

How Wiretap Laws Apply to Citizens Who Record Police
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Aiming a camera at police can be risky. Citizens in more than one jurisdiction have been arrested for video- and audio-recording on-duty police officers. These citizens are often documenting police abuses. In most cases, the arrests are unwarranted and based on wrongly applied wiretap statutes.

Citizens may successfully challenge their arrests as unlawful if they are in a state that allows recording of a communication as long as one party to it consents. The citizen who records police is the consenting party, so then the police cannot lawfully make an arrest to prevent the recording even if they do not consent to it.

Arrests also have occurred in states that allow recording only if all parties to it consent. In such states, citizens who record police have had difficulty challenging arrests as unlawful. Illustrative cases have occurred in three states: Massachusetts, Illinois, and Maryland.¹ In these states, police arrested citizens on the basis of wiretap statutes that prohibited recording unless all parties to the conversation had consented.²

In Massachusetts, Michael Hyde was arrested in 2001 for violating the state's wiretap statute after recording a police encounter.³ In a 4-2 decision, the Massachusetts Supreme Judicial Court upheld his conviction.⁴ In Illinois, Christopher Drew faced 4 to 15 years for violating the wiretap statute.⁵ Drew recorded his arrest for selling artwork

¹ Kyle VanHemert, *Are Cameras the New Guns*, Gizmodo, June 2, 2010, <http://gizmodo.com/5553765/are-cameras-the-new-guns>.

² *Id.*

³ *Id.*

⁴ *Commonwealth v. Hyde*, 434 Mass. 594 (2001).

⁵ Kyle VanHemert, *Are Cameras the New Guns*, Gizmodo, June 2, 2010, <http://gizmodo.com/5553765/are-cameras-the-new-guns>.

on the streets.⁶ The charges for not having a peddler's license and peddling in a prohibited area are misdemeanors, but those charges were dropped, and he was then prosecuted for violating the state's wiretap statute, which is a felony.⁷

Anthony Graber was pulled over by a Maryland State Trooper, who brandished his gun at him.⁸ Graber was on his motorcycle and his helmet camera recorded the encounter.⁹ When he got home, he posted the video on YouTube.¹⁰ Police then got a search warrant to raid his home and arrested him for violating Maryland's state wiretap law, with up to 16 years in prison.¹¹ The county judge's ruling in favor of Graber helped "clarify the state's [wiretap] law and makes it clear that police officers enjoy little expectation of privacy as they perform their duties."¹²

Wiretap statutes are generally classified as one-party or as two-party. One-party statutes require only one-party to consent to the recording, which can be the person recording. Two-party, or all-party, statutes require the parties to the conversation, without exception, to consent to the recording. In a two-party state, the person who is recording can be arrested when the police do not consent to a recording of themselves.¹³

Below is a table that shows states that are one-party or two-party consent states.

	ONE PARTY CONSENT	TWO PARTY CONSENT
Alabama	Nebraska	California

⁶ *Id.*

⁷ *Id.*

⁸ Annys Shin, *Traffic Stop Video on YouTube Sparks Debate on Police Use of Md. Wiretap Laws*, The Washington Post, June 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/15/AR2010061505556.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Peter Hermann, *Judge says man within rights to record police traffic stop*, The Baltimore Sun, Sept. 27, 2010, http://articles.baltimoresun.com/2010-09-27/news/bs-md-recorded-traffic-stop-20100927_1_police-officers-plitt-cell-phones.

¹³ Kyle VanHemert, *Are Cameras the New Guns*, Gizmodo, June 2, 2010, <http://gizmodo.com/5553765/are-cameras-the-new-guns>.

Ala. Code § 13A-11-30	Neb. Rev. Stat. § 86-283	Cal. Penal Code § 632(a) ¹⁴ ¹⁵
Alaska	Nevada	Connecticut
Alaska Stat. Ann. § 42.20.310	Nev. Rev. Stat. § 200.620	C.G.S.A. § 52-570d ¹⁶
Arizona	New Jersey	Florida
A.R.S. § 13-3005(a)(2)	N.J. Stat. Ann. § 2A:156A-2	Fla. Stat. § 934.03(2)(d) ¹⁷
Arkansas	New Mexico	Illinois
Ark. Code Ann. § 5-60-120	N.M. Stat. Ann. § 30-12-1 ¹⁸	720 ILCS 5/14-2 ¹⁹
Colorado	New York	Maryland
Colo. Rev. Stat. § 18-9-304.	N.Y. Penal Law § 250.00	Md. Code Ann., Cts. & Jud. Proc. § 10-402 ²⁰
District of Columbia	North Carolina	Massachusetts
D.C. Code § 23-542	N.C. Gen. Stat. Ann. § 15A-286	Mass. Ann. Laws ch. 272, § 99(c) ²¹
Delaware	North Dakota	Montana
11 Del.C. § 2402	N.D. Cent. Code § 12.1-15-04	Mont. Code Ann. § 45-8-213 ²²
Georgia	Ohio	New Hampshire
Ga. Code Ann. § 16-11-66(a)	Ohio Rev. Code Ann. § 2933.51	N.H. Rev. Stat. Ann. § 570-A:1 ²³
Hawaii	Oklahoma	Oregon
Haw. Rev. Stat. § 803-42	Okla. Stat. Ann. tit. 13, § 176.2	Or. Rev. Stat. Ann. § 165.540 ²⁴
Idaho	Rhode Island	Pennsylvania

¹⁴ In *People v. Algire*, the California Appellate Court held that the exclusionary rule of the Cal. Penal Code. § 632(a)(d), which prohibits confidential communications from being admissible in judicial proceeding, was abrogated by the Truth-in-Evidence provision of the California Constitution, which “permit[s] exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution.” *People v. Algire*, 165 Cal.Rptr.3d. 650, 655 (2013).

¹⁵ The California statute excludes any information “made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” Cal. Penal Code § 632(c).

¹⁶ C.G.S.A. § 53a-187, 53a-188 only requires one party consent and provides criminal liability, while § 52-570d requires all party consent and provides civil liability.

¹⁷ Florida’s statute only applies to a “person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting.” Fla. Stat. § 934.02(2).

¹⁸ In *New Mexico v. Hogervorst*, the Court of Appeals held that the state’s Interference with Communications law did not apply to face-to-face communication. *State v. Hogervorst*, 90 N.M. 580, 586 (N.M. Ct. App. 1977).

¹⁹ A prior version of 720 ILCS 5/14-2 was ruled unconstitutional in *People v. Clark* and *People v. Melongo*. It was held likely unconstitutional in *ACLU v. Alvarez*. Illinois introduced a new version, which also requires all-party consent, and has been effective since December 2014. *People v. Clark*, 6 N.E. 3d 154 (Ill. 2014); *People v. Melongo*, 6 N.E. 3d 120 (Ill. 2014); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

²⁰ In *Malpas v. Maryland*, the Maryland Court of Special Appeals interpreted the statute as applying only when the parties had a reasonable expectation of privacy. *Malpas v. Maryland*, 116 Md.App. 69 (1997).

²¹ Massachusetts courts have applied the statute to police recordings. *Commonwealth v. Manzelli*, 68 Mass.App.Ct. 691 (2007).

²² There are many exceptions to the statute, including when all the parties have been given warning of the recording. Mont. Code. Ann. § 45-8-213.

²³ The statute only applies when the person has a “reasonable expectation that the communication is not subject to interception.” N.H. Rev. Stat. Ann. § 570-A:1.

²⁴ There are many exceptions to the law, including “private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.” Or. Rev. Stat. Ann. § 165.540(6)(c)

Idaho Code Ann. § 18-6702

Indiana

Ind. Code Ann. § 35-31.5-2-176

Iowa

Iowa Code Ann. § 727.8

Kansas

Kan. Stat. Ann. § 21-6101(4)

Kentucky

Ky. Rev. Stat. Ann. § 526.020

Louisiana

La. Rev. Stat. Ann. § 15:1303

Maine

Me. Rev. Stat. Ann. tit. 15, § 710

Michigan²⁷

Minnesota

Minn. Stat. § 626A.02

Mississippi

Miss. Code Ann. § 41-29-531(e)

Missouri

Mo. Ann. Stat. § 542.400

R.I. Gen. Laws § 12-5.1-1

South Carolina

S.C. Code Ann. § 17-30-15

South Dakota

S.D. Codified Laws § 23A-35A-1

Tennessee

Tenn. Code Ann. § 40-6-303

Texas

Tex. Code Crim. Proc. Ann. art. 18.20

Utah

Utah Code Ann. § 77-23a-3

Virginia

Va. Code Ann. § 19.2-61

West Virginia

W. Va. Code § 62-1D-2

Wisconsin

Wis. Stat. Ann. § 968.27

Wyoming

Wyo. Stat. Ann. § 7-3-701

18 Pa. Cons. Stat. Ann. § 5702²⁵

Vermont²⁶

Washington

Wash. Rev. Code Ann. § 9.73.030

Information from: Reporters Committee for Freedom of the Press, Reporter's Recording Guide, <http://www.rcfp.org/reporters-recording-guide/state-state-guide/montana>; [AAPS, Summary of Consent Requirements for Taping Telephone Conversations, http://www.aapsonline.org/judicial/telephone.htm.](http://www.aapsonline.org/judicial/telephone.htm)

While most of the states that require all-party consent make an exception for when the parties are in public and have no reasonable expectation of privacy, often “this exception is not being recognized.”²⁸ The Supreme Court developed a test for

²⁵ Only applies when there is a reasonable expectation of privacy. 18 Pa. Cons. Stat. Ann. § 5704.

²⁶ There is no applicable statute; however, there are cases that indicate that Vermont may be an all-party state, one-party state, and require a reasonable expectation of privacy. See *Vermont v. Fuller*, 503 A.2d 550 (1985); *Vermont v. Kasper*, 404 A.2d 85 (1979); *Vermont v. Rheume*, 889 A.2d 711 (2005); *Vermont v. Brooks*, 601 A.2d 963 (1991).

²⁷ Michigan requires all parties to consent for a person to “use any device to eavesdrop” on a private conversation. Mich. Comp. Laws § 750.539c. However, in *Sullivan v. Gray*, the Michigan Court of Appeals held that the statute applied only to third parties, and not to participants of the phone conversation. *Sullivan v. Gray*, 117 Mich.App. 476, 481 (1982). In *Williams v. Williams*, the Michigan Court of Appeals held that this exception did not extend to allow vicarious consent. *Williams v. Williams*, 229 Mich.App. 318, 324 (1998).

²⁸ Kyle VanHemert, *Are Cameras the New Guns*, Gizmodo, June 2, 2010, <http://gizmodo.com/5553765/are-cameras-the-new-guns>.

“reasonable expectation of privacy” in *Katz v. United States*.²⁹ The test has an objective and subjective aspect.³⁰ Under this test, which is found in Justice Harlan’s concurrence, “a search under the Fourth Amendment occurs when (1) an individual possesses an actual expectation of privacy and (2) society would consider the expectation reasonable.”³¹ This test has been applied by the Supreme Court in later cases involving privacy issues and has “laid the groundwork for modern electronic surveillance laws.”³² Generally, courts have held that while in a public area that is viewable by third parties, there is no reasonable expectation of privacy.^{33 34} In Maryland and other jurisdictions, case law concludes that on-duty police do not have a reasonable expectation of privacy while conducting a traffic stop.³⁵

However, in January of 2015 a United States District Court in California ruled that an animal rights activist’s conversation on a public sidewalk was confidential.³⁶ California’s wiretap statute prohibits the recording of “confidential information,” which requires a “party to that conversation [to have] an objectively reasonable expectation that the conversation is not being overheard or recorded.”³⁷ The Court noted that the defendant provided “no authority suggesting that just because a conversation takes place on a public sidewalk, the speaker forfeits any reasonable expectation of

²⁹ *Katz v. U.S.*, 88 S.Ct. 507, 516 (1967).

³⁰ *Id.*

³¹ Dustin F. Robinson, *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 Geo. L.J. 1399, 1402 (2012) citing *Katz*, 88 S.Ct. at 516.

³² Carly Humphrey, *Keep Recording: Why On-Duty Police Officers do Not Have a Protected Expectation of Privacy Under Maryland’s State Wiretap Act*, 19 Geo. Mason L. Rev. 775, 786 (2012).

³³ *Id.*

³⁴ *McCray v. State*, 84 Md.App. 513, 519 (1990); *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001); *U.S. v. Hedrick*, 922 F.2d 396, 400 (7th Cir. Ct. of Appeals 1991).

³⁵ Carly Humphrey, *Keep Recording: Why On-Duty Police Officers do Not Have a Protected Expectation of Privacy Under Maryland’s State Wiretap Act*, 19 Geo. Mason L. Rev. 775, 786 (2012).

³⁶ *Cuviello v. Feld Entertainment, Inc.*, 90 Fed.R.Serv.3d 1009. 5 (N.D. Cal. 2015).

³⁷ *Id.* at 4-5.

confidentiality.”³⁸ When determining that the plaintiff’s communications were confidential, the Court took into account the plaintiff’s actions to distance himself from others, to look around to ensure no one else was around, and to lean in close to speak.³⁹ The Court concluded that the plaintiff had a reasonable expectation of privacy.⁴⁰

Massachusetts and Illinois were the only states to have an all-party consent statute that did not have an expectation-of-privacy provision.⁴¹ In Massachusetts in 2001, the Supreme Judicial Court “ruled that the wiretapping law granted no exception for citizens recording police officers.”⁴² During a traffic stop, the man had secretly recorded police officers during a traffic stop.⁴³ Lower courts, however, have interpreted the rule to apply only to surreptitiously recording police.⁴⁴ Therefore, “[p]eople get convicted of secretly recording police, while charges against people who record police openly have generally been thrown out.”⁴⁵

While Massachusetts has generally held that openly recording police is not illegal, the Illinois legislature “specifically amended the state’s wiretapping law to make it illegal to record on-duty police officers without their consent, even in public”⁴⁶ after *People v. Beardsley*.⁴⁷ However, a Seventh Circuit Court of Appeals ordered an Illinois county to

³⁸ *Id.* at 5.

³⁹ *Id.*

⁴⁰ *Id.* at 6.

⁴¹ Radley Balko, *The War on Cameras*, Reason.com, January 2011, <http://reason.com/archives/2010/12/07/the-war-on-cameras/singlepage>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Rania Khalek, *14 Years in Prison for Taping the Cops? How Eavesdropping Laws are Taking Away Our Defense Against Police Brutality*, AlterNet, July 27, 2011, http://www.alternet.org/story/151806/15_years_in_prison_for_taping_the_cops_how_eavesdropping_laws_are_taking_away_our_best_defense_against_police_brutality.

⁴⁷ Dustin F. Robinson, *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 Geo. L.J. 1399, 1410 (2012)

stop enforcing its all-party consent statute in 2012.⁴⁸ In *ACLU v. Alvarez*, the Court said that the First Amendment protects audio recording through the speech and press clauses and held that the ACLU had a strong likelihood of success on the merit and that the statute was likely unconstitutional.⁴⁹ Drew, who had been arrested for selling artwork on the streets, died less than 24 hours before the Seventh Circuits decision.⁵⁰ Then in 2014 the Illinois Supreme Court held that the Illinois wiretap was unconstitutional in *People v. Clark* and *People v. Melongo*.⁵¹ In December 2014, the Illinois legislature enacted a new all-party consent statute.

The previous version of the law stated that:

“(a) A person commits eavesdropping when he:

“(1) Knowingly and intentionally uses an eavesdropping device for the purposes of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (a) with the consent of all of the parties to such conversation or electronic communication[.]”⁵²

Conversation was defined in the statute 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.”⁵³ The current version of the statute still requires all of the parties to consent to the recording, but it requires that the communication be a “private conversation.”⁵⁴

⁴⁸ *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012).

⁴⁹ *Id.*

⁵⁰ Ryan Haggerty, *Christopher Drew, 1950-2012*, Chicago Tribune, May 10, 2012, http://articles.chicagotribune.com/2012-05-10/news/ct-met-drew-obit-20120510_1_eavesdropping-case-eavesdropping-law-separate-case

⁵¹ *People v. Clark*, 6 N.E. 3d 154 (Ill. 2014); *People v. Melongo*, 6 N.E. 3d 120 (Ill. 2014).

⁵² 720 ILCS 5/14-2(a)(1)(A) (West 2010).

⁵³ 720 ILCS 5/14-1(d) (West 2010).

⁵⁴ 720 ILCS 5/14-2.

Even in states where citizens can film on-duty police officers, the law is still being misapplied although the law is clear.⁵⁵ The Pennsylvania Supreme Court ruled that the state's wiretapping law did not apply to on-duty police officers because they had no expectation of privacy in 1989.⁵⁶ However, arrests still continue in Pennsylvania.⁵⁷ Brian Kelly was arrested for recording a traffic stop in 2008.⁵⁸ The District Attorney "told a local newspaper at the time that while Kelly might not have known his recording was illegal (which it wasn't), 'ignorance of the law is no defense.'"⁵⁹ In 2009, a federal judge ruled that Kelly was not entitled to damages for the unlawful arrest "because the First Amendment right to record police was not clearly established at the time of his arrest."⁶⁰ Then in 2009, Elijah Matheny was arrested for recording an altercation between his friend a police officer and the charges were later dropped.⁶¹

In Oregon, a man was wrongly arrested in 2011 for recording police who arrested his friend.⁶² The police paid the man a settlement, but the Beaverton Police Chief still told the "local newspaper that taping police without their consent is a 'technical violation' of Oregon law."⁶³ Then in New Hampshire, 2006, Michael Gannon was arrested in 2006 "for recording police in his own home, despite having a warning that the premises were monitored by a surveillance camera."⁶⁴ In 2011, Adam Whitman "was

⁵⁵ Radley Balko, *The War on Cameras*, Reason.com, January, 2011, <http://reason.com/archives/2010/12/07/the-war-on-cameras/singlepage>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

arrested for recording cops who had raided a party where they suspected underage drinking.”⁶⁵ Both men were charged initially, but the charges were later dropped.⁶⁶

While most states’ wiretap statutes allow citizens to record on-duty police officers, citizens are still being arrested when they do. Although courts are overturning these rulings, the arrests hinder free speech and citizens’ ability to act as a watchdog on the police. Until police are more aware of wiretap statutes and their applicability, and there are consequences for wrongfully arresting citizens, these ill-applied statutes will continue to be a hindrance.

⁶⁵ *Id.*

⁶⁶ *Id.*