[225] Content-neutral laws

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220. *Id.* at 603-05 (majority opinion). The Seventh Circuit stated that the essential ingredients of intermediate scrutiny require the government to bear the burden of demonstrating "(1) content neutrality . . . [;] (2) an important public-interest justification for the challenged regulation; and (3) a reasonably close fit between the law's means and its ends." *Id.* at 605. The U.S. Supreme Court has articulated the same test with language differing in form, not substance. The Court has said that content-neutral government regulation withstands constitutional scrutiny if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression [in other words, is content-neutral]; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70 (1981). *See also* Stone, *supra* note 81, at 191. By contrast, the strict scrutiny standard under which content-based based statutes are reviewed demands (i) a compelling government justification for the challenged statute, (ii) that is narrowly tailored to serve that justification, and (iii) is the least restrictive means of achieving that interest. City of Boerne v. Flores, 521 U.S. 507 (1997).

221. *See generally* Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011).

222. Aschcroft v. ACLU, 535 U.S. 564, 573 (2002).

223. *Alvarez*, 679 F.3d at 603-05.

224. *See id.*

225. *See id.*; Stone, *supra* note 81, at 198 & n.31.

receive intermediate scrutiny because the U.S. Supreme Court has determined that they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[226] First Amendment scholar Geoffrey Stone has explained the rationale behind the content-based/content-neutral distinction:

> [T]he first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate. Any law that substantially prevents the communication of a particular idea, viewpoint, or item of information violates the first amendment except, perhaps, in the most extraordinary of circumstances. This is so, not because such a law restricts "a lot" of speech, but because by effectively excising a specific message from public debate, it mutilates "the thinking process of the community" and is thus incompatible with the central precepts of the first amendment.[227]

Indeed, Stone cites as a representative example of a content-based restriction "laws or judicial decisions prohibiting 'invasions of privacy' through public disclosure of 'embarrassing' information."[228] He argues that what makes such laws content-based, and also what makes such laws so nefarious, is that they "substantially prevent the communication of particular ideas, viewpoints, or items of information *by all means*."[229] By contrast, "content-neutral restrictions limit the availability of only particular means of communication. They thus leave speakers free to shift to other means of expression."[230]

2. Statutes That Create Exceptions for Police Officers, the Media, and Other Preferred Recording Parties are Content-Based and Deserve Strict Scrutiny

At first blush, it appears that the Illinois eavesdropping statute, and others that criminalize recording of police officers, are content-neutral.[231] At their core, these laws generally proscribe the recordation by mechanical device of a communication without the consent of *all parties* to the conver-

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226. Stone, *supra* note 81, at 198.
227. *Id.*
228. *Id.* at 199.
229. *Id.* at 200.
230. *Id.*
231. *See* 720 ILL. COMP. STAT. § 5/14-2(a)(1) (State Bar Edition 2012).

sation.[232] Were the statute confined to this prohibition, alone, it would appear content-neutral.[233] No "idea, viewpoint, or item of information" is isolated for punishment and "excised" from the public debate.[234] Rather, the statute, like a billboard ban, forces communication about the public acts of police to other media, such as oral accounts. In practice, though content-neutral, the law strikes at political speech and thus infects the lifeblood of the First Amendment.[235] As a threshold matter, it bears emphasizing that statutes that prohibit filming of police publicly performing their official duties censor the most potent documentary evidence of the performance of their essential government function.[236] It has been oft-repeated that:

> [d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[237]

While the appearance of content neutrality was sufficient to placate the Seventh Circuit in *Alvarez*, a closer reading of the statute, in totality, militates in favor of a finding that the law is, indeed, content-based.[238] It is a well-settled proposition, argued by the ACLU in the case, that the government runs afoul of the First Amendment by "taking the right to speak from some and giving it to others."[239] Such laws create a favored class of speech based on content and are all but dead-on-arrival under strict scrutiny.[240]

While the all-party consent requirement, in isolation, is content-neutral, the Illinois eavesdropping statute provides a full menu of exemptions for law enforcement officers, public officials, media organizations, and certain business corporations.[241] Among this panoply of carve-outs are exemptions from criminal penalty for:

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232. *See supra* notes 54-67 and accompanying text.

233. *See id.*

234. *See* Stone, *supra* note 81, at 198-200.

235. *See* 720 ILL. COMP. STAT. 5/14-3 (State Bar Edition 2012); Roth v. United States, 354 U.S. 476, 484 (1957) (defining political expression as core of First Amendment).

236. *See Roth*, 354 U.S. at 484.

237. *Id.*; Buckley v. Valeo, 424 U.S. 1, 14 (1976) (quoting *Roth*, 354 U.S. at 484).

238. *See* 720 ILL. COMP. STAT. 5/14-3 (State Bar Edition 2012).

239. ACLU v. Alvarez, 679 F.3d 583, 603 (7th Cir. 2012) (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899 (2010)).

240. *Alvarez*, 679 F.3d at 603.

241. 720 ILL. COMP. STAT. 5/14-3 (State Bar Edition 2012).

> • the media and others that publicize "[a] broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;"
>
> • anyone that records "the proceedings of any meeting required to be open by the Open Meetings Act;"
>
> • manufacturers or retailers of food and drug products who make a "[r]ecording or listening with the aid of any device to incoming telephone calls of phone lines publicly listed or advertised as consumer 'hotlines' by manufacturers or retailers of food and drug products;"
>
> • various recordings made by police officers, including "[r]ecordings made simultaneously with the use of an in-car video camera recording of an oral conversation between a uniformed peace officer, who has identified his or her office, and a person in the presence of the peace officer whenever (i) an officer assigned a patrol vehicle is conducting an enforcement stop; or (ii) patrol vehicle emergency lights are activated or would otherwise be activated if not for the need to conceal the presence of law enforcement."
>
> • Certain recording by "telephone monitoring device by either (1) a corporation or other business entity engaged in marketing or opinion research or (2) a corporation or other business entity engaged in telephone solicitation . . . to record or listen to oral telephone solicitation conversations or marketing or opinion research conversations by an employee of the corporation or other business entity."[242]

Notwithstanding the exceptions from the statute's all-party consent requirement for police, media, and, remarkably, "retailers of food and drug products" and pesky telemarketers, the Seventh Circuit found that the statute was content-neutral because the elevation of certain "preferred" speakers over others only renders a regulation content-based "when the government discriminates among *private* speakers, not when it facilitates its own

242. *Id.*

speech."[243] This justification marks an inexplicable error in an otherwise well-reasoned opinion.[244] For one, this argument is unsubstantiated, and, for that matter, the court cited no authority for the proposition.[245] Further, the court's argument is insupportable. The elevation of government speech over the commensurate message of *private* speakers is the definition of censorship. The principle espoused by the majority is the province of an autocracy where state-run media censor private speakers and publicize the government-sanctioned message. China's censorship boards or the preeminence of *Pravda* come to mind. The argument, even if true, cannot be applied to the Illinois statute where the government *does*, in fact, "discriminate[] among *private* speakers."[246] What else, other than private discrimination, explains the criminalization of this form of speech when the message is about the performance—positive or negative—of police officers but not when it is the content of a public meeting, inadvertently recorded private conversations in media broadcast, telemarketer solicitations, or calls to "consumer hotlines" recorded by supermarkets and pharmaceutical companies?[247] To say more would be superfluous. The statute contains content-based discrimination and, thus, should face strict scrutiny.[248]

This analysis, applied to all-party consent statutes, other than Illinois's inartfully drafted law, yields the same conclusion.[249] For instance, Montana criminalizes the recording of 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."[250] However, the Montana statute creates exceptions where the recorded parties are:

- "elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty;"
- "persons speaking at public meetings;"

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243. *Alvarez*, 679 F.3d at 603-05. The majority expressed concern with the statute's exemption for live broadcasts "by radio, television, or otherwise," which appears to subordinate some private speakers in preference for others while also violating the principle that the institutional press, is accorded no special entitlements. *Id.* at 604. However, it declined to address the issue because it was not at issue in the ACLU's challenge. *Id.*

244. *See id.*

245. *See id.*

246. *Id.*; *See* 720 ILL. COMP. STAT. 5/14-3 (State Bar Edition 2012).

247. *See* 720 ILL. COMP. STAT. 5/14-3 (State Bar Edition 2012).

248. *See id.*

249. *See, e.g*, MONT. CODE ANN. § 45-8-213(1)(c) (2013) MASS. GEN. LAWS ch. 272, § 99(D)(1) (2013).

250. MONT. CODE ANN. § 45-8-213(1)(c) (2013).

> • "persons given warning of the transcription or recording, and if one person provides the warning, either party may record;" or
>
> • "a health care facility . . . or a government agency that deals with health care if the recording is of a health care emergency telephone communication made to the facility or agency."[251]

Massachusetts offers fewer exceptions but still declines to proscribe recordings by "investigative or law enforcement officers . . . for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth" and "a financial institution" that records "telephone communications with its corporate or institutional trading partners in the ordinary course of its business."[252] It is clear from these examples that most, if not all, statutes that proscribe protected First Amendment recordings of police officers should face strict scrutiny where they insulate preferred speakers and subjects.[253]

C. IS SURREPTITIOUS RECORDING OF POLICE IN THE PUBLIC PERFORMANCE OF THEIR DUTIES PROTECTED FROM PUNISHMENT BY THE FIRST AMENDMENT?

The most pressing—and least predictable—question that remains in the wake of *Glik* and *Alvarez* is whether the positive First Amendment right conferred in those cases will extend to surreptitious recordings of police officers.[254] While *Glik* offered robust support for the right, the plaintiff was recording the officers in plain view.[255] It is critical to note that the opinion did not discuss or reference *Commonwealth v. Hyde*, where the Supreme Judicial Court of Massachusetts upheld against constitutional challenge the conviction of a motorist who clandestinely recorded officers during a traffic

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251. *Id.*

252. MASS. GEN. LAWS ch. 272, § 99(D)(1)(e), (f) (2013).

253. *See* ACLU v. Alvarez, 679 F.3d 583, 603-05 (7th Cir. 2012). Another justification that future courts might use to apply intermediate scrutiny is that the act of "filming" is "expressive conduct" rather than "pure" speech. *See supra* notes 155-65 and accompanying text. The Supreme Court, in a line of cases of older vintage, has stated that some wordless expression, while technically conduct, is so entangled with expression that any infringement is tested under intermediate scrutiny. *Id.* The majority opinion in *Alvarez*, probably rightfully, disagreed that the act of recording matters of public importance was "conduct," even "expressive conduct." *Alvarez*, 679 F.3d at 595-96.

254. *Alvarez*, 679 F.3d at 607 n.13.

255. Glik v. Cunniffe, 655 F.3d 78, 80 (1st Cir. 2011).

stop.[256] Perhaps the silence speaks volumes. Likewise, in *Alvarez*, the ACLU's carefully coordinated test case proposed only to *openly* record officers.[257] The Seventh Circuit majority nominally addressed the distinction in a footnote: "We are not suggesting that the First Amendment protects only *open* recording. The distinction between open and concealed recording, however, may make a difference in the intermediate calculus because surreptitious recording brings stronger privacy interests into play."[258] Judge Posner, ever the skeptic, unsettled the issue further with a perceptive observation:

> It is small consolation to be told by the majority that "the ACLU plans to record *openly*, thus giving the police and others notice that they are being recorded[.]" All the ACLU means is that it won't try to hide its recorder from the conversants whom it wants to record, though since the typical recorder nowadays is a cell phone it will be hidden in plain view. A person who doesn't want his conservation to be recorded will have to keep a sharp eye out for anyone nearby holding a cell phone, which in many urban settings is almost everyone.[259]

On this point, it seems Judge Posner has it right. First, the distinction between open and secret recording is practicably untenable and captures too much valuable political speech to pass constitutional muster.[260] Second, as discussed below, the distinction is unnecessary because the balance in favor of the important free speech justifications for invalidating the laws *vis-à-vis* recording of police in public, and against the comparatively more modest privacy interests of other conversants, is not tipped in the opposite direction when the recording is concealed.[261]

1. The States that Proscribe Certain Surreptitious Recordation

In some instances, if other statutory elements are met, several states criminalize surreptitious recording of police officers.[262] As it stands, two states, Montana and Massachusetts, criminalize surreptitious, but not open, recordation of conversations without the consent of all parties and without

256. Commonwealth. v. Hyde, 750 N.E.2d 963, 967 (Mass. 2001).
257. *Alvarez*, 679 F.3d at 588.
258. *Id.* at 607 n.13 (citing Bartnicki v. Vopper, 532 U.S. 514, 529 (2001)).
259. *Id.* at 613 (Posner, J., dissenting) (internal parenthetical omitted).
260. *See infra* notes 261-325 and accompanying text.
261. *See id.*
262. Alderman, *supra* note 54, at 489-96 & app. 1.

imposing a reasonable expectation of privacy on the recorded parties.[263] Illinois and Oregon are the only states in the country that make illegal the recordation of conversations (i) both open and surreptitious, (ii) without the assent of all parties, and (iii) without a reasonable expectation of privacy requirement.[264] One more state, Nevada, proscribes only surreptitious recording without all party consent, while also requiring a reasonable expectation of privacy of the recorded parties.[265] Finally, two more states, Iowa and Kansas, prohibit (i) only the surreptitious, not open, recordation of conversations; (ii) without the consent of *one* party (which includes the recorder if also a conversant, but would not include a third party like Simon Glik); and (iii) where the parties own a reasonable expectation of privacy.[266] All other states do not make a distinction between open and surreptitious recording in delimiting the universe of illegal conduct.[267]

2. Enforcing the Distinction is Impracticable

Practically speaking, as Judge Posner instructs, it would be unmanageable for states to permit open recording of police yet criminalize surreptitious recording, regardless of the other particulars of the respective wiretapping laws.[268] Cell phones are capable of so many functions that an officer will not reasonably be able to ascertain whether he is being recorded.[269] A bystander with a cell phone in hand might be recording a police officer on a device—or application on a device—with audio capability, or might be performing a legal function not within the ambit of wiretapping laws, such as photographing the encounter, sending a text message, or, by way of example in Simon Glik's case on Boston Common, recording video of the ducks in Frog Pond.[270] Moreover, while a few state statutes criminalize surreptitious recording of police officers in public, but not open recording, it does not appear that any court has established a test creating an

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263. MONT. CODE ANN. § 45-8-213(1)(c) (2013); MASS. GEN. LAWS ch. 272 §§ 99(B)(4), (C) (2013).

264. 720 ILL. COMP. STAT. § 5/14-2(a)(1) (State Bar Edition 2012); OR. REV. STAT. §§ 165.535-540 (2013). *See supra* note 54 and accompanying text. *See also* Alderman, *supra* note 54, at 489-96 & app. 1.

265. NEV. REV. STAT. §§ 200.610-690 (2011). *See* Alderman, *supra* note 54, at 489-96 & app. 1.

266. IOWA CODE §§ 727.8, 808B.1-.2 (2013); KAN. STAT. ANN. §§ 21-4001-4002 (2012). *See* Alderman, *supra* note 54, at 489-96 & app. 1.

267. *See* Alderman, *supra* note 54, at 489-96 & app. 1.

268. *See* ACLU v. Alvarez, 679 F.3d 583, 613 (7th Cir. 2012) (Posner, J., dissenting).

269. *See id.*

270. *See id.*

open/secret dichotomy.[271] Such a test would be unworkable, as the distinction is easily collapsed.[272] For instance, would the test set an objective or subjective standard? Certainly a subjective test would collapse the distinction between open and surreptitious recording because an officer could always testify that he or she did not know she was being recorded, rendering the recordation impermissibly secret.[273] In other words, the test would render illusory the First Amendment protection for open recording.[274]

An objective test would also be problematic. It may be easier to administer because the inquiry would focus on the actions of the recorder, not the subjective perception and recollection of the officer.[275] For instance, a recording party could present evidence or testimony attesting to holding the camera in plain view.[276] There is some modicum of protection for the constitutional right because the prosecution bears the burden of proving surreptitious recording as an element of the crime.[277] However, this in no way provides absolute protection against mistake and overzealous prosecution of open recorders wrongfully accused of hiding a recording device.[278]

3. Enforcing the Distinction Captures Too Much Important Political Speech to be Constitutional

Even assuming the test could be administered fairly and without error, it leaves an intolerably large blind spot that would still criminalize many valuable recordings of potent First Amendment value.[279] Consider one of the most iconic and newsworthy videos in U.S. history: George Holliday's grainy recording of four Los Angeles police officers savagely beating mo-

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271. *See* MONT. CODE ANN. § 45-8-213(1)(c) (2013); MASS. GEN. LAWS ch. 272 §§ 99(B)(4), (C) (2013).

272. *See Alvarez,* 679 F.3d at 613 (Posner, J., dissenting).

273. Commonwealth v. Rivera, 833 N.E.2d 1113, 1125 (Mass. 2005) (holding defendant's subjective unawareness of security cameras did not render recording "secret" where cameras were "in plain sight.").

274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.*

278. *Rivera*, 833 N.E.2d at 1125.

279. Commonwealth v. Hyde, 750 N.E.2d 963, 976 (Mass. 200) (Marshall, C.J., dissenting) ("[The public's role as watchdog] cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording—secretly recording on occasion—an interaction between a citizen and a police officer."). *See* Timothy Williams, *Recorded on a Suspect's Hidden MP3 Player, a Bronx Detective Faces 12 Perjury Charges*, N.Y. TIMES, Dec. 7, 2007, http://www.nytimes.com/2007/12/07/nyregion/07cop.html?_r=0 (describing surreptitious recording of custodial interrogation that revealed detective's serial perjury at attempted murder trial).

torist Rodney King with nightsticks.[280] The video led to a prodigious amount of national news coverage and prompted a frank discussion on race.[281] In this regard, the video itself was tantamount to political speech at the so-called "core" of the First Amendment.[282] The video served as a catalyst for the federal indictment of four police officers, sweeping reform in police departments not just in California but across the nation, and, more ominously, widespread politically motivated rioting in Los Angeles.[283] The video galvanized such an incessant national political stir that President George H.W. Bush was compelled to make a national comment in the days following the video.[284] He told a wary nation: "What I saw made me sick . . . sickening to see the beating that was rendered. There's no way in my view to explain it away. It was outrageous."[285] In response to the riots that spread across Los Angeles following the state court acquittal of the officers, the President made a national speech vowing that the U.S. Department of Justice would seek charges.[286] A commission tasked with investigating King's beating spearheaded dramatic reforms in the scandal-wracked Los Angeles Police Department and noted that it "owes its existence to the George Holliday videotape."[287] Outside government, the video helped spawn a fierce and politically motivated genre of "gangster rap" that discussed feelings of oppression in the African American inner city and spoke of violence and crime in raw terms.[288] This nascent form of music, like the video that assisted in its birth, finds its home in this same "core" of First Amendment political expression.[289]

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280. Rubin et al., *supra* note 171.

281. *See id.*

282. *See id.*

283. *See id.*

284. *President Bush Sickened by Rodney King Case*, THE GUARDIAN, Mar. 22, 1991, http://www.guardian.co.uk/theguardian/2012/mar/22/archive-1991-president-bush-sickened-rodney-king.

285. *Id.*

286. Bush, George H.W., President, United States of America, Address to the Nation on the Civil Disturbances in Los Angeles, California (May 1, 1992) (transcript available in the George Bush Presidential Library). *See* United States v. Koon, 34 F.3d 1416, 1426 (9th Cir. 1994).

287. *See* Rubin et al., *supra* note 171; REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT ii (1991) (on file with author) ("Our commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful, since the efforts of King's brother . . . to file a complaint were frustrated, and the report the involved officers was falsified.").

288. *See* Jeanita W. Richardson & Kim A. Scott, *Rap Music and its Violent Progeny*: *America's Culture of Violence in Context*, 71 J. NEGRO EDUC. 175, 175-92 (2002).

289. *See id.*

While it is incontrovertible that Holliday's video was a paradigmatic example of First Amendment political speech, it is also likely that Holliday would have broken the law under any wiretapping statute of the one-party or all-party consent species that criminalized surreptitious recording.[290] Just after midnight on March 3, 1991, Holliday was woken up by sirens.[291] Upon seeing the officers viciously attacking King, he retrieved a handheld Sony camcorder and stepped out onto the balcony of his apartment to film the disgusting scene.[292] Under the cover of darkness, above the officers, at a considerable distance, Holliday was a shadow.[293] His recording would probably not be considered open where no one else saw him making the film, and the officers could not be reasonably expected to have even constructive awareness.[294] Or, consider the case of Oscar Grant, the Oakland teenager whose shooting death, at the hands of Bay Area Rapid Transit police officer, led to riots reminiscent of Los Angeles in 1992 and to the manslaughter conviction of the offending officer.[295] Grant's wrongful death was captured on cell phones of onlookers on a departing train.[296] A court could conceivably determine that a recording made behind the dark glass of a train car, where an officer could not reasonably be expected to have notice of being filmed, was clandestine.[297] The problem, then, is that it is these videos memorializing, as they do, the activity of officers when they think no one is looking that strike closest to the truth.[298] And, it is these truths that contribute the most meaningful messages to our political discourse.[299] If, as our Supreme Court has repeatedly stated, the highest degree of First Amendment protection should be afforded its "core" of messages informing the debate on "public issues" and the "interchange of ideas for the bringing about of political and social changes," the open/surreptitious distinction in wiretapping laws should not be permitted as applied to recording of po-

290. *See, e.g.*, 720 ILL. COMP. STAT. 5/14-2(a)(1) (State Bar Edition 2012). *See also* Commonwealth v. Hyde, 750 N.E.2d 963, 976 (Mass. 2004) (Marshall, C.J., dissenting).

291. Michael Goldstein, *The Other Beating*, L.A. TIMES, Feb. 19, 2006, http://www.latimes.com/la-tm-holidayfeb19,0,581354.story.

292. *Id.*

293. *Id.*

294. *Id.*

295. *See* Demian Bulwa, *BART Urges Patience over Video of Shooting*, S.F. CHRON., Jan. 10, 2009, http://www.policeone.com/communications/articles/1771860-Video-of-BART-officer-fatally-shooting-fight-suspect-surfaces/.

296. *Id.*

297. *See id.*

298. *See* ACLU v. Alvarez*,* 679 F.3d 583, 614 (7th Cir. 2012) (Posner, J., dissenting) (acknowledging that videotapes present one of the most accurate forms of evidence). *See also* Scott v. Harris, 550 U.S. 372, 380-81 (2007) (describing the uniquely probative nature of videotape evidence).

299. *See* Stone, *supra* note 81, at 198-200.

lice.[300] At least in this context, the ban on surreptitious recording threatens to strike too deeply into the core of protected expression.[301]

Also, in the constitutional calculus of intermediate or strict scrutiny, there is no public-interest justification that would tip the scales in favor of enforcing a ban on surreptitious recordation of police.[302] The Seventh Circuit stated in dicta that intermediate scrutiny would be the standard of review on a facial or as-applied challenge to a law proscribing clandestine recordation of a police officer.[303] The Seventh Circuit appears to suggest that intermediate scrutiny would apply because the same protected interest—dissemination and reception of public information—is implicated by a law barring concealed recordation of police officers.[304] It bears noting that intermediate scrutiny would likely also apply to laws that allow open, but ban surreptitious, filming of police officers in the public administration of their duties.[305] This is because, like content-neutral regulations that infringe on protected speech, the law imposes a restriction on just one "manner" of vindicating the right to record police officers.[306] The Supreme Court has held that so-called content-neutral "time, place or manner restriction[s]" receive intermediate scrutiny.[307]

Here, the *Alvarez* majority also suggested that "surreptitious recording brings stronger privacy interests into play" that could merit a different result under intermediate scrutiny.[308] This seems unlikely. The governmental objective of protecting conversational privacy is more protected by a ban on surreptitious recordation only to the extent the parties have subjective awareness that they are being filmed and are able to relocate to more private environs.[309] However, as discussed above, requiring the recorded party's subjective awareness of the recordation would render illusory protection for the speech right because aggrieved police officers will rarely be independently aware that they are being filmed while engaged in their du-

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300. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

301. *See id.*; Commonwealth v. Hyde, 750 N.E.2d 963, 976 (Mass. 2004) (Marshall, C.J., dissenting).

302. *See Alvarez*, 679 F.3d at 604-09.

303. *Id.* at 607 n.13.

304. *See id.*

305. *See id.*

306. *See id.*

307. *Alvarez*, 679 F.3d at 605. The test has been articulated slightly differently as the "intermediate scrutiny" standard applied to content-neutral regulations of general application. *Compare* Frisby v. Schultz, 487 U.S. 474, 481 (1988) *with* Turner Broad Sys. v. FCC, 512 U.S. 622, 640 (1994). The intermediate standard of review applied to time, place, and manner restrictions requires that they are (i) reasonable, (ii) content neutral, (iii) are narrowly tailored to serve a significant government interest, and (iv) "leave open ample alternative channels of communication." *Frisby*, 487 U.S. at 481 (citation omitted).

308. *Alvarez*, 679 F.3d at 607 n.13.

309. *See id.*

ties, making criminal all acts of recording prior to the officer's discovery.[310] Moreover, even open recording is susceptible to criminal penalty if an officer claims unawareness or was unreasonably ignorant that he was on camera, and no other evidence can support the recorder's contention that he was filming in "plain view."[311] In this sense, it cannot be said that a ban on surreptitious recording is "narrowly tailored" to serve the government interest of protecting conversational privacy or that a ban on concealed recording "leave[s] open ample alternative channels of communication."[312]

4. The Government Interest in Protected Conversational Privacy is not Better Served by Laws Banning Surreptitious Recordation of Police Officers

As discussed above, the surreptitious nature of the recording would not change the balance that the *Alvarez* majority rightfully placed between the First Amendment right at issue and the interest of protecting conversational privacy.[313] The right is the same—dissemination and reception of public information to contribute messages to important political dialogues.[314] That message is no different whether captured by a recording in plain view or one hidden from open sight.[315] Likewise, the privacy interests of the conversants, if any, are just as minimal.[316] Again, police officers have no expectation of privacy in the public execution of their duties, whether it be performing an arrest or speaking to a civilian in earshot of the public.[317] Likewise, the civilian conversant is divested of a privacy expectation where the officer is likely to relate the information in a public police report, in public testimony, or to other officers, witnesses, or the media.[318] Seldom is the scenario when a conversation with a police officer could reasonably be expected to be "confidential."[319] The factors contributing to the analysis of laws prohibiting open recording are unchanged when the recording is concealed.[320] It seems that the Seventh Circuit majority, in its Spartan footnote, has conflated the surreptitious nature of the recorder with the *locus* of the

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310. *See supra* notes 268-78 and accompanying text.
311. *See id.*
312. *See Frisby*, 487 U.S. at 481 (citation omitted).
313. *See Alvarez*, 679 F.3d at 604-09.
314. *Id.* at 596.
315. *See id.*; Commonwealth v. Hyde, 750 N.E.2d 963, 976 (Mass. 2004) (Marshall, C.J., dissenting).
316. *See* ACLU v. Alvarez, 679 F.3d 583, 604-09 (7th Cir. 2012).
317. *See supra* notes 178-88 and accompanying text.
318. *See id.*
319. *See id.*
320. *See id.*

recording.[321] For indeed, the calculation changes immeasurably where the recorder has "bugged" a private office, intruded on a hushed conversation in a restaurant booth, or invaded a private residence or automobile to capture a conversation with a police officer.[322] While all of those recordings would probably be achieved by surreptitious interception, it is not the clandestine nature of the recording that elevates the substantiality of the privacy interests, but the intrusion into an objectively private location that is protected by legitimate property, trespassing, and other laws.[323] A ban on the former alone captures too much protected speech to pass constitutional muster, while a ban on the latter involves privacy expectations of such a degree to place in serious doubt the propriety of the recorder's interception.[324] For all the foregoing reasons, the open/surreptitious distinction should be of no constitutional significance.[325]

D. ARE OFFICERS ENTITLED TO QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR UNCONSTITUTIONAL ARRESTS OF RECORDERS OF PUBLIC POLICE ACTIVITY?

Even where the right to film police in the exercise of their public duties has been positively declared, the risk remains that it is a right without a remedy.[326] Congress established § 1983 so that violations of constitutional liberties by persons acting under color of law could be vindicated.[327] However, government actors are entitled to an affirmative defense pursuant to the doctrine of qualified immunity that would defeat a claim for civil liability.[328] Qualified immunity will only attach if (i) the right at issue was not "clearly established" at the time of the alleged civil rights violation, and (ii) "a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights."[329] The courts may address the prongs in either sequence.[330] The First Circuit, in *Glik*, has already held that the right to record police in the public performance of their duties is "clearly established."[331] Following *Alvarez*, it is highly likely that the Seventh Circuit

321. *See Alvarez*, 679 F.3d at 607 n.13.
322. *See supra* notes 188-205 and accompanying text.
323. *See id.*
324. Frisby v. Schultz, 487 U.S. 474, 481 (1988).
325. *See id.*
326. Potere, *supra* note 27, at 289 ("Unfortunately, courts that use their *Pearson* discretion to avoid determining whether a constitutional right exists and then declare that a right is not clearly established can do so *ad infinitum*. This leads to the undesirable consequence that a right might never be established.").
327. 42 U.S.C. § 1983 (1996).
328. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
329. Glik v. Cunniffe, 655 F.3d 78, 81 (1st Cir. 2011).
330. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
331. *Glik*, 655 F.3d at 84-85.

will follow suit.[332] However, there is a potential circuit split. The Third Circuit, in *Kelly v. Borough of Carlisle*—a decision that predates *Glik* and *Alvarez*—granted a police officer's claim of qualified immunity after determining that the right to record police *at a traffic stop* was not clearly established.[333] It remains unanswered whether future courts will conclude—in the wake of *Glik* and *Alvarez*—that the right to record police is not "clearly established." However, it appears, for a variety of reasons, the *Kelly* case is an outlier, and the right affirmatively established in *Glik* and *Alvarez* (and a smattering of federal district court and state cases) is "clearly established."[334] Nonetheless, the question has serious implications for those, like Simon Glik or scores of wrongfully arrested civilians in Illinois, who seek to vindicate an unconstitutional deprivation of their right to record the public activities of police officers.

1. The "Clearly Established" Framework

The Supreme Court's guidance is frustratingly cryptic on how to determine whether a putative constitutional right is "clearly established" in a § 1983 action.[335] The Court has instructed that the government official must have "fair warning" that his actions would violate a protected right.[336] "Fair warning" in large measure is derived from the constructive notice provided by court opinions.[337] A case on point in the jurisdiction or a "robust consensus of cases of persuasive authority" delineating the right will provide this requisite "fair warning."[338] Unfortunately, the Supreme Court has not provided further illustration of how many "cases of persuasive authority" constitute a "robust consensus."[339] In *Glik*, the First Circuit held that a case decided ten years earlier, *Iacobucci v. Boulter*, conclusively established that there exists in the First Circuit "a right to film government officials or matters of public interest in public space."[340] *Iacobucci*, in concert with a raft of federal district court and state cases cited by the court, gave the officers "fair warning" of the unconstitutionality of their conduct.[341]

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332. *See id.*
333. Kelly v. Borough of Carlisle, 622 F.3d 248, 259 (3d Cir. 2010).
334. *See* notes 335-370 and accompanying text.
335. *See* Potere, *supra* note 27, at 287-88.
336. Hope v. Pelzer, 536 U.S. 730, 739-41 (2002).
337. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) (quoting Wilton v. Layne, 526 U.S. 603, 617 (1999)).
338. Glik v. Cunniffe, 655 F.3d 78, 84-85 (1st Cir. 2011).
339. *See* Potere, *supra* note 27, at 287-88. The First Circuit has suggested that two "closely related" cases may be sufficient to find that a right is clearly established. Wilson v. Boston, 421 F.3d 45, 57 (1st Cir. 2005).
340. *Glik*, 655 F.3d at 84-85.
341. *Id.*

2. There is a "Robust Consensus" of Persuasive Authority

Now that two circuit courts of appeals have declared a positive First Amendment liberty to record police officers in the execution of the public duties, there is likely a "robust consensus" of persuasive authority that render the right "clearly established."[342] What is more, there is no authority at the circuit level or in the federal district courts that stands contrary; no federal court has expressly held that the Constitution does not protect the right.[343]

Likewise, two more circuit courts in abbreviated fashion and in opinions that have not generated the attention of *Glik* and *Alvarez,* appear to have aligned themselves with the reasoning of the First and Seventh Circuits.[344] In *Smith v. City of Cumming*, the plaintiffs, James and Barbara Smith, filed a § 1983 action against the City of Cumming Police Department.[345] The Smiths, upset over a prior traffic stop, repeatedly filmed police pulling over other vehicles to create an evidentiary record of what they believed was the department's abusive use of traffic stops.[346] While the Smiths were never arrested, they alleged that they were continually "harassed" when videotaping officers.[347] The Eleventh Circuit offered terse recognition of "a First Amendment right, subject to reasonable time, place and manner restrictions, to photograph or videotape police conduct."[348] Nonetheless, the court dismissed the complaint, determining that the Smiths had "not shown that the Defendants' actions violated that right."[349] Similarly, in *Fordyce v. City of Seattle*, the Ninth Circuit reversed a grant of summary judgment to police officers who allegedly assaulted a marcher who attempted to film police interference with a public protest.[350] In remanding, the Ninth Circuit held that "a genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police

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342. *See Ashcroft*, 131 S. Ct. at 2084.

343. *See generally* ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

344. *See* Smith v. Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing First Amendment right to "record matters of public interest"); Fordyce v. Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

345. *Smith*, 212 F.3d at 1332-33.

346. *Id.*

347. *Id.* at 1333.

348. *Id.* In support, the Eleventh Circuit cited numerous cases. *Id. See* Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiffs' interest in filming public meetings is protected by the First Amendment); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); Iacobucci v. Boulter, 1997 U.S. Dist. LEXIS 7010, No. CIV.A. 94-10531 (D. Mass, Mar. 26, 1997) (unpublished opinion) (finding that an independent reporter has a protected right under the First Amendment and state law to videotape public meetings).

349. *Smith*, 212 F.3d at 1333.

350. *Fordyce*, 55 F.3d at 438.

officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest."[351] The court's affirmation of the First Amendment right, though coming in a brusque recognition in the secondary clause of one sentence, nonetheless operates as persuasive authority.[352] Indeed, the First Circuit in *Glik* found that the Ninth and Eleventh Circuits had, in fact, positively affirmed the First Amendment right to film police in public.[353] It explained that those courts' abrupt declarations of the right evinced the "self evident" nature of the issue.[354]

Importantly, the consensus of persuasive authority extends to federal district court cases that also have "clearly established" the First Amendment right.[355] In *Robinson v. Fetterman*, the U.S. District Court for the Eastern District of Pennsylvania awarded damages pursuant to § 1983 to a truck driver twice arrested for criminal harassment after videotaping police at a truck inspection point on a state highway.[356] The court further held that the First Amendment preserved Robinson's right to express his concern about the safety of truck inspections through videotaping officers.[357] Robinson's actions, the court reasoned like the First and Seventh Circuits in *Glik* and *Alvarez*, fell comfortably within the scope of the First Amendment's protection of the right to gather information about matters of public interest.[358] The court wrote: "videotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case."[359] Similarly, in *Cirelli v. Town of Johnston Sch. Dist.*, the U.S. District Court for the District of Rhode Island held that a teacher's videotaping of hazardous conditions at school was aimed at gathering information on a matter of public concern, which was protected by the First Amendment and subject only to permissible time, place, and manner restrictions.[360] These cases are further arrows in the quiver of persuasive authority that renders the right to film police "clearly established" in future § 1983 challenges.[361]

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351. *Id.* at 439.
352. *Id.*
353. Glik v. Cunniffe, 655 F.3d 78, 84-85 (1st Cir. 2011).
354. *Id.* at 85.
355. *See* Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); Cirelli v. Town of Johnston Sch. Dist., 897 F. Supp. 663, 668 (D.R.I. 1995) (holding that teacher had First Amendment right to videotape potentially hazardous working conditions at school, which were a matter of public concern).
356. *Robinson*, 378 F. Supp. 2d at 538-40.
357. *Id.* at 541.
358. *Id.*
359. *Id.*
360. *Cirelli*, 897 F. Supp. at 668.
361. *See Robinson*, 378 F. Supp. 2d at 541; *Cirelli*, 897 F. Supp. at 668.

3. Kelly *is Likely an Outlier*

In *Kelly v. Borough of Carlisle*, the U.S. Court of Appeals for the Third Circuit concluded that the U.S. District Court erred in holding that the § 1983 plaintiff's right to videotape the officers conducting his traffic stop was "clearly established" under the First Amendment.[362] Deciding without the benefit of the *Glik* or *Alvarez* opinions, the court determined that the Eleventh Circuit's opinion in *Smith v. City of Cumming* and the U.S. District Court for the Eastern District of Pennsylvania's ruling in *Robinson v. Fetterman* were "insufficiently analogous to the facts of this case."[363] Noting that the right to record police is "subject to reasonable time, place and manner restrictions," the Third Circuit emphasized that—even where generally protected under the First Amendment's protection for the "right to receive information and ideas"—videotaping is "inherently dangerous" in the setting of a traffic stop.[364] It is critically important to note that throughout the country, the "clearly established" analysis changed since the *Glik* and *Alvarez* opinions.[365] Cases in two different circuits of such magnitude, it must be said, put officers on "fair notice" of the constitutional right, *at minimum*, to openly film public police activity.[366] Moreover, as the First Circuit noted, *Kelly* is easily distinguished on its facts.[367] The court was not dismissive of the right, as Judge Posner's dissent, but stressed the significance of the fact that the recording occurred during a traffic stop. Indeed, the court wrote "the right to videotape police officers *during traffic stops* was not clearly established."[368] Not insignificantly, the recording also may have been surreptitious, as the officers contended they were not aware the plaintiff activated a recording device in his lap.[369] If anything, to the extent *Kelly* has any currency, the case stands for the proposition that a constitutional right to surreptitiously record a traffic stop is not "clearly established."[370]

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362. Kelly v. Borough of Carlisle, 622 F.3d 248, 259 (3d Cir. 2010).

363. *Id.* at 262. *See* Smith v. Cumming, 212 F.3d 1332, 1332 (11th Cir. 2000); *Robinson*, 378 F. Supp. 2d. 534.

364. *Kelly*, 622 F.3d at 262.

365. *See id.*

366. *See id.*

367. Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011).

368. *Kelly*, 622 F.3d at 263 ("[W]e recognized that the right to receive information and ideas was well established.").

369. *Id.* at 251.

370. *See id.* at 262-63.

IV. Conclusion

While the First and Seventh Circuit Courts of Appeals opinions in *Glik v. Cunniffe* and *ACLU v. Alvarez* answered many questions—and vastly deepened the well of persuasive authority regarding the First Amendment right to record public police activity—there remain unresolved issues. First, though an insightful commentary, Judge Posner's dissent in *Alvarez* is too attenuated from recognized First Amendment jurisprudence to be a model for future courts. It seems highly likely that future courts addressing the issue as one of first impression will follow the thoroughly reasoned opinion of the majority. Second, while the *Alvarez* majority determined that the Illinois eavesdropping statute was "content-neutral," and thereby applied the intermediate scrutiny standard, this appears to be error. All-party consent statutes that criminalize the recordation of police in the performance of their public duties contain numerous exemptions for police, media, telemarketers, and others. Therefore, the statutes elevate certain speakers based on content. As such, the Seventh Circuit should have applied strict scrutiny, as should future courts. Third, although the *Glik* and *Alvarez* opinions only extend constitutional shelter to "open" recording, surreptitious recording is equally deserving of First Amendment protection. Enforcing the open/surreptitious distinction is impracticable, and, more importantly, the "core" political expression threatened by a prohibition on concealed recording remains of the best constitutional pedigree, while the government interest in "conversational privacy" is no greater where neither the police nor those who converse with them have an objectively reasonable expectation of privacy. Moreover, the parties are reasonably protected from intrusion into sensitive conversations by property, trespass, and other laws that may not be derogated, even in pursuit of the First Amendment right to record. Lastly, following *Glik* and *Alvarez*, it appears that there is "a robust consensus of persuasive authority," rendering the right to record public police activity "clearly established."