PUBLIC OFFICIALS, PUBLIC DUTIES, PUBLIC FORA: CRAFTING AN EXCEPTION TO THE ALL-PARTY CONSENT REQUIREMENT

*BY JAKE TRACER**

INTRODUCTION

Anthony Graber, a Maryland Air National Guard staff sergeant, was riding his Honda motorcycle, speeding down I-95 near Balti-

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more at 80 miles per hour.[1] Chris Drew, an artist and free speech advocate, was offering his wares outside a Macy's on State Street in Chicago, where it is illegal for street vendors to sell their goods.[2] Robert Hammonds, an aspiring filmmaker, was yelling at what he thought was a drunk driver—but turned out to be a police officer—who had cut him off late one Saturday night in Miami.[3]

All three were arrested and charged with essentially the same crime: wiretapping. Graber, Drew, and Hammonds were all recording their experiences, and Maryland, Illinois, and Florida are three of twelve states that require all parties to a conversation to consent before that conversation can be recorded.[4] Because the police officers who stopped them never consented, the three were charged with felonies.[5] Drew and Hammonds were found out immediately; their recording equipment was discovered at the scene.[6] Graber's, however, was not. The circumstances that led to Graber being charged, as well as the court decision that subsequently dismissed those charges, highlight one of the predominant tensions in the wiretapping debate: the tradeoff between the free-speech right of citizens to record public activity, and law enforcement officials' rights to privacy and autonomy.

1. *See* Annys Shin, *From YouTube to Your Local Court*, WASH. POST, June 16, 2010, at A1.

2. *See* Cheryl Corley, *Often, You Can Film Cops; Just Don't Record Them*, N.P.R. (Sept. 1, 2010), http://www.npr.org/templates/story/story.php?storyId=129553748.

3. *See* Tim Elfrink, *Cops vs. Cameras: Filming Cops Illegal*, MIAMI NEW TIMES (Jan. 27, 2011), http://www.miaminewtimes.com/2011-01-27/news/cops-vs-cameras-filming-cops-illegal/.

4. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (LexisNexis 2011); 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2011); FLA. STAT. § 934.03 (2011). The other nine states are California, Connecticut, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *See* CAL. PENAL CODE §§ 631–32 (West 2012); CONN. GEN. STAT. § 53a-189 (2011); MASS. GEN. LAWS ch. 272, § 99 (2011); MICH. COMP. LAWS § 750.539c (2011); MONT. CODE ANN. § 45-8-213 (2011); NEV. REV. STAT. § 200.620 (2011); N.H. REV. STAT. ANN. § 570-A:2 (2011); 18 PA. CONS. STAT. ANN. § 5703 (West 2011); WASH. REV. CODE ANN. § 9.73.030(1)(b) (West 2010).

5. The maximum sentence for violating Maryland's wiretapping statute is five years. *See* MD. CODE ANN. CTS. & JUD. PROC. § 10-402(b) (West 2011). In Illinois, the maximum sentence is fifteen years for a first-time offense. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2011) (classifying the recording of a police officer as a Class 1 felony); 730 ILL. COMP. STAT. 5/5-4.5-30(a) (assigning a sentence of four to fifteen years for Class 1 felonies). In Florida, the maximum sentence is five years. *See* FLA. STAT. ANN. § 934.03(4)(a) (West Supp. 2011) (classifying the offense as a third-degree felony); FLA. STAT. ANN. § 775.082(3)(d) (West 2010) (assigning a maximum sentence of five years for third-degree felonies).

6. *See* Corley, *supra* note 2; Elfrink, *supra* note 3.

Scholars and courts have argued both sides. Those favoring a citizen's right to record police officers have noted that such a right would: (1) check the authority of the police to wield the state's power, especially since police can frequently undertake actions (like wiretapping) that would be illegal for citizens;[7] (2) deter potential misconduct of the particular officers being recorded;[8] (3) publicize misconduct when it does occur, thereby deterring misconduct generally;[9] and (4) foster the search for truth and exculpate the innocent.[10]

Conversely, critics of a broad right to record police activity have noted that such a right would: (1) ignore that police officers are individuals whose privacy can be invaded;[11] (2) potentially deter police conduct that should be encouraged;[12] and (3) erroneously assume that citizen recordings will always help the fact-finding process arrive at the correct conclusion.[13]

7. *See* Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1551 (2008) ("Police officers are permitted to commit actions that would be illegal if committed by private citizens, and some officers abuse that permission."(footnotes omitted)).

8. *See id.* at 1553 ("Where citizens are permitted to surreptitiously record the police, officers have incentives to be on their best behavior at all times, not just when their own recorders are on."); Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1003 (2009) ("The threat of surreptitious citizen recordings of police interactions further deters police misconduct." (footnotes omitted)).

9. *See* Mishra, *supra* note 7, at 1554 ("Recording devices can capture police officers' misconduct in order to publicize it.").

10. *See* Kirk v. State, 526 So.2d 223, 227 (La. 1988) ("There is no apparent governmental interest which is furthered by the classification which permits prosecutors to obtain and use this type of superior evidence that criminal defendants are prohibited from obtaining."); Skehill, *supra* note 8, at 1004 ("[C]itizen recordings could provide police departments with documented instances of police misconduct, which could aid in police training, making police departments less susceptible to Section 1983 lawsuits.").

11. *See* Mishra, *supra* note 7, at 1555 ("[S]tates should explicitly permit citizens to record police communications *other than* those uttered with the reasonable expectation that they would not be recorded." (emphasis added)); Shekill, *supra* note 8, at 1006 ("Without a doubt, off-duty police officers should enjoy privacy rights equal to those afforded regular citizens.").

12. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 357 (2011) (noting that some police officers do not want to be recorded because of concerns that making their identities more widely known will "put them at risk of retaliation").

13. This point is particularly important to remember as video evidence inevitably proliferates. While video evidence can be thought of as the ultimate smoking gun, its persuasive power belies the fact that, like all evidence, video must be interpreted to have meaning. Even the Supreme Court has struggled to recognize this

Social culture in the 21st century encourages the expansive sharing of public life, and advances in technology make it ever easier to distribute any information shared with the public at large. These dynamics inevitably create tension between citizens who want to record police activity and police officers who do not want such recordings to be created or distributed.[14] That tension is bound to emerge with increasing frequency until it is resolved. Even though the charges against Anthony Graber were eventually dismissed, his experiences reveal how seemingly innocuous acts can now potentially run afoul of wiretapping laws that require all parties to a conversation to consent to its recording.

Graber was pulled over for speeding on March 5, 2010, but the wiretapping charges against him were not filed until April 7.[15] The delay was caused by the fact that the officer who stopped Graber did not know the interaction had been recorded by a small camera mounted on Graber's motorcycle helmet.[16] On March 10, Graber posted the footage to YouTube, where the police eventually discovered it.[17] The first three minutes of the video are surprising in how unimportant they seem: The driver's-eye view shows the red motorcycle popping a wheelie, hitting 125 miles per hour on the speedometer, and changing lanes constantly while weaving between cars. At one point, the motorcycle approaches a marked police car and slows down. It then speeds up again, to about 80 miles per hour, and veers right onto an exit ramp. Then, around the three-minute mark, the motorcycle stops as an unmarked grey sedan pulls up alongside it. The driver of the sedan – wearing jeans and a grey pullover sweater – gets out of the car, pulls a gun out from its hol-

feature of video evidence. *See* Scott v. Harris, 550 U.S. 372, 389–90 (2007) (Stevens, J., dissenting) (arriving at exactly the opposite conclusion as the rest of the Court when reviewing video evidence that the majority held to be overwhelmingly clear).

14. *See* Joshua Brustein, *Stop, Frisk, Record*, N.Y. TIMES, June 8, 2012, at MB4, *available at* http://www.nytimes.com/2012/06/10/nyregion/a-new-tool-to-chronicle-police-stops.html (discussing the New York Police Department's displeasure at the release of a smart phone app developed by the New York Civil Liberties Union that encourages users to use their cell phones to record police stops and automatically upload the videos to the NYCLU).

15. *See* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *4–5 (Md. Cir. Ct. Sept. 27, 2010).

16. *See* Shin, *supra* note 1.

17. *See id*; Motorcycle Traffic Violation – Cop Pulls Out Gun, YOUTUBE (March 10, 2010), http://www.youtube.com/watch?v=BHjjF55M8JQ [hereinafter GRABER VIDEO]; *see also* Carlos Miller, *Motorcyclist Jailed for 26 Hours for Videotaping Gun-Wielding Cop*, PIXIQ (April 16, 2010, 2:46 AM), http://www.pixiq.com/article/maryland-motorcyclist-spends-26-hours-in-jail-on-wiretapping-charge-for-filming-cop-with-gun (attributing YouTube upload to Graber).

ster, and demands that Graber get off his motorcycle. Only after telling Graber that he is "state police" does the man put the gun away. Graber gets off the bike, and the video ends.

Graber's mistake, as the Maryland state circuit court later noted, was that he "did not tell the Troopers he was recording the encounter nor did he seek their permission to do so."[18] Even though Graber posted the video online to question the police officer's use of his gun in the situation,[19] the footage clearly showed that Graber in no way attempted to secure the officer's consent before recording.[20] The Harford County State Attorney, Joseph I. Cassilly, then prosecuted Graber, later acknowledging he did so in an attempt to spark the Maryland state legislature into changing the law.[21] Thus Graber was ultimately charged with a crime because he used a small device to record someone on the street and later posted the video to YouTube.

However, the text of the statute did not support prosecuting Graber for his actions. In criminalizing the interception of an "oral communication," Maryland defined the term to mean "any conversation or words spoken to or by any person in *private* conversation."[22] Analogizing to a civil claim that required the plaintiff to show a reasonable expectation of privacy before the Maryland Court of Special Appeals would find an "oral communication,"[23] the circuit court in *Graber* held that a police officer's stop of a motor vehicle on a public highway did not constitute a "private conversation."[24] In reaching that decision, Judge Emory A. Plitt Jr. concluded, "Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public.

18. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *4.

19. Graber titled his YouTube posting "Cop Pulls Out Gun On Motorcyclist" to call attention to that moment. *See* GRABER VIDEO, *supra* note 17.

20. Maryland allows the recording of a conversation when "all of the parties to the communication have given prior consent." MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (LexisNexis 2011).

21. Cassilly told a reporter he believes the statute "criminalizes all sorts of conduct that government has no business regulating." Justin Fenton, *Recording Police Likely OK, Attorney General Says*, BALT. SUN, July 30, 2010, http://articles.baltimoresun.com/2010-07-30/news/bs-md-attorney-general-wiretap-20100730_1_police-officers-recording-police-law-enforcement.

22. MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (LexisNexis 2011) (emphasis added).

23. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *10–11 (quoting Fearnow v. Chesapeake Telephone, 655 A.2d 1, 33 (Md. Ct. App. 1995)).

24. *Id.* at *7.

When we exercise that power in public fora, we should not expect our actions to be shielded from public observation."[25]

Judge Plitt's holding sides with citizens who seek to use their increasing access to recording equipment in order to document what they perceive to be police misconduct. While video footage may not be able to resolve issues of fact absolutely,[26] its existence and admission in court can constitute powerful evidence that neither citizens nor police departments would want to eliminate entirely. All twelve states that ban the recording of conversations absent all-party consent also have exceptions for police activity.[27] Yet every state recognizes that police should be able to record the activity of citizens in situations where it may prove necessary to discover or prevent the commission of a crime. If that video evidence, despite its inherent flaws and need for interpretation, has enough value to override the privacy interests of those being recorded, it seems reasonable that the value of deterring present and future police misconduct should also override any privacy interests that police officers possess.

Moreover the conflict between the police's use of state authority and the public's desire to check that authority can also apply more broadly to a larger group of actors exercising some kind of state power. In *Graber*, Judge Plitt's assertion that "[t]hose of *us* who are public officials . . . should not expect *our* actions to be shielded from public observation"[28] implicitly suggests a more expansive reading that one that would hold public officials other than police officers similarly subject to citizen recording. The ideal balance between the exercise of state power and the public's ability to check it is thus not an issue limited to concerns about police misconduct. It implicates every state actor, and with the seemingly limitless scope

25. *Id.* at *35.

26. *Cf.* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (noting that the video evidence seen as incontrovertibly conclusive by the Supreme Court in *Scott* was viewed differently by different social groups, suggesting that the Court's opinion substantively privileged one group's view and denied another's).

27. *See* CAL. PENAL CODE §§ 633 (West 2012); CONN. GEN. STAT. § 53a-187(b) (2011); FLA. STAT. ANN § 934.03(2)(c) (West Supp. 2011); 720 ILL. COMP. STAT. ANN. 5/14-3(g) (West 2011); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(2) (LexisNexis 2011); MASS. GEN. LAWS ch. 272, § 99(D)(1)(c) (2011); MICH. COMP. LAWS § 750.539g(a) (2011); MONT. CODE ANN. § 45-8-213(1)(c) (2011); NEV. REV. STAT. § 179.460(1) (2011); N.H. REV. STAT. ANN. § 570-A:2(II)(c)–(d) (2011); 18 PA. CONS. STAT. ANN. § 5704(2) (West 2011); WASH. REV. CODE ANN. § 9.73.090(2) (West 2010).

28. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *35 (emphasis added).

of technological possibility, normative principles must define the range of acceptable citizen recording.

This Note will attempt to define that range. Part I reviews both the federal and state wiretapping statutes, focusing primarily on the legislative histories of the dozen state statutes that require all parties to consent to recording before it can occur.[29] Part II then considers the three factors that should circumscribe a citizen's right to record state action: (1) whether the actor is a public official, (2) whether the actor is exercising a public duty, and (3) whether the actor is in a public forum. I argue that citizens should be able to record their interactions with any public official exercising a public duty in a public forum, regardless of whether the state's wiretapping statute includes an all-party consent requirement.

I.
FEDERAL AND STATE WIRETAPPING STATUTES

In order to describe the situations in which an exception to the all-party consent requirement should apply, it is first necessary to understand the policy rationales supporting the requirement. This section will outline those various justifications. Part A will briefly review the relevant history of federal wiretapping law, and Parts B, C, and D will then discuss the three rationales state legislatures have used to justify departing from the federal norms: the privacy of the conversation, the autonomy of the participants, and a combination of the two.

A. The One-Party Consent Standard in Federal Law

The development of wiretapping law in the United States has predictably followed the development of technologies that made wiretapping possible. In 1928, not long after the telephone became a staple of modern communication, the Supreme Court decided *Olmstead v. United States*, holding that warrantless police recording of the defendant's telephone conversations did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.[30] Writing for the majority, Chief Justice Taft distinguished the recording of telephone conversations from the opening of a sealed letter on the grounds that the letter "is a paper, an

29. The issue of citizen recording is not as prominent in the other 38 states, since citizens could presumably record their interactions with any state actor merely by consenting to their own acts of recording.

30. Olmstead v. United States, 277 U.S. 438, 464 (1928).

effect,"[31] and therefore must be searched to be discovered, while a telephone conversation, even when tapped and recorded, can be "secured by the use of the sense of hearing and that only."[32] Thus the Court concluded that the Fourth Amendment does not protect telephone conversations because no searching or seizing occurs.

Yet the Court in *Olmstead* also acknowledged that "Congress may of course protect the secrecy of telephone messages . . . by direct legislation,"[33] suggesting that the issue was not one for the Court to decide. Six years later, Congress accepted the Court's invitation by passing the Communications Act of 1934, which prohibited the interception of "any communication."[34] However, circuit courts differed in deciding whether the tapping of a telephone conversation with one party's consent violated the Act.[35] The Supreme Court eventually resolved the issue, deciding that all-party consent was not required as a prerequisite to recording communications under the statute.[36] The consent of one party would suffice.

The one-party-consent ethos survived the overruling of *Olmstead* in *Katz v. United States* in 1967.[37] While the Court in *Katz* rejected *Olmstead*'s conception of a search as requiring physical trespass,[38] it left open the possibility that recording a conversation with only one party's consent may not violate the Fourth Amendment.[39] The year after *Katz* was decided, Congress amended the Communications Act by passing the Omnibus Crime Control and

31. *Id.* at 464. The Fourth Amendment only protects "[t]he right of the people to be secure in their persons, houses, *papers, and effects*." U.S. CONST. amend. IV (emphasis added).

32. Olmstead, 277 U.S. at 464.

33. *Id.* at 465.

34. Communications Act of 1934, Pub. L. No. 416, § 605, 48 Stat. 1064, 1103–04 (amended 1968). The text was revised to prohibit "any *radio* communication." 47 U.S.C. § 605(a) (2006) (emphasis added).

35. *Compare*, *e.g.*, United States v. Polakoff, 112 F.2d 888, 889 (2d Cir. 1940) (requiring the consent of both parties before a third party can listen to a telephone conversation), *with* United States v. White, 228 F.2d 832, 835 (7th Cir. 1956) (finding no interception of a communication when one party to a conversation consents to a third-party listener).

36. *See* Rathbun v. United States, 355 U.S. 107, 111 (1957) ("Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.").

37. Katz v. United States, 389 U.S. 347 (1967).

38. *Id.* at 353.

39. *Id.* at 358 n.22 (finding that "[a] search to which an individual consents meets Fourth Amendment requirements").

Safe Streets Act of 1968,[40] which outlaws the interception of "any wire, oral, or electronic communication."[41] The Act provides an exception when the person recording "is a party to the communication or where one of the parties to the communication has given prior consent to such interception."[42] The one-party consent standard survived even as the rest of the *Olmstead* conception of wiretapping and privacy fell.

Under the federal one-party consent standard, people can record their conversations with others regardless of whether the other participants would consent to having their words preserved. While this rule has the advantage of simple administration and comports with general expectations that what is told to one person can usually be repeated to another,[43] some state legislatures felt that such a rule was not protective enough of individual privacy.[44] Since the federal standard is a floor that allows states to provide more privacy protection if they so choose,[45] these states adopted the all-party consent requirement in the wake of Congress' 1968 Act.[46] The states could not have anticipated that one day, decades later, the technology required to record public officials without their knowledge would be commonplace. The rationales for these state laws as

40. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711 (2006).

41. 18 U.S.C. § 2511(1)(a) (2006).

42. 18 U.S.C. § 2511(2)(d) (2006). For a view of the one-party consent provision in the federal statute as a response to *Katz*, see Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 842 (1998).

43. *See, e.g.*, United States v. White, 401 U.S. 745, 753 (1971) (holding that the Fourth Amendment does not prohibit informants from recording their conversations with suspects in part because informants can recount the conversations at trial and the recordings are merely "more accurate version[s] of the events in question").

44. Proponents of the all-party consent rule argue that while people may expect their conversations to be recalled by others, they do not expect them to be repeated verbatim. *See, e.g.*, State v. Goetz, 191 P.3d 489, 500 (Mont. 2008) ("[W]hile we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.").

45. *See* Bast, *supra* note 42, at 845 ("[S]tate statutes must protect the individual's privacy at least as much as the Federal Act, but the states may provide more protection.").

46. For example, Maryland legislators debated the all-party consent requirement in the early 1970s and eventually passed a bill that included it in 1977. See Part I.B.5, *infra*, for a full recounting of this legislative process.

expressed through their legislative histories present issues that any exception to the all-party consent rule must consider.

Different privacy concerns underlie the creation of the various all-party consent rules. Some states focus on the nature of the conversation as a proxy for privacy, while others focus on an individual's consent to recording as a proxy for autonomy concerns. Still others straddle the line, embracing both rationales. Each set of state rationales must be considered individually because different rationales for the all-party consent rule implicate different grounds for a potential exception.

B. The Nature of the Conversation

The first rationale for adopting the all-party consent rule considers the kind of conversation that can be protected from recording. According to this rationale, having consent to record from every party to a conversation signals that the conversation itself is not a private one and can therefore be preserved. In theory, then, if other factors suggest that the conversation in question is not private, it should be recordable even without the explicit consent of every individual. In other words, consent to record signals that the conversation is not private, but consent need not be the only possible signal. As described in depth below, six states relied on this notion of privacy to justify the all-party consent rule: Washington, Pennsylvania, California, Nevada, Connecticut, and Maryland.

1. Washington

Judicial interpretations of Washington's all-party consent rule offer a clear example of how a statutory focus on the nature of private conversations can provide the basis for exceptions to the rule. Washington is one of just ten states to protect personal privacy in its state constitution,[47] and its conception of the all-party consent rule prohibits people from recording any "[p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation."[48] The statutory focus on protecting "private" conversations implies that if the conversation in question is not private, then the ban on recording does not apply.

47. *See* James A. Pautler, Note, *You Know More Than You Think:* State v. Townsend*, Imputed Knowledge, and Implied Consent Under the Washington Privacy Act*, 28 SEATTLE U. L. REV. 209, 218 (2004). The other nine states are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, and South Carolina.

48. WASH. REV. CODE ANN. § 9.73.030(b) (West 2010).

Washington's courts have generally adopted this position. While the Washington Supreme Court has never decided a case on this issue, lower state courts have uniformly found exceptions to the State's all-party consent requirement when the circumstances surrounding a recorded conversation suggest that the conversation itself is not private. In *State v. Flora*, a state court explicitly found that police officers exercising their official duties in public are not protected by the all-party consent rule because their personal privacy interests fail the threshold question of "whether the matter at issue ought properly be entitled to protection at all."[49] Thus, in Washington, if a conversation's characteristics are not private—as official police activity on a public street was found not to be[50]—then any autonomy-based privacy interests of the individual participants are irrelevant.[51] Federal courts interpreting the state statute have come to similar conclusions.[52]

2. Pennsylvania

Similarly focusing on the nature of the conversation at issue, Pennsylvania's wiretapping statute bans the recording of "any wire, electronic or oral communication"[53] without all-party consent. The statute in turn defines "oral communication" to include only utterances "by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation."[54] In applying the statute to police officers, state courts have effectively focused only[55] on whether the circumstances of a conversation suggest it was private. Thus suspects are free to secretly record their interviews with police, not because interviewing officers subjectively expect them to do so, but because police usually record the interviews anyway, suggesting that conversations with police officers are not objectively private.[56] Police conversations in a squadroom can also be recorded without consent since

49. State v. Flora, 845 P.2d 1355, 1357 (Wash. App. Div. 1 1992).

50. In *Flora*, police officers approached the defendant because they received a tip that he had violated an ongoing protective order, and they discussed the issue with him on the street outside Flora's house. *Id.* at 1355–56.

51. For a full discussion of the autonomy-based rationale for the all-party consent requirement, see Section I.C, *infra*.

52. *See*, *e.g.*, Alford v. Haner, 333 F.3d 972, 976 (9th Cir. 2003) ("Tape recording officers conducting a traffic stop is not a crime in Washington.").

53. 18 PA. CONS. STAT. ANN. § 5703(2) (West 2011).

54. *Id.* at § 5702.

55. *See* Part I.D, *infra*.

56. *See* Commonwealth v. Henlen, 564 A.2d 905, 906 (Pa. 1989).

they can "be heard without amplification."[57] The Pennsylvania Supreme Court has not ruled on the question of whether police officers can ever engage in private conversations,[58] but its decisions on police activity in other contexts suggest that they can not.

3. California

Just as Pennsylvania courts have suggested that the state's wiretapping statute only applies to private conversations, the California Supreme Court has implied that a similar rationale controls interpretations of its state wiretapping law. California adopted the all-party consent rule in 1967 when legislative distaste for more relaxed judicial doctrine culminated in an attempt to quell the "serious threat to the free exercise of personal liberties" created by unauthorized recording.[59] However, in the context of recording conversations, the rule only applies to "confidential communication[s],"[60] defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . . or . . . in which the parties to the communication may reasonably expect that the communication may be . . . recorded."[61] This definition creates a "confidential communication" not when parties actually expect privacy, but only when it is objectively reasonable for them to do so.[62] Thus, in California, even when a party to a conversation does not consent to recording, the conversation can still be recorded if it is of a type

57. Agnew v. Dupler, 717 A.2d 519, 524 (Pa. 1998).

58. The Pennsylvania Supreme Court expressly declined to decide this issue in *Henlen*. *Henlen*, 564 A.2d at 907 (declining to reach the issue of whether "a police officer acting in his official capacity . . . waives the protections afforded under the Act").

59. CAL. PENAL CODE § 630 (West 2012). *See generally* H. Lee van Boven, *Electronic Surveillance in California: A Study in State Legislative Control*, 57 CAL. L. REV. 1182, 1191 n.57 (1969) (noting that prior to the enactment of California's privacy statute in 1967, "both California and federal courts had permitted all forms of participant monitoring").

60. CAL. PENAL CODE § 632(a) (West 2012).

61. *Id.* § 632(c).

62. *See generally* Flanagan v. Flanagan, 41 P.3d 575, 576–77 (Cal. 2002) (endorsing the standard "that a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded"). This approach greatly resembles that taken by the Pennsylvania courts, as discussed in Part I.B.2, *supra*.

that does not deserve protection.[63] In theory, this distinction could also apply to police officers.[64]

4. Nevada (and Connecticut)

The Nevada Supreme Court has interpreted that state's wiretapping statute[65] to apply the all-party consent rule only to certain types of conversations. In *Lane v. Allstate Insurance Co.*,[66] the court noted an odd distinction in Nevada state law that applied the all-party consent rule to phone conversations,[67] but only required one party to consent to the recording of an in-person conversation.[68] This is the clearest example of the privacy rationale that focuses on the nature of the conversation: the exact same conversation could have different standards applied to it based purely on its medium. Thus, for telephone conversations, Nevada always applies the all-party consent rule, whereas Washington and Pennsylvania courts ask whether the conversation was private; conversely, for in-person conversations, Nevada never applies the all-party consent rule while Washington and Pennsylvania might.[69] While this scheme may seem odd, Nevada is not alone in enforcing it: Connecticut's statute functions similarly.[70]

63. *See, e.g.*, People v. Nakai, 107 Cal. Rptr. 3d 402, 418 (Ct. App. 2010) (finding that defendant "reasonably indicated" he wanted a communication kept private, but that the conversation itself could be recorded or overheard and so did not merit protection under § 632).

64. During the height of the Occupy Wall Street protests in last November, a video depicting two University of California, Davis police officers pepper spraying peaceful student protesters went viral online. *See* Aggie TV, *UC Davis Protestors Pepper Sprayed*, YOUTUBE (Nov. 18, 2011), http://www.youtube.com/watch?v=6AdDLhPwpp4. Presumably, recording and disseminating the video is legal even though the officers involved did not consent to the recording.

65. NEV. REV. STAT. § 200.620 (2011).

66. 969 P.2d 938, 941 (Nev. 1998).

67. *See* § 200.620.

68. *See* § 200.650.

69. Since people looking to record their interactions with police officers would most likely be doing so in person, the Nevada wiretapping statute may not apply to the majority of interactions this Note argues should be exempted from the all-party consent requirement. However, private citizens may still wish to record their own phone conversations with public officials, so the Nevada statute is not entirely outside the scope of this Note's inquiry.

70. In Connecticut, the all-party consent rule only applies to telephone conversations and only results in civil damages. *See* CONN. GEN. STAT. § 52-570d (2011). Connecticut's criminal wiretapping statute also includes the all-party consent rule, but it only applies to recordings "by a person not present" at the conversation. § 53a-187(a). Because any citizen recording of public officials would only implicate recording by a participant in the conversation, Connecticut's criminal wiretapping statute is beyond the scope of this note.

The Nevada court in *Lane* upheld the distinction in part because in 1985 a proposed amendment to loosen the all-party consent rule for police activity was defeated in the state legislature because of concerns that police officers would abuse the lower standard and record too much.[71] This logic reveals that when the Nevada legislature upheld the need to apply the all-party consent rule to police activity, it justified the decision not based on concerns for the privacy of Nevada's citizens, but because of a need to regulate police activity. While the two concerns are related, they are not identical.[72] In this light, the all-party consent rule is less a protection of individual privacy than a prophylactic tool to regulate police behavior by selecting out certain types of conversations that should be recorded less frequently.[73] In other words, when bound up with deterring official misconduct, the all-party consent requirement does not solely aim to protect individual privacy; instead, it prevents recording so as to accomplish a goal outside the privacy realm.

5. Maryland

The history of Maryland's wiretapping statute—culminating in the *Graber* decision[74]—highlights the process by which state legislatures use the all-party consent requirement as a tool to regulate police behavior in the guise of protecting individual privacy.

The Maryland General Assembly originally passed a version of the statute with the one-party consent provision, but the governor vetoed it.[75] In a letter explaining his veto to the Speaker of the state House of Delegates, the governor quoted the portion of the bill that contained the one-party consent provision and concluded that

71. *See Lane*, 969 P.2d at 941 ("[L]egislators continued to express concern over potential abuses when judicial oversight is lacking.").

72. *See* Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH U. L. REV. 303, 307 (2010) ("Current Fourth Amendment jurisprudence governing searches contains two contrasting narratives, one focused on regulating police and the other on protecting privacy. Sometimes the two narratives coordinate; regulation of police can be privacy protecting. At other times the narratives diverge.").

73. Connecticut's granting of a private right of action for civil damages when telephone calls are recorded without the consent of all parties fits squarely into this category. The Supreme Court of Connecticut has acknowledged that the rule was enacted largely to ensure that "recording by officials not involved in law enforcement be done with the knowledge of both parties." Washington v. Meachum, 680 A.2d 262, 272 (Conn. 1996).

74. State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Sept. 27, 2010).

75. *See* Letter from Marvin Mandel, Governor of Md., to Hon. Thomas Hunter Lowe, Speaker of the House of Delegates of Md. (June 1, 1973) (electronic copy on file with author).

the "opportunity for unwarranted spying and intrusions on people's privacy authorized by [the] bill is frightening; and recent revelations have given clear indication that the possibilities of abuse are more real than theoretical."[76] The "recent revelations" probably referred to the Baltimore Police Department's practice dating back to the 1960s of asking phone company employees to listen in on select telephone conversations before police officers were able to secure warrants and listen themselves.[77] The practice ended in 1973 when the governor vetoed the bill.[78] In 1977, the state legislature passed a revised version of the bill that included the all-party consent requirement and the governor signed it into law. State courts responded by interpreting the requirement strictly, reflecting how important it was to the bill's enactment.[79]

The great irony in the history of Maryland's wiretapping statute is that the governor's stated focus on individual privacy grew out of a scandal implicating the blatant misconduct of police officers. Thus the statutory birth of the state's all-party consent requirement, while promoted as a victory for privacy interests, was primarily an attempt to deter state officials from gaining access to conversations they should not hear. Much like how Nevada courts have interpreted the state's wiretapping statute more from the perspective of regulating law enforcement rather than protecting individual privacy, Maryland's statute internalized this distinction in the legislative process leading up to the passing of the law. The regulation of police activity, not the privacy of Maryland citizens, was at issue when the governor vetoed the bill.

Despite this focus on police activity, the "controversial" aspect of the law when it was passed was that it had multiple consent standards for different situations, deviating from an all-party consent rule for police activity.[80] At the time, the American Bar Association advocated imposing an all-party consent rule on police infor-

76. *Id.*

77. *See* Marianne B. Davis & Laurie R. Bortz, *The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. BALT. L. REV. 374, 385 (1978).

78. *Id.* at 383–84.

79. *See, e.g.*, Adams v. State, 406 A.2d 637, 642 (Md. Ct. Spec. App. 1979) (finding that "by making both participants' consent mandatory, [Maryland] law has imposed stricter requirements for civilian monitoring than has federal law").

80. *See* Davis & Bortz, *supra* note 77, at 398 (characterizing the provisions that allow the police to record some conversations with only one-party consent "[u]ndoubtedly, the most significant and controversial change from earlier Maryland law").

mants,[81] but the Maryland legislature disagreed.[82] From the perspective of the present day, the conflict underscores how stated concerns in Maryland for protecting privacy through the all-party consent rule cannot be separated fully from worrying that police officers will be too active in their use of wiretapping technology.

Once the stated goal of protecting privacy is revealed as a kind of proxy for figuring out what kinds of conversations should be off limits to the police, it seems absurd to enforce the statute against someone like Anthony Graber, who acted with the intent to expose police wrongdoing. Thus, in holding that the all-party consent rule should not apply when citizens record police officers, Judge Plitt noted in *Graber* that at the very least, police officers' interactions with citizens "in public places"[83] are not the types of "private"[84] conversations that Maryland's wiretapping statute seeks to protect.[85]

Ultimately, while the goals of protecting privacy and deterring police misconduct overlap, they are not coextensive. If they were, the all-party consent rules in Maryland and Nevada would be dramatically overbroad because they would prohibit citizens from recording each other without any state actors involved. By using the all-party consent requirement, which ostensibly applies even in situations in which private citizens record one another, as a means to accomplish the end of ensuring that police only act in certain ways, the wiretapping statutes in these states raise the question of whether they should be applied in every circumstance in which they conceivably could. Thus the goal of deterring police misconduct through the all-party consent requirement puts pressure on state courts not to apply the statute when there is no reason to worry about police misconduct.

The process by which courts can determine whether police regulation is implicated in any given case necessarily shifts the inquiry to the nature of the conversation being recorded, rather than to whether the participants have affirmatively consented to such recording. Therefore, a broader exception to the rule that might en-

81. *See id.* at 394 n.145 (summarizing the ABA's suggested legislation as seeking in part "[t]o disallow interception where not all parties consent, *even where acting under police direction*" (emphasis added)).

82. *Id.*

83. State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *13 (Md. Cir. Ct. Sept. 27, 2010).

84. MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (LexisNexis 2011) (defining "oral communication" as "any conversation or words spoken to or by any person in *private* conversation") (emphasis added).

85. *See* § 10-402(a)(1) (prohibiting the interception of any "oral . . . communication" without the consent of all parties).

compass state actors other than police officers in situations other than police stops should ask whether the kinds of conversations sought to be protected by the rule align with the kind of conversation potentially to be exempted from it.

C. The Consent of the Participants

The second rationale for adopting the all-party consent rule focuses instead on individual liberty as reflected through an individual's consent to being recorded. In contrast to defining privacy by focusing on the nature of the conversation, this rationale protects privacy in the sense that it prohibits recording to respect the control each participant should have over the preservation and distribution of his own speech. Thus the privacy being protected is that of the autonomous individual who is recorded without consent. To overcome this privacy/autonomy rationale, any exception to the all-party consent rule would therefore have to implicate only conversations in which the people being recorded without consent either have no *ex ante* privacy interests at stake or have forfeited whatever privacy interests they do have because their consent can be implied even if it was not granted explicitly. Two states adopted the all-party consent rule explicitly to protect this autonomy-based privacy: Illinois and Massachusetts.

1. Illinois

Illinois adopted this autonomy rationale most explicitly, in part because the current statute is a legislative response to state judicial interpretations of the original law. The state's wiretapping statute has included the all-party consent rule since it was first passed as part of the Criminal Code of 1961, outlawing the recording of "all or any part of any oral conversation"[86] without "the consent of any party thereto."[87] However, in 1986, the Illinois Supreme Court held that the statute did not require the consent of every party to the conversation before recording could take place if the conversation was not a private one.[88] Considering a factual scenario similar to that in *Graber*,[89] the court read Illinois' statute to embrace the con-

86. ILL. REV. STAT., ch. 38, para. 14-2(1) (1961).

87. ch. 38, para. 14-2(1)(A).

88. *See* People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986) ("The primary factor in determining whether the defendant in this case committed the offense of eavesdropping is not, as the appellate court reasoned, whether all of the parties consented to the recording of the conversation.").

89. In *Beardsley*, the defendant attempted to record his interaction with a police officer after being pulled over for speeding. *See id.* at 347. However, unlike

cept of privacy based on the nature of the conversation; thus even though the defendant was recording the conversation of two police officers, he did not violate the statute because the officers' conversation was not private while the defendant was present.[90]

The Illinois state legislature responded in 1993 by amending the statute to require explicitly the consent of every party regardless of the nature of the conversation. The 1993 amendment defines "conversation" in the statute as "any oral communication between two or more persons *regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation*,"[91] tracking exactly the Illinois Supreme Court's language in *People v. Beardsley*[92] to overturn that case. And in case that approach somehow seemed too subtle, proponents of the amendment in both houses of the state legislature noted their intent to overturn *Beardsley* in the legislative debates. In the state Senate, Senator Hawkinson described *Beardsley* as "essentially overturn[ing] our own statute," stating that the amendment would "revert that law back to what we intended . . . so that citizens . . . will not be able to tape each other without consent."[93] The next day, in the House of Representatives, Representative Dart described the amendment as being "in answer to the *Beardsley* case"[94] and said that the Illinois Supreme Court had "misinterpreted the statute."[95]

Since that 1993 amendment took effect, Illinois courts have applied the wiretapping statute regardless of the privacy of the conversation, focusing exclusively on the question of consent.[96] Thus the

Anthony Graber, Robert Beardsley took the recording equipment with him into the police squad car after he refused to show a driver's license, recording the officers' conversation while he was sitting in the back seat. *See id.* at 347–48. Since the officers knew Beardsley was in the car, the court found that their conversation in the front seat was no longer private. *Id.* at 350.

90. *See id.* at 350. The court noted that "it seems logical that if the officers intended their conversation to be entirely private, then they would have left the squad car," suggesting that the intent of the nonconsenting party may affect the legal outcome. *Id.* In the same paragraph, however, the court noted that such intent only matters "under circumstances justifying such expectation." *Id.* Thus the court's approach has more in common with the external privacy rationale because the statute can only apply to conversations the court deems to be private.

91. 720 ILL. COMP. STAT. 5/14-1(d) (2011) (emphasis added).

92. *See Beardsley*, 503 N.E.2d at 350 (framing the central issue as "whether the officers/declarants intended their conversation to be of a private nature under circumstances justifying such expectation").

93. S. 88-69, 1st Reg. Sess., at 32 (Ill. 1993) (statement of Sen. Hawkinson).

94. H.R. 88-75, 1st Reg. Sess., at 25 (Ill. 1993) (statement of Rep. Dart).

95. *Id.* at 26 (statement of Rep. Dart).

96. *See, e.g.*, *In re* Marriage of Almquist, 704 N.E.2d 68, 71 (Ill. App. Ct. 3d Dist. 1998) ("[T]he addition of a definition of 'conversation' to the eavesdropping

state's justification for the all-party consent rule has shifted from a judicially created rationale focusing on the nature of the conversation to a legislatively created approach centered on the autonomy interest underlying consent.[97] While the constitutionality of Illinois' wiretapping statute is now in doubt,[98] the state is not alone in adopting this approach.

2. Massachusetts

The judicial doctrine that developed in Massachusetts following the adoption of the all-party consent rule in that state suggests that once an autonomy-based approach is firmly entrenched, courts still have to develop a method to determine whether parties have consented to recording in a given case.[99] So when Massachusetts overhauled its wiretapping statute in 1968 by implementing a definition of privacy based on individual consent,[100] state courts had to determine exactly when recording by "any person other than a per-

statute was an effort narrowly tailored to the goal of removing any expectation of privacy element from the crime of eavesdropping.").

97. The importance of this distinction has increased in light of the recent trend of police departments requiring officers to wear video- and audio-recording cameras attached to their chests at all times while on duty. *See* Erica Goode, *Video, a New Tool for the Police, Poses New Legal Issues, Too*, N.Y. TIMES, Oct. 12, 2011, at A14, *available at* http://www.nytimes.com/2011/10/12/us/police-using-body-mounted-video-cameras.html (noting that "more than 1,100 police agencies across the country" have purchased such devices). Such recording would presumably be illegal in a state like Illinois since the individuals being recorded would not have consented to such recording by police. Conversely, such recording would presumably be legal in states that consider the nature of the conversation, since a police officer's conversations are not private. Such recording may violate the privacy rights of those being recorded for other reasons, however.

98. *See* ACLU of Ill. v. Alvarez, No. 11-1286, slip op. at 47 (7th Cir. May 8, 2012) ("Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties—including audio recording that implicates no privacy interests at all.").

99. Naturally, this question does not concern states that consider privacy based on the nature of the conversation. Likewise, the question of whether a conversation is objectively reasonably private or deserving of protection does not concern states that exclusively follow the autonomy-based rationale.

100. The statute's preamble declares in part the intent to curb "the secret use" of recording equipment, suggesting that the problem with such equipment is not that it is used in certain situations, but rather that it is used without the consent of all the parties to a conversation. *See* MASS. GEN. LAWS ch. 272, § 99(A) (2011).

son given prior authority by all parties" to a conversation had occurred.[101]

In 1976, the Supreme Judicial Court of Massachusetts established the necessary framework. In *Commonwealth v. Jackson*, the court was faced with the question of whether a recorded telephone conversation in which the defendant said, "[y]ou know, I know the phone is tapped," but nonetheless never consented to the recording, fell under the wiretapping statute's prohibition of interceptions.[102] Noting that the statute only defines "interceptions" to mean "to secretly hear [or to] secretly record,"[103] the court reasoned that if the recording was not a secret, it did not fall under the statute.[104] Thus the court held both that the defendant's actual knowledge of the recording could take the action outside the scope of the statute and that such knowledge could be implied by "clear and unequivocal objective manifestations of knowledge, for such indicia are sufficiently probative of a person's state of mind as to allow an inference of knowledge."[105]

Ultimately, the court read the statute to focus on the mental state of the person being recorded because the legislature had focused on individual consent when crafting the contours of the wiretapping law. Such a judicial approach loosens the strict all-party consent rule by allowing courts to find a kind of implied consent when no explicit authorization exists.[106] The line between implied knowledge and lack of knowledge is still maintained in Massachusetts state courts today.[107]

Taken together, the Illinois and Massachusetts experiences with the all-party consent rule suggest that to overcome the contours of an autonomy-based approach to privacy, any exception must either cover only individuals who have no personal interest in

101. § 99(B)(4) (defining "interception," which is made illegal by § 99(C)(1)).

102. *See* Commonwealth v. Jackson, 349 N.E.2d 337, 339 (Mass. 1976).

103. *Id.* (alteration in original) (quoting MASS. GEN. LAWS ch. 272, § 99(B)(4)).

104. *See id.* ("[I]f the two recordings in this case were not made secretly, they do not constitute an 'interception' as defined by § 99 B 4.").

105. *Id.* at 340.

106. *See* Jack I. Zalkind & Scott A. Fisher, *Participant Eavesdropping – The All Party Consent Requirement*, 22 BOS. B. J. 5, 8 (1978) ("[*Jackson*] in effect permits an 'interception' of a communication where the statements of the aggrieved party imply consent, even though in actuality, no 'prior authority' had been obtained from 'all parties.'").

107. *See, e.g.*, Commonwealth v. Boyarsky, 897 N.E.2d 574, 579 (Mass. 2008) (applying *Jackson*).

privacy worth protecting or—if a state legislature forecloses that route as Illinois' did—embrace only situations in which individuals with privacy interests can be found to imply their consent to recording.[108] This suggests a different potential exception than one focused on what classes of conversations should be exempted. However, since some states adopted the all-party consent rule on the basis of both rationales discussed above, any realistic exemption would have to account for both justifications.

D. Conversation and Consent

Rather than focusing exclusively on either rationale for the all-party consent rule, four states adopted the rule on the basis of both theories: Florida, Montana, Michigan, and New Hampshire. The laws in these states are motivated by concerns for both the private nature of conversations and the consent of the participants. Because of this complexity, courts in these states sometimes adjust the reach of the all-party consent requirement by using the medium of the conversation as a proxy to find implied consent when explicit consent does not exist.

1. Florida

Florida, for example, prohibits recording speech "uttered by a person exhibiting an expectation that such communication is not subject to interception" under "circumstances justifying such expectation."[109] Although the language of Florida's wiretapping statute is similar to Pennsylvania's,[110] the two states have interpreted their respective laws differently. In Pennsylvania, courts have focused exclusively on the objective reasonableness of a privacy expectation, even under circumstances suggesting that the speakers did not subjectively expect their conversations to be private.[111] Florida courts, on

108. Naturally, an exception that did both would be fine as well.

109. FLA. STAT. ANN. § 934.02(2) (West Supp. 2011).

110. Pennsylvania's law defines "oral communication" to include statements "by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 PA. CONS. STAT. ANN. § 5702 (West 2011). For a full discussion of Pennsylvania's wiretapping statute, see Part I.B.2, *supra*.

111. *See, e.g.*, Commonwealth v. Henlen, 564 A.2d 905 (Pa. 1989). In *Henlen*, the Supreme Court of Pennsylvania first found that a state trooper who allowed a third party to be present for part of a suspect interview could not have "expected his conversation with Appellant to remain confidential." *Id.* at 906. Rather than concluding that the subjective prong ended the inquiry, however, the court went on to hold that the trooper did not "possess[ ] a *justifiable expectation* that his words would not be subject to interception." *Id.* at 907 (emphasis added). By ruling on

the other hand, focus on both prongs of the intended statutory inquiry.

The Florida statute therefore resembles a classic expectation of privacy inquiry,[112] which incorporates consent because anyone who consents to recording could not subjectively expect the conversation to be private. The two provisions of the statute—so integrated that they appear in the same *sentence* defining "oral communication"—effectively treat the finding of a private communication as a threshold matter, which, if met, triggers a judicial inquiry into the issue of consent.[113] If a conversation is deemed private in nature, then Florida law only considers recording lawful "when *all* of the parties to the communication have given prior consent."[114]

While the Florida legislature sought to enact a broad standard of privacy protection when it adopted the all-party consent rule in 1974,[115] incorporating both rationales actually limits the potential scope of the act. To be sure, any semblance of the all-party consent requirement necessarily increases the protection offered federally. However, the two inquiries contemplated by Florida's law narrow the application of the all-party consent requirement. Since either prong can establish a lawful basis for recording, Florida law allows the recording of conversations that other states would not.[116] Since Florida courts have interpreted the scope of "private" conversations

the objective prong of the statute when the subjective prong alone could have resolved the inquiry, the Pennsylvania Supreme Court effectively read the subjective prong out of the state law.

112. The subjective-objective approach recalls Justice Harlan's "reasonable expectation of privacy" test in *Katz*. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

113. For a recent example, see *Jackson v. State*, 18 So. 3d 1016, 1030 (Fla. 2009) ("[A] speaker must have an actual subjective expectation of privacy and our society must recognize that the expectation is reasonable for the oral conversation to be protected.").

114. FLA. STAT. ANN. § 934.03(2)(d) (West Supp. 2011) (emphasis added). Police, however, can record with the consent of only one party to the conversation. § 934.03(2)(c).

115. By court accounts, the *only* comment on the floor of the Florida House of Representatives when considering the bill stated that it would "make it illegal[ ] for a person to record a conversation, even though he's a party to it, without the other person's consent." *See* State v. Tsavaris, 394 So. 2d 418, 422 (Fla. 1981) (quoting from a tape of the legislative debate).

116. For example, if a conversation is found not to be private, recording would be allowed regardless of whether or not a party consents, violating the autonomy rationale discussed in Part I.C, *infra*. Likewise, if a court finds that a party implies his or her consent, recording would be allowed regardless of whether or not other circumstances would suggest it was private, violating the nature of the conversation rationale discussed in Part I.B, *infra*.

narrowly,[117] the range of the all-party consent rule's application is limited even further.

2. Montana

Montana's experience with the all-party consent requirement bears out this tension even more dramatically. In 1972, the state revised its constitution, explicitly including an individual right of privacy in the final version.[118] As one delegate at the 1972 constitutional convention explained, the right "produces . . . a semipermeable wall of separation between individual and state. . . . [W]hat it says is, don't come into our private lives unless you have good reason for being there."[119] This constitutional foundation implicates an autonomy-based rationale for the all-party consent requirement because the state's focus is on protecting an individual right as opposed to a structural concern about what kinds of conversations should and should not be recorded. As the Montana Supreme Court has noted, this emphasis leads to the conclusion that even when people expect their conversations to be repeated, their words cannot be recorded without consent.[120] It is probably for this reason that the state's all-party consent statute explicitly mentions "the knowledge of all parties to [a] conversation,"[121] but not the nature of the conversation in question.

However, the Montana Constitution still allows for recording when there is no personal privacy to invade. Thus, despite the Montana Supreme Court's 2008 finding that the state constitution pro-

117. Only conversations in the home have strong privacy protection in Florida. *See* Carol M. Bast, *Eavesdropping in Florida: Beware a Time-Honored But Dangerous Pastime*, 21 NOVA L. REV. 431, 457 (1996) ("Thus far, Florida courts have not recognized that it is possible to have a reasonable expectation of privacy in a location other than one's home.").

118. *See* MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

119. Larry M. Elison & Dennis NettikSimmons, *Right of Privacy*, 48 MONT. L. REV. 1, 11 (1987) (quoting statement of Delegate Campbell).

120. *See* State v. Goetz, 191 P.3d 489, 500 (Mont. 2008) ("We are convinced that Montanans continue to cherish the privacy guaranteed them by Montana's Constitution. Thus, while we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.").

121. MONT. CODE ANN. § 45-8-213(1)(c) (2011).

tects privacy beyond the scope of the Fourth Amendment,[122] two years later, in *State v. Meredith*, that same court found that comments made in a police interrogation room were not private, even if the speaker expected them to be.[123] The court found that the speaker "*may* have an expectation of privacy in his statements,"[124] but the conversation itself was not private. Implicitly addressing the issue of consent, the court then found that "there was no reason . . . to make the incriminating statements out loud unless [the speaker] wanted to be overheard. Had he wanted to preserve his privacy, he would not have voiced his thoughts."[125] Although the reasoning may seem circular,[126] the conclusion implies that the speaker did in fact consent to the recording.

State v. Meredith cements Montana's reliance on both rationales for the all-party consent requirement because the judicial inquiry is focused on both the nature of the conversation and the speaker's consent.[127] But that reasoning leaves an open question: does Montana's state law require finding both that the conversation is not private and that consent is implied, or, like under Florida law, is one finding sufficient? *Meredith* does not answer this question. Its dicta suggests that the speaker somehow consented because speaking implies that the speaker wants to be overheard. That interpretation would practically eliminate consent as a factor, but the reasoning has not yet been tested directly. Given the state constitution's emphasis on individual privacy, it seems possible that Montana's reliance on both rationales for the all-party consent requirement will ultimately lead the state to limit recording as much as possible. This position would favor a final rule that requires finding both that a conversation is not private and that the participants all consented explicitly before recording can occur.

122. *See Goetz*, 191 P.3d at 496 ("Article II, Section 10 of the Montana Constitution, in conjunction with Article II, Section 11, grants rights beyond those in the federal constitution and requires an independent analysis of privacy and search and seizure issues.").

123. *See* State v. Meredith, 226 P.3d 571, 580 (Mont. 2010) ("Police interrogation rooms are traditionally areas where people are watched and monitored in some form or fashion whether it be by two-way glass, video taping or audio recording.").

124. *Id.*

125. *Id.*

126. If the mere act of speaking implies that the speech is not meant to be private, then *any* speech could be recorded as long as it is spoken aloud, which is to say that any speech could be recorded.

127. *See Meredith*, 226 P.3d at 571 (considering both whether the defendant implied his consent by speaking and whether his conversation was private).

3. Michigan

Montana's wiretapping statute suggests that reliance on both rationales for the all-party consent requirement can make recording illegal in more circumstances than reliance on only one rationale, while Florida's law suggests the opposite. The law in Michigan does not fit either model. While its wiretapping statute is explicit in adopting the all-party consent rule, state courts have limited its application so severely that the underpinning rationale is muddled and unclear.

In Michigan, eavesdropping is defined as recording "any part of the private discourse of others without the permission of all persons engaged in the discourse."[128] While the text of the statute seems clear in its adoption of the all-party consent requirement, in *Sullivan v. Gray* a state Court of Appeals read it as applying only to third parties, since the "discourse of others" implies that the person recording is not participating in the conversation in question.[129] While the Michigan Supreme Court has neither affirmed nor overruled the Court of Appeals' interpretation,[130] other courts in the state have consistently followed the decision.[131] Thus the explicit all-party consent requirement in Michigan only applies when someone *other* than a participant in the conversation records it. This distinction blends the two rationales for the all-party consent requirement by imagining "private" conversations as those not recorded by one of the participants while also explicitly incorporating consent.

The distinction may have been significant when *Sullivan* was decided in 1982; at the time, small recording technology that could be hidden by a person in a conversation was still relatively unusual. However, as technology has advanced and it has become relatively simple for anyone to record conversations on small devices, the

128. MICH. COMP. LAWS § 750.539a(2) (2011).

129. *See* Sullivan v. Gray, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982) ("The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. Had the Legislature desired to include participants within the definition, the phrase 'of others' might have been excluded or changed to 'of others or with others'.").

130. *See* Dickerson v. Raphael, 601 N.W.2d 108 (Mich. 1999).

131. *See, e.g.,* Lewis v. LeGrow, 670 N.W.2d 675, 683–84 (Mich. Ct. App. 2003) (following *Sullivan* explicitly); People v. Lucas, 470 N.W.2d 460, 472 n.19 (Mich. Ct. App. 1991) (same); *see also* Jonathan Turkel, *When Words Come Back to Haunt You: A Primer on the Use and Admissibility of Surreptitiously Recorded Conversations in Civil Cases*, 87 MICH. B. J., Oct. 2008, at 26, 28 (2008) ("The Michigan Court of Appeals has reaffirmed the *Sullivan* rationale, but the Michigan Supreme Court has expressly reserved ruling on its soundness" (citations omitted)).

Court of Appeals' interpretation of "discourse of others" eviscerates the explicit all-party consent requirement in the state. In this way, it does not matter what rationales the Michigan legislature considered when adopting the requirement because the courts and modern technology have effectively read it out of the statute.

4. New Hampshire

New Hampshire draws a similar distinction between a third party recording a conversation and a participant doing the same. But while one is illegal and one legal in Michigan, both are illegal in New Hampshire: A third party's recording is a felony,[132] while a participant's recording is only a misdemeanor.[133] This distinction reflects a concern for the consent of the participants being recorded, since people may expect their conversations to be repeated by the person to whom the statements are made, but not by third parties outside the conversation. While this might suggest a broad application of the all-party consent requirement in New Hampshire, state courts have recently acted to insert into the law some sensitivity to the nature of the conversation.

The New Hampshire Supreme Court, for example, has in recent years taken a broad view of consent, considering external factors outside those reflecting how people express themselves. In two recent cases involving the question of whether a defendant consented to the recording of online instant messaging communications, the court has made this approach especially clear. In *State v. Lott*, decided in 2005, the court found that the defendant had consented because "persons using an instant messaging program are aware that their conversations are being recorded."[134] Thus consent can be inferred based purely on the type of communication used; this approach resembles the doctrine of implied consent that Massachusetts courts have developed.[135]

However, in *State v. Moscone*, decided in 2011, the New Hampshire Supreme Court relied on *Lott* to find consent even when the defendant told the person with whom he was communicating to "delete [her] archives,"[136] suggesting that even though the type of conversation *could* be recorded, the defendant did not expect this particular one to be. However, the court decided that because "the

132. *See* N.H. REV. STAT. ANN. § 570-A:2(I) (2011).
133. *See* § 570-A:2(I-a).
134. State v. Lott, 879 A.2d 1167, 1171 (N.H. 2005).
135. *See* Part I.C.2, *supra*.
136. State v. Moscone, 13 A.3d 137, 145 (N.H. 2011).

messages were capable of being recorded,"[137] he had consented nonetheless. This shifts the inquiry from the determination of subjective consent to a pure consideration of the medium of conversation; once the court found that the instant messages were recordable, it effectively found that the defendant had consented to such recording because the conversation was no longer private. While it seems unlikely the court would extend the analysis so far, there seems to be little preventing reliance on *Moscone* to find that because any conversation is capable of being recorded by an ordinary cell phone, consent can always be implied even if explicitly denied.

The New Hampshire Supreme Court's interpretation of the state's wiretapping statute also suggests that the distinction between the two rationales for the all-party consent rule may begin to blur. As *Moscone* shows, the fact that the statutory structure reflects a concern for autonomy, as is implicit in this state's all-party consent requirement, did not prevent state courts from shifting the analysis to the medium of the conversation. In other words, even if a legislature focuses on only one rationale, state courts may well supply the other. This potential blurring of the two rationales, along with the fact that some states explicitly rely on both, explains why any exception for the all-party consent requirement should satisfy both rationales. Otherwise, the scope of the exception may not accurately match the policy rationales states use in justifying the rule.

II.
THE RIGHT TO RECORD STATE ACTION

Before considering the appropriate extent of an exception to the all-party consent rule, it is first necessary to determine the source of such an exception. Scholars have offered various First Amendment foundations for the existence of a constitutional right to record police activity.[138] Recent circuit court decisions have held such a right exists in some form under the First Amendment.[139]

137. *Id.*

138. For a summary of the five arguments—which include inherently expressive activity; the Free Press Clause; the right to gather information; the public's right to receive information; and prior restraints—see Michael Potere, *Who Will Watch the Watchers?: Citizens Recording Police Conduct*, 106 Nw. U. L. Rev. (forthcoming 2012) (manuscript at 36), *available at* http://ssrn.com/abstract=1837718. Choosing among the five theories is well beyond the scope of this Note.

139. *See* ACLU of Ill. v. Alvarez, No. 11-1286, slip op. at 34 (7th Cir. May 8, 2012) (holding that the Illinois eavesdropping statute "interferes with the gathering and dissemination of information about government officials performing their duties in public" and is therefore subject to First Amendment scrutiny); Glik v.

Depending on the currently unknown extent of First Amendment protection, legislative involvement may nonetheless prove necessary in order to establish the bounds of the exception to the all-party consent rule. If the right to record police activity is ultimately not protected by the First Amendment, exceptions to the all-party consent requirement will have to come from the legislature. While reliance on legislation has the disadvantages of piecemeal, state-by-state applicability[140] and inevitable delay,[141] it also has the advantage of allowing an exception's contours to be determined by policy rather than constitutional doctrine. If the First Amendment protects the right of citizens to record their interactions with police officers, it may not allow citizens to record a host of other state actors similarly exercising state authority in public.[142] Yet Judge Plitt's observation in *Graber* that "[t]hose of *us* who are public officials . . . are ultimately accountable to the public"[143] suggests that an exception to the all-party consent requirement should extend beyond police officers to include other state actors. If the First Amendment right to record is limited to police officers, a broader statutory exception would be necessary to supplement the amendment's incomplete protection. Conversely, if the First Amendment reaches beyond police officers, the contours of the constitutional exception must still be defined.[144]

Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (holding that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment").

140. Recall that the state attorney who prosecuted Anthony Graber did so to incentivize the Maryland state legislature to change its state law. *See* Fenton, *supra* note 20.

141. At the time of this writing, no changes to the Maryland law have been made.

142. *See* Potere, *supra* note 138, at 21 (discussing qualified immunity protections for state officials).

143. State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *15 (Md. Cir. Ct. Sept. 27, 2010) (emphasis added).

144. In *Glik*, the First Circuit found that the plaintiff had the right to record public officials in part because he was in the middle of the Boston Common, "the oldest city park in the United States and the apotheosis of a public forum." *Glik*, 55 F.3d at 84. Had the recording occurred during a traffic stop, as in Anthony Graber's case, the court expressed far less conviction that the First Amendment would protect the activity. *Id.* at 85 (noting that "a traffic stop is worlds apart from an arrest on the Boston Common"). Thus even *Glik*'s seemingly broad First Amendment protection may not cover every situation in which the application of the all-party consent requirement seems inappropriate. The question of what geographic areas would be covered by an exception will be considered in full in Part II.C, *infra*.

Writ broadly, the all-party consent rule expresses concern for both the private nature of a conversation and the consent of the participants. Any effective exception must therefore overcome both concerns. Anthony Graber's prosecution seems so outlandish in part because recording police officers performing their official duties on public highways overcomes both concerns easily. First, the nature of the conversation clearly was not private. Police officers, whose authority to exercise the state's power is restricted only by personal discretion, are not engaged in "private" conversations when they interact with citizens while carrying out official duties.[145] Additionally, by not incorporating any element of affirmative consent into the state wiretapping statute, the Maryland legislature effectively consented on behalf of the officer who pulled Graber over. When functioning as state actors, police officers have no individual or personal privacy to invoke; they cannot deny the state's consent to recording and transparency.[146] Thus it is the *combination* of a public official performing a public duty in a public forum that makes the *Graber* outcome seem intuitively obvious.

The ultimate breadth of an exception to the all-party consent requirement depends on the individual scopes of these three factors. Each should be considered individually.

A. Public Officials

Because they exercise the state's power to deprive citizens of their liberty, police officers are quintessential public officials, who—at least in the First Amendment context—include all public employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[147] If one assumes public officials' conversations in the course of their public duties conducted in a public forum can be recorded, a natural question arises: who counts as a public official?

145. *See* William H. Rehnquist, *Is an Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement?: Or; Privacy, You've Come a Long Way, Baby*, 23 U. KAN. L. REV. 1, 8 (1974) ("An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.").

146. *Accord* Potere, *supra* note 138, at 16 ("Police officers acting within their official capacity are generally afforded a diminished expectation of privacy.").

147. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

"Public official" might be defined through analogy to the agency principles that underlie the state action doctrine.[148] Thus police officers could be seen as public officials because they are agents of the state. Yet this conception of public officials is overbroad because it would also include anyone else who can be characterized as a state actor, including low-level civil-service employees—like mail carriers—who perform their official duties in public and yet do not wield the state's power like police officers. Rather than exercising the state's police power to deprive citizens of their liberty, these employees perform administrative functions, and this fundamental distinction undermines the justification for exempting them from the all-party consent requirement. First, interpreting public officials to include employees like mail carriers would not satisfy the all-party consent requirement's interest in protecting private conversations; a conversation with a mail carrier about the citizen's private mail would most likely not relate to a task for which the mail carrier has any discretion that needs to be checked.[149] Second, such an application of the exception cannot meet the all-party consent requirement's interest in protecting the autonomy of the individual. Police officers implicitly consent to recording by accepting the vast discretion conferred upon them by the state. Their status as public officials thus comes not only through their exercise of state power, but also through the state's trust that they will exercise sound discretion in using that power. Since the state entrusts civil-service employees with less discretion, less oversight of their activities is necessary.

Even clerks who distribute public benefits based on neutral and objective criteria should not be exempted from the all-party consent rule. Even though they exercise the state power of deprivation—here in denying benefits rather than liberty—they accomplish this end without making any discretionary decisions. There is no need for an additional check on their power through citizen recording since all clerks should make the same objective determinations given the same neutral data. Additionally, administrative proceedings and the democratic process offer the public the

148. *See* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1785 (2010) ("[P]rivate individuals are principals, entitled to act to pursue their own interests, whereas government decisionmakers are agents, whose function is to further the interests of the citizens.").

149. Recall that rationales based on the nature of the conversation tend to intermingle with concerns about regulating police activity. *See* Part I.B.5, *supra*. This suggests that what makes a conversation with a police officer not private is the public's interest in ensuring that police power is not wielded irresponsibly.

chance to question the determinations made by all benefit-clerks. Therefore, in this case, the individual right to refuse recording need not be subordinated to the collective need to monitor state action.

If police officers—who have almost unlimited discretion to assert a high level of authority—form one end of the public official spectrum, civil-service employees form the other end, and the category of public officials exempted from the all-party consent requirement must balance these two poles. Finding that the individuals in question are state actors may factor into whether they are public officials for the purpose of an exception to the all-party consent requirement, but this determination can only form a threshold inquiry.[150] The remainder of the inquiry should focus on whether this state actor exercises a reasonable amount of discretion. Such an inquiry will ensure that the exception is not applied to individuals whose power can be checked through existing democratic mechanisms.

The main drawback of this approach to defining public officials is that it would not cover a group of individuals who exercise discretion in dealing with public issues, but are nonetheless considered private actors under the state action doctrine. For example, in cases questioning the applicability of the Fourth Amendment's limits on police searches and seizures, a majority of federal jurisdictions have found that bounty hunters (or bail enforcement agents who track down fugitives for monetary reward) are not state actors.[151] While such a holding allows bounty hunters to exercise even broader discretion when gathering evidence than police officers are allowed, it would prevent their public evidence gathering from being recorded without their consent, even when it is in public view. In this way, the state action trigger to the determination of whether the actor is a public official is problematic because it would limit the public's opportunity to document public life in precisely the situations where constitutional safeguards are at their lowest ebb.

150. However, for states that adopted the all-party consent requirement purely to protect the nature of the conversation in question, this inquiry could form the complete test because it would weed out those conversations that are private compared to those which are public.

151. *See* Adam M. Royval, Note, United States v. Poe: *A Missed Opportunity to Reevaluate Bounty Hunters' Symbiotic Role in the Criminal Justice System*, 87 DENV. U. L. REV. 789, 789 (2010). The Tenth Circuit held that bounty hunters are not state actors in 2009. *See* United States v. Poe, 556 F.3d 1113, 1117 (10th Cir. 2009).

However, if a problem exists here, it lies with the first-order determination that bounty hunters are not state actors, not the second-order application of that decision to an all-party consent requirement exception. Since bounty hunters are not state actors in most circuits, their actions are not subject to constitutional constraints. Private individuals have no obligation to obey the Constitution's commands,[152] so the public has no cognizable ability to incentivize bounty hunters to follow the contours of the Fourth Amendment. Thus the social desire to record as a means of deterring inappropriate conduct has no relevance without state action of some kind. Using state action to trigger the public official prong of an exception to the all-party consent requirement would therefore not encompass people like bounty hunters. The all-party consent requirement would apply to them unless and until they were determined to be state actors against whom the Constitution can be enforced.

Overall, then, the group of public officials to be exempted from the all-party consent requirement should be state actors whose agency relationships involve the exercise of discretion when they deprive citizens of liberty, property, or the like. When these conditions are met, the state should be able to consent to recording on behalf of the individuals who wield discretionary state power. The recording of such an official performing a public duty in a public forum should be exempted from any all-party consent requirement.

B. Public Duties

Not every act of a public official in a public forum involves a public duty. When a police officer buys a cup of coffee, he or she is not engaging with the public in the same way as when making an arrest or issuing a traffic ticket. The former is arguably a private act because the officer is not exercising the authority granted to him or her by the state, while the latter occurs in the course of the officer's job responsibilities to protect the community. Since only an action in the course of a public duty can potentially spark the kinds of constitutional violations that citizen recording is meant to deter,[153] only actions in the course of a public duty should trigger an exception to the all-party consent requirement. Otherwise, like the bounty hunter problem above, an exception could be used to deter wholly legal activity.

152. *See* BeVier & Harrison, *supra* note 148, at 1769.

153. *See id.* at 1791–92 (noting that the state action exists when government actors act as agents of the government, not when individuals acting as private citizens are supported by the state).

Unlike an individual's status as a public official—which inherently implicates the scope of that individual's autonomous decision making—the range of that official's public duties merely distinguishes among specific interactions that individual has with the public. Thus the public duty question only asks whether an exception to the all-party consent requirement would apply in certain situations, not whether the state should have the ability to consent on the public official's behalf. An exception to the all-party consent requirement that hinges partly on the performance of a public duty would imply that—unlike actions taken for private purposes—acts in the course of a public duty are not the type of conversations the requirement seeks to protect.

But what does it mean for an act to be in the course of a public officer's public duties? Even the act of buying a cup of coffee could be seen as public if the police officer is on duty at the time, receiving pay from a tax-funded budget. Such a broad definition of public duties would make it possible to record public officials any time they are being paid by the state and in a public forum. This approach would allow citizen recording of public officials in the greatest number of circumstances. However, there are two problems to defining an officer's public duties broadly, suggesting that the scope of allowable recording should be narrowed.

First, the social value of recording a police officer engaging in non-police activity is less than the value of comparable recordings of officers wielding state power. The difference comes from the kinds of inappropriate activity the two kinds of recordings can potentially reveal. When police officers make arrests, for example, their legitimate course of conduct is defined by constitutional norms, and surreptitious recording of their actions seeks to deter unconstitutional noncompliance. However, when public officials engage in public activity not connected to their roles as state actors, no constitutional baseline exists. While recording in this context could reveal inefficiencies in the use of state power—police officers taking too many breaks, for example—the question of how state resources are spent is more nuanced than the question of whether individual rights are violated. Recorded evidence of a public official's misdeed while exercising state power can be dispositive of a violation of individual rights, while evidence of inefficiency must be aggregated to be consequential. The public value of a single recorded instance of a public official's private conduct is therefore

less than the value of a recording depicting the exercise of state action.[154]

Second, even if recordings of the private conduct of public officials were considered valuable enough, the "on the clock" trigger of an official's public duties is becoming increasingly difficult to identify and may soon effectively disappear entirely as a legal distinction. In *City of Ontario v. Quon*, the Supreme Court considered whether a police department's review of personal messages sent on a SWAT team member's department-issued pager constituted an unconstitutional search under the Fourth Amendment.[155] During oral arguments, Chief Justice Roberts tried to distinguish between pager messages sent while Quon was on duty and when he was not, because the police department had only reviewed messages Quon sent during working hours.[156] However, the attorney representing Ontario argued that SWAT team members were issued pagers because they were "on duty . . . 24/7."[157] In response, Justice Scalia noted that "if they were on duty 24/7, there weren't any off-duty messages, were there?"[158] According to the official transcript of the oral arguments, Justice Scalia's quip was followed by laughter,[159] highlighting the absurdity of the idea that an employee can be considered on duty all the time simply by virtue of being issued a device to facilitate communication outside of business hours. But the lawyer's argument hints at the subtle point that advances in technology are blurring the line between work and private life across a wide scope of industries.

When one works as a public official, this blurring is especially problematic since different constitutional rules apply when officials function as state actors and as private individuals. In his opinion for

154. Of course, the issue is complicated somewhat by the fact that aggregated recorded evidence of the inefficient use of public resources could at some point prove widespread misuse. However, to avoid the fallacy of substituting anecdotes for empirical evidence, the number of recordings to be aggregated would have to be so large that it seems to pose a practical impossibility.

155. *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2624 (2010) ("This case involves the assertion by a government employer of the right . . . to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by . . . the Fourth Amendment.").

156. *See* Transcript of Oral Argument at 15, City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (No. 08-1332) (statement of Chief Justice Roberts) ("Well, you don't have to look at the messages to determine that with respect to the off-duty messages, right?").

157. *Id.* (statement of Kent L. Richland).

158. *Id.* at 16 (statement of Justice Scalia).

159. *See id.*

the Court, Justice Kennedy did not decide this specific issue because he worried about the unforeseen consequences of a broad holding in an area of law affected by rapid technological developments.[160] Since the availability of technology affects "what society accepts as proper behavior,"[161] the Court effectively deferred to cultural norms to delineate between when employees are on-call and off-duty.

The same issues are present in considering the scope of an exception to the all-party consent requirement. If the concept of public duty is a blunt status determination based on whether the public official is on the job, the gradual merging of work into private life will make it next to impossible to limit the exception effectively. And the march of technology can only make the problem more pronounced as personal recording equipment becomes more prevalent and less expensive.

Instead of using an "on the clock" conception of a public official's public duty, the scope of that duty should be narrowed to only those instances in which public officials exercise the state power assigned to them. Such a definition mirrors the concept of *respondeat superior* in that it would only allow the state to authorize the recording of public officials without consent in the precise moments when those officials are acting as agents of the state.[162] This would both ensure the privacy of public officials when they engage in private actions during the workday and ensure that the public is able to record the use of state action even if made by an off-duty public official. Defining public duty based on whether a public officer in a public forum is engaging in state action will certainly create some doctrinal confusion, but if *Quon* is any guide, attempting to delineate based on whether an official is on duty or off duty will create even more.

C. Public Fora

Even if a public official is exercising a public duty, the physical location where the act takes place should affect the scope of an exception to the all-party consent requirement. Like the public duty issue discussed above, the public forum distinction affects the all-party consent requirement's concern for the private nature of certain conversations. The need for a geographic limit on an excep-

160. *See Quon*, 130 S. Ct. at 2630.

161. *Id.* at 2629.

162. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2011) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

tion is apparent when considering extreme positions on the continuum of public access to conversations involving public officials engaging in their public duties. At one end, when a police officer stops someone on a sidewalk, the location is clearly public because the public both has access to the location generally and can overhear the specific conversation taking place. The police officer also knows all this to be the case. At the other end of the spectrum, consider a conversation between two police officers in the station house that is secretly recorded. In that case, members of the public would be listening in on a conversation they ordinarily cannot hear, taking place in a location they ordinarily cannot access. The officers would have no notice of their "presence." Because the state could consent to recording on behalf of both officers,[163] the only rationale to prevent recording such a conversation is that the conversation itself is private.[164] An exception to the all-party consent requirement should therefore include some means to filter which conversations involving public officials engaging in public duties remain too private to be opened to citizen recording.

The clearest analogue to this issue in current law is the public forum doctrine in the Supreme Court's First Amendment jurisprudence. However, the analysis that led the Supreme Court to divide land into three categories for First Amendment purposes poses problems in the wiretapping context. For the purposes of wiretapping, all land should have the potential to be a public forum because a public official can wield state power anywhere.

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court developed a tripartite classification system for how the First Amendment applies to different geographical locations.[165] The first category consisted of "quintessential public forums" such as streets and parks, where the First Amendment prohibits almost all regulation

163. This flows from the theory that the state can exert special control over police officers by virtue of the fact that it employs them and grants them the power to exercise the state's authority. *Accord* Potere, *supra* note 138, at 16 ("Police officers acting within their official capacity are generally afforded a diminished expectation of privacy.").

164. This is especially the case when the conversation involves issues the public officials need to keep secret from the public in order to serve the public. Details about criminal investigations, for example, would fit this description. *See* Eric Lane, Frederick A.O. Schwarz Jr. & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 740 (2010) ("[S]ecrecy may serve our constitutional commitment to individual rights by protecting the identities of individuals under investigation or by protecting personal data such as social security numbers.").

165. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

of speech beyond a narrow class of time, place, and manner restrictions.[166] The second category included all "public property which the State has opened for use by the public as a place for expressive activity,"[167] to which the same limits on regulation apply as in the first category.[168] The difference between the first two categories is thus not in the rules that apply to them, but how the forums come to exist: In the first category, the public forum exists because the location has traditionally been used for expressive activity,[169] while in the second category, the public forum exists because the state has actively allowed expressive activity to occur there.[170] The third category delineated a class of nonpublic forums, which included all other public property and can be regulated more strictly.[171] At issue in *Perry* was an interschool mail system, which the Court found to be a nonpublic forum that the school district could regulate by allowing its use by some private organizations but not others.[172]

Perry would clearly cover a substantial number of cases arising from an exception to the all-party consent requirement. When Anthony Graber was pulled over on a public highway, his interac-

166. *See id.* ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (citations omitted).).

167. *Id.*

168. *See id.* at 46 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

169. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

170. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

171. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 46 ("Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

172. *See id.* ("The school mail facilities at issue here fall within this third category.").

tion with a Maryland state trooper occurred in a traditional public forum and so any exception to the all-party consent requirement would certainly apply. However, the Court's reasons for creating its three categories do not perfectly map onto the policy concerns that citizen recording poses. In *Perry*, the Court was concerned with the "right of access to public property,"[173] while in the context of an exception to the all-party consent requirement, the question is whether the conversation to be recorded is private.

This difference suggests that *Perry*'s concept of public fora alone is inadequate to form the basis of a recording exception. First, *Perry* only considers public property, and many interactions with public officials occur on private land. For example, a police search of a private home does not take place in any kind of public forum, yet individuals who let police officers into their homes may wish to record the ensuing interactions. The motivation for this type of recording—to ensure the search does not violate the Fourth Amendment—promotes the policy rationale for creating an exception to the all-party consent requirement generally. Thus these conversations should be considered as occurring in public fora, even though the land is privately owned. Even though the public at large does not have general access to the land, the individual who seeks to record does. This would allow an individual to record public officials engaging in public duties either when the individual owns the land or generally has access to it, which would open spaces like retail stores or office buildings to recording. Since the goal of an exception to the all-party consent requirement is to deter unconstitutional conduct on the part of public officials, it is appropriate to expand the concept of the public forum in this context. The alternative—to allow citizen recording of public officials only when land is publically owned—would create a regime that would make some recording criminal for reasons having nothing to do with the interaction being recorded. Instead, the same rules should apply regardless of whether the land is publically or privately owned.

Second, the privacy concern inherent in the all-party consent requirement suggests that *Perry*'s absolute classification of publically owned land as a public or nonpublic forum needs to be more flexible in the recording context. For example, police custodial interviews—which usually happen in a stationhouse—would be considered as occurring in a nonpublic forum under *Perry*. Yet the concern for police misconduct is as pronounced in this setting as

173. *Id.* at 44.

when police officers stop individuals on the street. Since many police departments record custodial interviews for their own records,[174] the issue mirrors the problem posed by the police recording stops via cameras on their cars but the law preventing those stopped from recording the police officers.[175] If the police stop and the custodial interview are different because the public has general access to the streets but not to the stationhouse, what unites them is the public's authorized presence in the specific location at the time of the recording.

Thus all land—whether publically or privately owned—should have the *potential* to be a public forum for the purposes of an exception to the all-party consent requirement. When public officials acting in the course of their public duties knowingly interact with private citizens, the land should then be considered a public forum. This broad approach would prevent the wholly secret recording of public officials when no private individuals are present, but allow it in most other circumstances. A private individual's presence with a public official would notify the official that the interaction could be recorded, deterring the inappropriate conduct that an exception to the all-party consent requirement seeks to stop.

D. Case-by-Case Exceptions

Even when public officials engage in public duties in public fora as described above, there may be some instances where state interests are nonetheless compelling enough to prevent citizen recording. In courtroom proceedings, for example, interactions between private citizens and judges may implicate the privacy rights of others in the courtroom, and if distributed, the recording may threaten a party's right to a fair trial.[176] The all-party consent requirement may also prove necessary during some police custodial interviews, when secrecy is necessary to investigate an unsolved

174. *See* Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 (2005) (noting that six states and the District of Columbia require custodial interrogations to be recorded and that "police and sheriff departments in at least 238 cities, counties and towns" require similar recording even without a state-level mandate).

175. Admittedly, the two situations are not perfectly analogous, since there is sometimes a strong need for secrecy in custodial interviews while police investigate unsolved crimes. However, this is the exception, not the rule.

176. For example, distributing recordings from a trial may prejudice the public against a criminal defendant. *See* William O. Douglas, *The Public Trial and the Free Press*, 46 A.B.A. J. 840, 844 (1960) ("[Mass opinion] is anathema to the very conception of a fair trial. It applies standards that have no place in determining the awful decision of guilt or innocence.").

crime. These kinds of instances suggest that an exception to the all-party consent requirement should not apply when a compelling state interest counsels against the recording of conversations that might otherwise fit the exception. Because the use of such an exception to the exception would hinge on the specific facts and balancing the state interests against the public's interest in recording, it could only be applied in an ad hoc, case-by-case manner. But the enforcement of the all-party consent requirement must be available in the narrow class of instances involving public officials exercising public duties in public fora where it is truly necessary.[177]

CONCLUSION

The all-party consent requirement to recording a conversation can protect privacy from two angles. First, by focusing on the nature of the conversation to be recorded, the requirement ensures that communications of a certain type are not recorded. Second, by focusing on the explicit or implicit consent of a conversation's participants, the requirement ensures that people are not recorded without their knowledge. However, both of these concerns decrease when the non-consenting party is a public official engaged in a public duty in a public forum. At the same time, the public's interest in recording increases in those situations, as memorializing these conversations can deter official misconduct generally and document specific misconduct should it occur. Because the benefits of citizen recording of public officials engaging in public duties in public fora outweigh the lessened concerns for privacy, these situations should be exempted from the all-party consent requirement's recording ban. The ease with which recording can now be accomplished has led many police departments to record more of their officers' interactions with the public; the accuracy of recorded evidence, while not perfect, is generally an improvement over traditional word-of-mouth. Developments in personal technology have made citizen recording as feasible as that which is conducted by the state. When it depicts public officials engaging in their public duties in public fora, it should receive the same legal treatment.

177. The use of such an exception to the exception should be narrow because government transparency and the deterrence of official misconduct are compelling interests in and of themselves that support a broad acceptance of citizen recording. So to prevent that recording from taking place, the asserted state interests must be both compelling in their own right and important enough to outweigh compelling reasons for allowing citizen recording.