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COMMENT

CITIZEN JOURNALISTS & THE RIGHT TO GATHER NEWS: WHY MARYLAND NEEDS TO ACKNOWLEDGE A FIRST AMENDMENT RIGHT TO RECORD THE POLICE

By: Kristine L. Dietz¹

INTRODUCTION

More than half of cell phone users in the United States own a smartphone.² The video recording capabilities of smartphones make it possible for users to record anything, almost anywhere, at anytime. This modern technology allows for the immediate transfer and widespread dissemination of footage. Recently, videos of alleged police misconduct have gone viral on the Internet and the police are not happy about it.³ This increase in citizen journalism has left police officers defensive about their privacy and their ability to do their job without interference. Proponents of the First Amendment, however, vigorously argue that implicit in each citizen's First Amendment right to gather, receive, and record public governmental conduct is the right to record police.⁴ This article will explain why this right must be recognized.

The First Amendment protects the press from governmental restrictions not because they are members of the press, but because those protections are provided to all citizens.⁵ Accordingly, protections of free speech and free press tend to be one and the same.⁶ Therefore, if members of the press are

¹ Kristine L. Dietz is a J.D. candidate at the University of Baltimore School of Law planning to graduate in May 2014. Ms. Dietz would like to especially thank Professor Michael Meyerson for his invaluable assistance. This piece would not have been possible without Professor Meyerson's contagious enthusiasm and appreciation for constitutional law.

² *Mobile Majority: U.S. Smartphone Ownership Tops 60%*, NIELSEN (June 6, 2013), <http://www.nielsen.com/us/en/newswire/2013/mobile-majority--u-s--smartphone-ownership-tops-60-.html> (noting that approximately 61% of cell phone users own a smartphone).

³ Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABC NEWS (July 19, 2010), <http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076#.ULJTYuOe9EB>.

⁴ Robert J. Tomei, Jr., *Watching the Watchmen: The People's Attempt to Hold On-Duty Law Enforcement Officers Accountable for Misconduct and the Illinois Law that Stands in Their Way*, 32 N. Ill. U. L. Rev. 385, 402 (2012).

⁵ Carly Humphrey, *Keep Recording: Why On-Duty Police Officers Do Not Have a Protected Expectation of Privacy Under Maryland's State Wiretap Act*, 19 Geo. Mason L. Rev. 775, 799 (2012).

⁶ *See id.* at 800.

allowed to record public governmental conduct, it follows that citizens should also be allowed. Not only are citizens allowed to record public governmental conduct, but also they play an important role in holding the government accountable to the people.⁷

Part I of this article includes an introduction to the cases and incidents that placed Maryland at the forefront of this First Amendment issue. Part II addresses the federal attention Maryland cases have attracted, and Part III advises on the outcomes of the Maryland cases. Part IV explores citizens' First Amendment right to gather information. Part V investigates the right to record under the First Amendment and explains how Maryland is violating this right. Part V will also discuss the Press Clause, the Fourth Estate theory and marketplace of ideas, prior restraints, and the Maryland Wiretap Act. Finally, Part VI proposes a bright line statute establishing a citizen's right to record police activity.

PART I: MARYLAND CASES

One of the earliest sparks of this debate in Maryland occurred in Baltimore's Inner Harbor in February 2008.⁸ Fourteen-year-old Eric Bush was skateboarding with friends when nineteen-year police veteran, Salvatore Rivieri, approached the teenagers to tell them they could not skateboard in the Inner Harbor.⁹ Rivieri proceeded to berate the teenagers about their lack of respect, even putting one of them in a headlock and pushing him to the concrete.¹⁰ Unbeknownst to Officer Rivieri, one of Bush's friends videotaped the entire incident.¹¹ The video quickly became an Internet sensation on YouTube,¹² and Bush and his mother filed a lawsuit against Officer Rivieri in the Circuit Court for Baltimore City in April 2008.¹³ After

⁷ See *id.* at 801.

⁸ Peter Hermann, *Harbor cop who yelled at skateboarder gets suit dismissed*, BALT. SUN (Sept. 22, 2009), available at http://weblogs.baltimoresun.com/news/crime/blog/2009/09/harbor_cop_who_yelled_at_skate.html.

⁹ Melissa Underwood, *Baltimore officer suspended after video surfaces of him berating skateboarder*, FOXNEWS.COM (Feb. 12, 2008), <http://www.foxnews.com/story/0,2933,330501,00.html>.

¹⁰ *Id.*; Peter Hermann, *Baltimore cop who berated skateboarder fired*, BALT. SUN (Aug. 25, 2010), available at http://weblogs.baltimoresun.com/news/crime/blog/2010/08/baltimore_cop_who_berated_skat.html.

¹¹ *Dude! Judge Oks teen's lawsuit against cop*, 4 NBC WASHINGTON (Dec. 11, 2008), <http://www.nbcwashington.com/news/local/Dude--Judge-OKs-Teens-Lawsuit-Against-Cop.html>.

¹² Hermann, *supra* note 10.

¹³ *Id.*

the suit was filed, Rivieri was suspended and the police department ordered an internal charge of discourtesy against Rivieri.¹⁴

Two years later, in March 2010, Anthony Graber was riding his motorcycle on Interstate 95 in Harford County.¹⁵ Graber was allegedly racing his motorcycle down the highway at eighty miles per hour, popping wheelies and swerving through lanes.¹⁶ What happens next would start the controversy: Graber used his helmet camera to film the entire traffic stop, which included the plain clothes state trooper cutting him off and drawing his gun.¹⁷ Graber then posted the video on YouTube resulting in a police raid of his home and confiscation of his camera, computers, and external hard drives.¹⁸ Graber was indicted for allegedly violating wiretap laws by filming the trooper without his consent.¹⁹

Two months following the incident on Interstate 95, Christopher Sharp attended the Preakness at Pimlico Race Course and used his cell phone to film officers arresting his friend.²⁰ Sharp twice refused to hand over his cell phone to police before ultimately complying with the officers' demands.²¹ The officer briefly left the area with Sharp's cell phone, then returned to give Sharp his cell phone back and ordered him to leave the race course.²² To Sharp's surprise, all videos had been deleted from his phone and the settings were adjusted to only permit emergency phone calls.²³ Sharp filed a complaint against Baltimore City Police alleging violations of state law and constitutionally protected rights.²⁴

In February 2012, Scott Cover used his cell phone to film officers who were handcuffing a man in the Federal Hill area of Baltimore City.²⁵ Cover

¹⁴ *Id.* The Baltimore City Police Department regulations on its disciplinary process are found in Baltimore City Police Department General Order 48-77. *Blondell v. Balt. City Police Dep't*, 341 Md. 680, 685, 672 A.3d 639, 642 n.2 (1996). The order predicates that when the Internal Investigation Division finds that a complaint is "sustained," the Deputy Commissioner has the ultimate say in punishment. *Id.*

¹⁵ *State v. Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *4 (Md. Cir. Ct. Sept. 27, 2010).

¹⁶ Sanchez, *supra* note 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Statement of Interest of the United States, *Sharp v. Balt. City Police Dep't*, Civil No. 11-02888-BEL (D. Md. Jan. 10, 2012).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Justin Fenton, *In Federal Hill, citizens allowed to record police – but then there's loitering*, BALT. SUN (Feb. 11, 2012), available at http://articles.baltimoresun.com/2012-02-11/news/bal-in-federal-hill-citizens-allowed-to-record-police-but-then-theres-loitering-20120211_1_loitering-officers-police-union.

had recently seen news reports of the Baltimore Police acknowledging citizens' right to record officers; however, that was not the right Cover was afforded.²⁶ The officers told Cover that he was loitering and ordered him to walk away or risk arrest.²⁷ This incident would mark one of the many loopholes to a mere affirmation of the right to record officers.

PART II: MARYLAND ATTRACTS FEDERAL ATTENTION

On January 10, 2012, the Department of Justice ("DOJ") made an unprecedented move²⁸ and filed a Statement of Interest in Christopher Sharp's case against the Baltimore City Police Department.²⁹ Sharp's counsel, the American Civil Liberties Union of Maryland, stated that the filing of the Statement of Interest was "quite extraordinary, particularly at the trial level."³⁰ In the statement, the DOJ opened by asserting that:

The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.³¹

The DOJ also focused on the insufficient policies that the Baltimore City Police Department implemented in response to this incident.³² Instead of focusing on the significant First Amendment issues at the heart of the case, the Baltimore City Police Department took remedial actions that included sending a department wide e-mail on the topic and providing additional

²⁶ *Id.*

²⁷ *Id.*

²⁸ Justin Fenton, *DOJ urges judge to side with plaintiff in Baltimore police taping case*, BALT. SUN (Jan. 11, 2012), available at http://articles.baltimoresun.com/2012-01-11/news/bs-md-ci-aclu-doj-videotaping-20120111_1_police-officers-police-department-baltimore-police. "The American Civil Liberties Union of Maryland . . . said it believes this is the first time the Department of Justice has weighed in on the topic of recording police." *Id.*

²⁹ Statement of Interest of the United States, *supra* note 20. Christopher Sharp used his cell phone to record his friend being arrested at the Preakness where Officers then demanded Sharp's cell phone and ultimately deleted the contents of his phone, resulting in Sharp filing a complaint against the Baltimore City Police Department, alleging violations of state law and constitutionally protected rights. *Id.*

³⁰ Fenton, *supra* note 28.

³¹ Statement of Interest of the United States, *supra* note 20, at 1.

³² *Id.* at 8.

training to sergeants.³³ The DOJ recommended that the police department take steps to “explicitly acknowledge that private citizens’ right to record police derives from the First Amendment” and “provide clear and effective guidance to officers about the importance of First Amendment principles involved.”³⁴ Specifically, the DOJ recommended that the department commence periodic training and develop a system to track allegations that an officer has violated a citizen’s First Amendment right to observe and/or record police conduct.³⁵

Just four months after the DOJ filed its Statement of Interest, it made another move in the Christopher Sharp case.³⁶ On May 14, 2012, Jonathan Smith, Chief of the Special Litigation Section, sent a letter³⁷ to the Baltimore Police Department’s Office of Legal Affairs and to Sharp’s *pro bono* attorney, Mary Borja.³⁸ Again, the DOJ began by asserting that police department policies should:

[A]ffirmatively set forth the contours of individuals’ First Amendment right to observe and record police officers engaged in the public discharge of their duties. Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.³⁹

Smith’s letter also addresses the several shortcomings of General Order J-16.⁴⁰ The DOJ suggested that the General Order should affirmatively state that individuals have a First Amendment right to record officers.⁴¹ Smith took issue with the Order’s many references to the “Constitutional rights” underlying the policy and argued that given the numerous allegations in

³³ *Id.* at 9.

³⁴ *Id.* at 9.

³⁵ *Id.* at 10.

³⁶ Letter from Jonathan M. Smith, Chief Special Litigation Section, U.S. Dep’t of Justice, to Mark H. Grimes, Balt. Police Dep’t (May 14, 2012).

³⁷ *Id.*

³⁸ Michael Hellgren, *Judge rules deleted videos case can go forward*, CBS BALTIMORE (Feb. 13, 2012), <http://baltimore.cbslocal.com/2012/02/13/judge-to-hear-arguments-on-deleted-videos-case/> (acknowledging Mary Borja as Sharp’s *pro bono* attorney).

³⁹ Smith, *supra* note 36, at 2 (citing *Glik v. Cunniff*, 655 F.3d 78, 82 (1st Cir. 2011)).

⁴⁰ Smith, *supra* note 36, at 4.

⁴¹ *Id.*

recent years, the Order should include a “specific recitation of the First Amendment rights at issue in General Order J-16.”⁴²

The Order also states that officers may not prohibit a person’s ability to record a video of police conduct that occurs “in the public domain;” the order, however, conveniently fails to define “public domain.”⁴³ Naturally, Smith demands that this term be defined in order to clarify that First Amendment rights are not limited to streets and sidewalks.⁴⁴

Next, the DOJ requested that the General Order go beyond simply prohibiting the search and seizure of cameras and other recording devices.⁴⁵ Of particular importance was the Baltimore City Police Department’s acknowledgment that it will not “threaten, intimidate, or otherwise discourage an individual from recording police officer enforcement activities or intentionally block or obstruct cameras or other recording devices.”⁴⁶

In general, the DOJ demanded more specificity out of the Baltimore City Police Department.⁴⁷ For example, the letter requested a recitation of the narrow circumstances in which a citizen’s recording of police activity *would* result in arrest,⁴⁸ a clarified explanation of the role of supervisors,⁴⁹ and guidance on how an officer could *lawfully* seek an individual’s consent to review photographs or recordings.⁵⁰

Finally, and most importantly to citizen journalists, the DOJ emphasized that police departments should not place a higher burden on citizens to exercise their right to record than they place on members of the traditional press.⁵¹ Fortunately, the Baltimore City Police Department’s General Order successfully addressed this idea by asserting that:

Members of the press and members of the general public enjoy the same rights in any area accessible to the general public. No individual is required to display “press credentials” in order to exercise his/her right to observe, photograph, or video record police activity taking place in an area accessible to, or within view of, the general public.⁵²

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 5.

⁴⁶ Smith, *supra* note 36, at 5.

⁴⁷ *Id.* at 4-9.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 7-8.

⁵⁰ *Id.* at 8-9.

⁵¹ *Id.* at 10.

⁵² Statement of Interest of the United States, *supra* note 20, at 4.

PART III: THE MARYLAND OUTCOMES

A. Eric Bush – The Skateboarder

Eric Bush and his mother filed a lawsuit against Officer Rivieri in the Circuit Court for Baltimore City in April 2008. While the case was pending, Rivieri was suspended from duty.⁵³ Shortly after the suspension, Officer Rivieri was allowed back on patrol after city prosecutors decided against filing criminal charges.⁵⁴ Ultimately, the civil suit was dismissed because it was filed after the 180-day deadline.⁵⁵ Following the dismissal, Officer Rivieri made a sworn statement alleging that Bush “held his skateboard in a threatening manner” and attempted to lunge toward Rivieri.⁵⁶ Rivieri’s story seems to contradict the video posted to YouTube.⁵⁷

On August 25, 2010, nearly one year after the case was dismissed, Officer Salvatore Rivieri, a nineteen-year veteran, was fired from the Baltimore City Police Department.⁵⁸ A three member police panel held a hearing on Rivieri’s conduct and found him guilty of “failing to issue the youth a citizen contact receipt and failing to file a report,” but not guilty of using excessive force.⁵⁹ In the end, Commissioner Frederick H. Bealefeld, III opted to fire Rivieri.⁶⁰ Fortunately for Eric Bush, neither he nor his friend who was recording was pursued for allegedly violating wiretap laws.

B. Anthony Graber – The Motorcyclist

After Anthony Graber posted his traffic stop on YouTube, he was indicted for allegedly violating wiretap laws by filming the trooper without his consent.⁶¹ About one month later, Maryland State Police raided Graber’s parents’ home confiscating his camera, computers, and external hard drives.⁶² Ultimately, Judge Plitt of the Circuit Court for Harford County granted Graber’s Motion to Dismiss all four charges relating to wiretap

⁵³ Hermann, *supra* note 8.

⁵⁴ *Id.*

⁵⁵ Peter Hermann, *Cop in Harbor skateboard incident says he was threatened*, BALT. SUN (Sept. 23, 2009), available at http://weblogs.baltimoresun.com/news/crime/blog/2009/09/cop_in_harbor_skateboard_incid.html.

⁵⁶ *Id.*

⁵⁷ *Id.*; *Baltimore cops V.S. skateboarder*, YOUTUBE (Feb. 9, 2008), http://www.youtube.com/watch?feature=player_embedded&v=9GgWrV8TcUc.

⁵⁸ Hermann, *supra* note 10.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Sanchez, *supra* note 3.

⁶² *Id.*

laws.⁶³ Notably, Judge Plitt ended his opinion with commentary on the role of public officials stating, “[t]hose of us who are public officials and are entrusted with the power of the state are ultimately held accountable to the public. When we exercise that power in public *fora*, we should not expect our actions to be shielded from public observation.”⁶⁴

C. Christopher Sharp – The Preakness Attendee

Following the taking of Christopher Sharp’s cell phone at the Preakness, he filed a complaint against Baltimore City Police alleging violations of state law and constitutionally protected rights.⁶⁵ Sharp’s case garnered federal attention from the Department of Justice on two occasions,⁶⁶ sparking conversations throughout the country on the right to record police conduct. Most recently, on March 8, 2013, a federal judge reprimanded the Baltimore City Police Department for attempting to uncover irrelevant “dirt” on Sharp, including details about his divorce and his ex-wife’s new boyfriend.⁶⁷ The Police Department even attempted to access the results of a drug test Sharp took three years before the 2010 incident⁶⁸ in an effort to determine whether he was a drug addict.⁶⁹ The judge called the Police Department’s actions “particularly egregious given the enormous power that police wield over citizens and their enhanced ability to track information.”⁷⁰ Consequently, the judge ordered the Police Department to pay a \$1,000 fine and to seek court permission before it contacts anyone else to gather information in the case.⁷¹ Just over a year later on April 7, 2014, Christopher Sharp filed a Stipulation of Dismissal in the United States District Court for the District of Maryland.⁷² On April 8, 2014, Judge Catherine C. Blake signed an Order

⁶³ *Graber*, 2010 Md. Cir. Ct. LEXIS at *35-36.

⁶⁴ *Id.* at *35.

⁶⁵ Statement of Interest of the United States, *supra* note 20.

⁶⁶ *See id.*; *see also* Smith, *supra* note 36.

⁶⁷ *Federal judge slams Baltimore Police Department over ‘abuse’*, WBALTV.COM (Mar. 11, 2013), <http://www.wbalTV.com/news/maryland/i-team/Federal-judge-slams-Baltimore-Police-Department-over-abuse/-/10640252/19243228/-/66bwbkz/-/index.html>.

⁶⁸ *Id.*

⁶⁹ Justin Fenton, *Baltimore police rebuked by federal judge in taping lawsuit*, BALTSUN (Mar. 8, 2013), available at http://articles.baltimoresun.com/2013-03-08/news/bs-md-ci-aclu-judge-rebukes-police-20130308_1_baltimore-police-record-police-court-filings.

⁷⁰ *Federal judge slams Baltimore Police Department over ‘abuse’*, *supra* note 67.

⁷¹ Fenton, *supra* note 69.

⁷² *Sharp v. Balt. City Police Dep’t et al*, No. 1:11CV02888 (D. Md. Apr. 8, 2014).

granting the Stipulation of Dismissal, dismissing with prejudice Sharp's claims against the Baltimore City Police Department.⁷³

D. Scott Cover – The Bystander

Scott Cover, although threatened with arrest for loitering, was never arrested or charged for his encounter with police in Federal Hill in early 2012.⁷⁴ Cover told the Baltimore Sun newspaper that he attempted to file a complaint with the police department; however, the shift supervisor was one of the officers who encouraged him to leave the scene.⁷⁵

PART IV: THE CITIZEN'S RIGHT TO GATHER INFORMATION

Each citizen's First Amendment right to gather information is steeped in our legal history. The free speech and free press clauses of the First Amendment protect citizens' right to gather and record information in order to publicize that information; further, Supreme Court case law has avowed this right time and time again.⁷⁶ Most importantly, many of these cases acknowledge that private citizens and the press share an equal right to gather information.⁷⁷

A. Equality in the Right to "Speak and Publish"

In *Zemel v. Rusk*, the Court held that "the right to speak and publish does not carry with it the unrestrained right to gather information."⁷⁸ Although acknowledging a limited right to gather information, the Court's choice of the words "speak and publish" suggests that its holding applies to both citizens and the press, therefore, indicating equality in the right to gather information. Further, in *Estes v. Texas*, the Court explained that the newspaper reporter is entitled to the same rights as the television and radio reporter and most importantly, all reporters are entitled to the same rights as the general public.⁷⁹ In essence, the press has a right to gather information, but that right is no greater than the right of the citizen.⁸⁰

Further, in *Branzburg v. Hayes*, the Court suggested that newsgathering qualifies for First Amendment protection because without this protection,

⁷³ *Id.*

⁷⁴ Fenton, *supra* note 25.

⁷⁵ *Id.*

⁷⁶ Tomei, *supra*, note 4, at 402 .

⁷⁷ See *infra* Part IV.A.

⁷⁸ *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

⁷⁹ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

⁸⁰ See *id.*

“freedom of the press would be eviscerated.”⁸¹ The Court went on to reiterate that the First Amendment does not afford the press a right of special access to information that is not shared by members of the general public.⁸²

Not only do the press and public enjoy the same rights when gathering and disseminating information, but also this speech cannot be easily regulated.⁸³ More specifically, “lawfully obtained truthful information about a matter of public significance” cannot be punished without a need to “further a state interest of the highest order.”⁸⁴ Therefore, to determine whether a citizen’s right to record an officer can be curtailed, there must be a systematic assessment of the opposing interests and the state’s given interest in protecting it.⁸⁵

Beyond the Supreme Court, the Eleventh Circuit was the first United States Court of Appeals to recognize citizens’ First Amendment right to record police conduct, subject to time, place, and manner restrictions.⁸⁶

B. Law Enforcement and the First Amendment

The Seventh Circuit has also been vocal on this issue. In *Schnell v. City of Chicago*, the court upheld a class action by news photographers, who alleged that the police used intimidation and force to interfere with their constitutional rights to gather and report news, including the right to photograph news events.⁸⁷ Recently in 2012, the Seventh Circuit elevated this holding in *ACLU v. Alvarez*.⁸⁸ The *Alvarez* court held that the Illinois statute that made recording the police without their consent a felony was overbroad and “restrict[ed] far more speech than necessary to protect legitimate privacy interests.”⁸⁹ The court even explicitly stated that the statute likely violates the First Amendment protections of free speech and freedom of the press.⁹⁰

In 2011, the First Circuit made a similar finding. In *Glik v. Cunniffe*, Glik used his cell phone to record officers arresting a man.⁹¹ Glik was prosecuted

⁸¹ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

⁸² *Id.* at 684.

⁸³ See *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979).

⁸⁴ *Id.*

⁸⁵ See Marianne F. Kies, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 297 (2011).

⁸⁶ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

⁸⁷ *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969).

⁸⁸ *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 651 (2012).

⁸⁹ *Id.* at 586.

⁹⁰ *Id.* at 587.

⁹¹ *Glik*, 655 F.3d at 80.

for violating a wiretap statute; however, the First Circuit ruled that Glik was simply exercising his First Amendment rights in filming the officers in a public space.⁹² The court emphasized that it is of no significance that Glik was a private citizen and not a reporter because the First Amendment right to gather news ensures that the “public’s right of access to information is coextensive with that of the press.”⁹³

PART V: THE FIRST AMENDMENT RIGHT TO RECORD

The First Amendment right to record is evident under several different theories. First, there is a constitutional basis, which centers on the First Amendment’s Free Press Clause and citizen journalists.⁹⁴ Second, the Fourth Estate Theory stresses the public interest in journalism, by both the press as an institution and civilian recorders.⁹⁵ A more progressive argument accuses the police officers of attempting prior restraint by confiscating recording devices at the scene.⁹⁶ Finally, there is the argument that the Maryland Wiretap Act does not apply to the right to record a police officer, as words shared with a police officer constitute a “public” conversation.⁹⁷

A. The Free Press Clause & Citizen Journalism

The First Amendment to the United States Constitution requires that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁹⁸ As previously stated, the First Amendment protects the press from governmental restrictions not because they are members of the press, but because those protections are provided to all citizens.⁹⁹ In fact, the Supreme Court has explicitly held that the First Amendment does not guarantee the press a right of special access to information that is not available to the general public.¹⁰⁰

The Supreme Court also took care to define “press” in a broad fashion, noting that the press includes “not only newspapers, books and magazines, *but also humble leaflets and circulars.*”¹⁰¹ The acknowledgment of “humble

⁹² *Id.* at 82.

⁹³ *Id.* at 83.

⁹⁴ Kies, *supra* note 85, at 290.

⁹⁵ *Id.* at 295-96.

⁹⁶ Michael Potere, Note and Comment: *Who Will Watch the Watchmen? Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 304 (2012).

⁹⁷ Wiretap & Elec. Surveillance, 85 Op. Att’y Gen. 225, 234 n.8 (2000).

⁹⁸ U.S. CONST. amend. I.

⁹⁹ Humphrey, *supra* note 5.

¹⁰⁰ *Branzburg*, 408 U.S. at 684.

¹⁰¹ *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)) (emphasis added).

leaflets and circulars” suggests that the First Amendment protects not only the press as an official institution, but also those citizens who create their own leaflets and circulars in an effort to discuss public affairs.¹⁰² This idea dates back to the founding of our country with such prominent pamphleteers as Thomas Paine and the anonymous authors of the Federalist Papers.¹⁰³

Some courts have taken the protections of the Press Clause one step further. In *New York Times Co. v. United States*, the Supreme Court held that the government could not censor a newspaper for publishing illegally obtained information.¹⁰⁴ Further, in *Bartnicki v. Vopper*, the Supreme Court held that the government could not punish a radio station for publishing illegally obtained information from a third party.¹⁰⁵ The Court articulated, “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹⁰⁶ This idea is easily transferable to the present issue: simply because there is a stranger being arrested for illegal conduct does not suffice to remove the First Amendment protection from a bystander’s speech on that matter.

Further, in *Von Bulow v. Von Bulow*, the Second Circuit held that those protected under the Press Clause are anyone who “at the inception of the investigatory process had the intent to disseminate to the public information obtained through the investigation . . . based on the person’s intent at the onset of the information gathering process.”¹⁰⁷ Accordingly, it would follow that any citizen who began recording a police officer with the intent to disseminate that information to the public is protected under the Press Clause.

In recent years, it has become easier and easier for citizens to disseminate information, giving rise to a wave of citizen journalism.¹⁰⁸ Citizen journalism is defined in various ways,¹⁰⁹ although it is generally accepted that citizen journalism is based on the idea that people without professional journalism training can use modern technology and the internet “to create, augment or fact-check media.”¹¹⁰ More than half of all cell phone users are capable of recording a video on their phone¹¹¹ and instantaneously

¹⁰² *Id.*

¹⁰³ Mark Glasser, *Your Guide to Citizen Journalism*, MEDIASHIFT (Sept. 27, 2006), <http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270.html>.

¹⁰⁴ 403 U.S. 713, 714 (1971).

¹⁰⁵ 532 U.S. 514, 518-19 (2001).

¹⁰⁶ *Id.* at 535.

¹⁰⁷ 811 F.2d 136, 143 (2d Cir. 1987).

¹⁰⁸ Humphrey, *supra* note 5, at 797-98.

¹⁰⁹ Citizen journalism has also been referred to as grassroots journalism, open source journalism, citizen media, participatory journalism, etc. Glasser, *supra* note 103.

¹¹⁰ *Id.*

¹¹¹ *Mobile Majority: U.S. Smartphone Ownership Tops 60%*, *supra* note 2.

disseminating that video to the entire world on websites like YouTube.¹¹² This capability, combined with widespread public access to the Internet,¹¹³ has allowed citizen journalism to become not only prevalent but also appreciated for breaking stories that the traditional press has failed to cover.¹¹⁴ Notably, it was citizen journalists who captured the video of President John F. Kennedy's assassination in 1963, the beating of Rodney King in 1991, and the earliest photos of the London bombings in 2005.¹¹⁵

Although the Supreme Court has not addressed the role of citizen journalists under the First Amendment, other courts have identified privileges afforded to bloggers.¹¹⁶ As early as 1999, the court in *Blumenthal v. Drudge* held that an online gossip site was not required to disclose its confidential sources, as it was protected under the First Amendment's reporter's privilege.¹¹⁷ Seven years later, the decision in *O'Grady v. Superior Court* confirmed that bloggers are not required to testify on the identity of their sources because the bloggers are protected by California's reporter's shield.¹¹⁸ The court articulated that if the bloggers' "activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial."¹¹⁹

B. The Fourth Estate Theory & the Marketplace of Ideas

Beyond the pages of the United States Constitution, there are compelling public interest arguments for the recognition of citizen journalists. Not only

¹¹² YOUTUBE, www.youtube.com (last visited Apr. 5, 2014).

¹¹³ In 2012, 273.79 million Internet users accessed the web from the United States. *Number of Internet users in the United States from 2000 to 2012 (in millions)*, STATISTA, <http://www.statista.com/statistics/205251/number-of-internet-users-in-the-united-states/> (last visited Apr. 5, 2014).

¹¹⁴ Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 525 (2007). Papandrea points out that bloggers were the first to break the story on the authenticity of CBS news anchor Dan Rather's documents on President George W. Bush's military service; bloggers were also the first to reveal the inappropriate emails sent from Congressman Mark Foley to congressional pages. *Id.*

¹¹⁵ Glasser, *supra* note 103.

¹¹⁶ See *Blumenthal v. Drudge*, 186 F.R.D. 236, 244-45 (D.D.C. 1999); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1466-67, 44 Cal. Rptr. 3d 72 (2006).

¹¹⁷ *Blumenthal*, 186 F.R.D. at 244.

¹¹⁸ *O'Grady*, 139 Cal. App. 4th at 1466-68, 44 Cal. Rptr. 3d at 106.

¹¹⁹ *Id.* at 1468, 44 Cal. Rptr. 3d at 106.

do citizen journalists serve as the “Fourth Estate” check on the state’s power, they also contribute to the marketplace of ideas.¹²⁰

Under the Fourth Estate theory, the purpose of the Free Press Clause is to “create a fourth institution outside the Government as an additional check on the three official branches.”¹²¹ The Supreme Court has specifically noted the significance of the Fourth Estate theory: “The press has been a mighty catalyst in awakening public interest in governmental affairs, *exposing corruption among public officers* and employees and generally informing the citizenry of public events and occurrences.”¹²²

Polls show that the public’s degree of confidence in the police has been declining slowly since 1996.¹²³ Accordingly, citizen journalists who record the police are providing the public a service by providing a check on police powers.¹²⁴ If police officers are aware that they may be recorded, it is likely they will conform their behavior to that which is permitted by the law and acceptable to the public.¹²⁵

Citizen journalists also ensure that government affairs are reported from every angle and multiple perspectives.¹²⁶ Since there is such widespread access to recording devices and the Internet, almost anyone can participate in the reporting, providing for a variety of viewpoints, and contributing to the “marketplace of ideas.”¹²⁷ Underlying the marketplace of ideas theory is the notion that speech deserves constitutional protection, thus, fueling a competitive environment where bad ideas will fail and good ideas will thrive.¹²⁸ Therefore, the addition of citizen journalists to the marketplace of ideas will ensure that the competition among citizens and traditional reporters remains fierce.

¹²⁰ Roy S. Gutterman, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 SYRACUSE L. REV. 197, 207-08 (2000).

¹²¹ Kies, *supra* note 85, at 295 (citing Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975)).

¹²² *Estes*, 381 U.S. at 539 (emphasis added).

¹²³ See generally Catherine Gallagher, Edward R. Maguire, Stephen D. Mastrofski, & Michael D. Reisig, *The Public Image of the Police*, THE INT’L ASS’N OF CHIEFS OF POLICE (Oct. 2, 2001), <http://www.theiacp.org/The-Public-Image-of-the-Police>.

¹²⁴ Kies, *supra* note 85, at 295-96.

¹²⁵ *Id.* at 296.

¹²⁶ *Id.* at 295-296.

¹²⁷ *Id.* at 295.

¹²⁸ Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824 (2008).

C. Prior Restraint

The concept of “prior restraint” became a fundamental element of First Amendment jurisprudence¹²⁹ following the Supreme Court’s 1931 decision in *Near v. Minnesota*.¹³⁰ Although not clearly defined at that time, the concept of prior restraint can be explained in two parts:

- (1) A prior restraint occurs whenever judges or executive branch personnel are authorized to take notice of specific expression intended for communication rather than that which has actually been communicated.
- (2) For those rare cases when the Constitution permits the regulation of expression before it is communicated, a prior restraint also occurs if either (a) the judiciary can initiate enforcement or delimit the speech that is prohibited; or (b) the executive can make a final determination of illegality.¹³¹

In brief, prior restraint occurs when speech is suppressed before it reaches the public.¹³² When the state does impose a prior restraint on speech, the government must overcome a “heavy burden” to justify the imposition of the restraint.¹³³ The following section will address the Supreme Court case of *Near v. Minnesota*, as well as separation of powers and subsequent punishment under the scope of prior restraint.

i. *Near v. Minnesota* & more . . .

In *Near v. Minnesota*, the statute at issue criminalized the publication of “obscene, lewd and lascivious” or “malicious, scandalous and defamatory” writings.¹³⁴ The controversy arose when *The Saturday Press* was brought to court for printing articles that accused police officers of “not energetically performing their duties.”¹³⁵ The Supreme Court held that *The Saturday Press* had a right to criticize police officers and struck down Minnesota’s statute as

¹²⁹ Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating A Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087 (2001) (citing Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989)).

¹³⁰ See generally *Near v. Minnesota*, 283 U.S. 697 (1931).

¹³¹ Meyerson, *supra* note 129, at 1096.

¹³² Potere, *supra* note 96, at 302.

¹³³ *New York Times Co. v. United States*, 403 U.S. at 714 (citing *Org. for a Better Austin v. Keefe* 402 U.S. 415, 419 (1971)).

¹³⁴ *Near*, 283 U.S. at 701.

¹³⁵ *Id.* at 704.

an unconstitutional “previous restraint” on speech and press.¹³⁶ The Court emphasized the historical appreciation of the United States for freedom of the press and forbidding prior restraints on publications regarding public officers and official misconduct.¹³⁷ In fact, these publications can even be false and still qualify as constitutionally protected.¹³⁸ The *Near* Court reasoned that “public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel . . . not in proceedings to restrain the publication of newspapers and periodicals.”¹³⁹

It is not difficult to draw the parallels between today’s right to record the police and *Near*’s right to publish controversial writings on the police. Just as the police in *Near* were seeking to punish The Saturday Press for its unfavorable publications, police officers have tried to punish citizen journalists for disseminating unfavorable videos.¹⁴⁰ Today’s police are attempting to impose prior restraints on the public by confiscating cameras and deleting the contents,¹⁴¹ threatening and arresting recorders at the scene,¹⁴² or charging recorders with additional crimes following the dissemination of the video.¹⁴³

The *Near* Court also identified three narrow situations in which the government may suppress speech.¹⁴⁴ Speech may be suppressed when:

- (1) it would “obstruct[] . . . [military] recruiting . . . or [disclose] sailing dates of transports or the number and location of troops,”
- (2) “the primary requirements of decency [need to] be enforced against obscene publications,”
- or (3) “[t]he security of the community life [needs to] be protected against incitements to acts of violence and the overthrow by force of orderly government.”¹⁴⁵

Citizen journalists’ recording of the police could *possibly* fall under the third exception.¹⁴⁶ However, the Court has previously held that the federal government was not permitted to restrict the publication of classified

¹³⁶ *Id.* at 716.

¹³⁷ *Id.* at 717.

¹³⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). However, the publications may not be protected if they were made with “actual malice.” *Id.*

¹³⁹ *Near*, 283 U.S. at 718-19.

¹⁴⁰ See Potere, *supra* note 96, at 304.

¹⁴¹ Statement of Interest of the United States, *supra* note 20.

¹⁴² Underwood, *supra* note 9; Fenton, *supra* note 25.

¹⁴³ Sanchez, *supra* note 3.

¹⁴⁴ *Near*, 283 U.S. at 716.

¹⁴⁵ See Potere, *supra* note 96, at 304 (quoting *Near*, 283 U.S. at 716).

¹⁴⁶ *Id.*

documents about the Vietnam War.¹⁴⁷ Justices Stewart and Brennan explained that the government may only restrict publication if it will “surely result in direct, immediate, and irreparable damage to our Nation or its people.”¹⁴⁸ It would logically follow that if the Court allowed the publication of classified documents during wartime, then the Court would also allow the publication of police conduct. More specifically, if the release of classified war documents does not cause immediate danger, then the release of footage of police conduct does not cause immediate danger.

Notably, the Supreme Court has explained, “the guarding of military . . . secrets at the expense of informed representative government provides no real security for our Republic.”¹⁴⁹ This idea easily translates to the issue at hand: the guarding of police secrets at the expense of informed citizens does not protect anyone. In fact, poor police practices would actually have the potential to injure citizens. Further, one of the main purposes of the First Amendment is to prohibit state suppression of embarrassing information.¹⁵⁰ This idea also applies to recording police conduct because one would assume that an underlying issue the police have with citizen journalism is the backlash they receive from their publicized conduct.

ii. Separation of powers & subsequent punishment

While prior restraints are understood to be unconstitutional, there are rare instances where a subsequent punishment on speech is permitted.¹⁵¹ To understand the permission of subsequent punishments, a basic understanding of the separation of powers doctrine is necessary.¹⁵²

The United States Constitution demands a strict separation between the three branches of government.¹⁵³ In most cases, any attempt by one branch to influence or control another branch’s powers is illegitimate and will be prohibited.¹⁵⁴ The Constitution provides for a system of checks and balances to prevent this encroachment on power.¹⁵⁵ For a subsequent punishment to be legitimate, it must occur in the following fashion:

First, the legislature enacts a general law defining the prohibited speech or conduct Second, the speech is

¹⁴⁷ *New York Times Co. v. United States*, 403 U.S. at 714.

¹⁴⁸ *Id.* at 730.

¹⁴⁹ *Id.* at 719.

¹⁵⁰ *Id.* at 723-24.

¹⁵¹ Meyerson, *supra* note 129, at 1095.

¹⁵² *See id.* at 1095-96.

¹⁵³ Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 468 (2011).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 475.

communicated. Third, the executive branch enforces the law by initiating legal proceedings, arresting the alleged law breaker, or filing a complaint in court Finally, the judicial branch rules on the legality of the communication Upon a finding of illegality, the punishment is prison or fine for a criminal offense and damages for a civil violation.¹⁵⁶

From this timeline, it follows that the only branch that may act prior to the communication of speech is the legislature.¹⁵⁷

The Maryland General Assembly has yet to enact any legislation aimed directly at a citizen's right to record public police conduct.¹⁵⁸ In the absence of legislation, neither the executive branch nor the judicial branch may step in to create a rule, as this would be an encroachment on the separation of powers.¹⁵⁹ However, that is exactly what is happening. Police, as part of the executive branch, are taking matters into their own hands and "the number of cases around the country where police have deliberately prevented members of the news media as well as ordinary citizens from recording their activities" is growing.¹⁶⁰ Whether the police are confiscating cameras and deleting the contents,¹⁶¹ threatening recorders at the scene,¹⁶² arresting recorders,¹⁶³ or charging recorders with additional crimes following the dissemination of the video,¹⁶⁴ the message is clear: "Don't criticize the police."¹⁶⁵

The executive branch, by way of the police, has not only taken the above steps to restrict speakers before they are able to communicate, but has also formulated rules on speech out of their constitutional chronological order.¹⁶⁶

¹⁵⁶ Meyerson, *supra* note 129, at 1095.

¹⁵⁷ *Id.* (explaining that the legislature can impose penalties for defamation, obscenity, and breaches of the peace).

¹⁵⁸ Letter from Robert N. McDonald, Chief of Counsel Op. and Advice, State of Md. Office of the Attorney Gen., to The Honorable Samuel I. Rosenberg, Md. H.D. (July 7, 2010) (on file with the author) (determining that The Maryland Wiretap Act is not likely to apply to a citizen's encounter with a police officer). This determination will be fully explained in sub-heading "D" of this part.

¹⁵⁹ Meyerson, *supra* note 129, at 1095.

¹⁶⁰ Op-Ed., *The right to photograph*, BALT. SUN (July 30, 2012), http://articles.baltimoresun.com/2012-07-30/news/bs-ed-aclu-police-recordings-20120730_1_police-officer-record-police-activity-maryland-police-departments.

¹⁶¹ Statement of Interest of the United States, *supra* note 20.

¹⁶² Underwood, *supra* note 9; Fenton, *supra* note 25.

¹⁶³ Sanchez, *supra* note 3. In August 2005, police tackled and arrested a 63-year-old man with Asperger's syndrome for taking pictures of the officers. *Id.*

¹⁶⁴ Sanchez, *supra* note 3.

¹⁶⁵ *Id.*

¹⁶⁶ Meyerson, *supra* note 129, at 1096.

As we know, the executive branch has no place in creating a general rule that relates to speech;¹⁶⁷ however, this is exactly what it has done.¹⁶⁸ Baltimore City Police General Order J-16 states:

No member of the Baltimore Police Department may prevent or prohibit any person's ability to observe, photograph, and/or make video recording of police activity that occurs in the public domain, so long as the person's location, actions, and/or behavior do not create a legitimate, articulable threat to Officer safety, or an unlawful hindrance to successful resolution of police activity.¹⁶⁹

While the General Order might sound promising, the Supreme Court has struck down prior restraint originating in the executive branch, when such policies lack "adequate procedures for determining what speech is unprotected by the Constitution."¹⁷⁰ Unfortunately, this order certainly fails to define what speech is protected and what speech is not protected. The department is essentially saying that citizens may record police, but if you are in its way, it will find a way to stop you.¹⁷¹

Additionally, the Baltimore City Police Department does not require new officer training to include specific instructions that photographing officers in public places is a constitutionally protected right.¹⁷² In fact, as counsel for Christopher Sharp in his case against the Baltimore City Police Department, the American Civil Liberties Union emphasized that its lawsuit could have been avoided if the police department would implement clearer policies.¹⁷³ Again, this lack of an adequate procedure to ensure that police officers know what speech is actually protected should serve as grounds for rejection.¹⁷⁴

With this General Order in place, the Baltimore City Police are able to impose subsequent punishments on behavior that creates a legitimate, articulable threat to officers or a hindrance to resolution of police activity.¹⁷⁵

¹⁶⁷ *Id.* at 1095.

¹⁶⁸ BALTIMORE POLICE DEPT., GENERAL ORDER J-16, VIDEO RECORDING OF POLICE ACTIVITY (NOV. 8, 2011), available at <http://blogs.nppa.org/advocacy/files/2012/02/Baltimore-Police-Guidelines-02-13-12.pdf>.

¹⁶⁹ *Id.* at 1.

¹⁷⁰ Meyerson, *supra* note 129, at 1096.

¹⁷¹ Fenton, *supra* note 25 (emphasizing that shortly after the Baltimore City Police released General Order J-16, Scott Cover was told to stop recording or he would be arrested for loitering).

¹⁷² Op-Ed., *supra* note 160.

¹⁷³ Fenton, *supra* note 28.

¹⁷⁴ Meyerson, *supra* note 129, at 1096.

¹⁷⁵ BALTIMORE POLICE DEPT., *supra* note 168, at 4.

These subsequent punishments reprimand the speaker after dissemination of the information, generally indicating a disapproval of the speech and intent to silence that particular speech in the future.¹⁷⁶ The danger in this sequence of events is clear: “repeatedly punishing the same speech will inevitably cause potential speakers to either censor their messages or refrain from sharing them entirely.”¹⁷⁷

The government understands that modern technology will not allow it to prevent the posting of recorded content to the Internet.¹⁷⁸ Therefore, its only option is subsequent punishment as a form of prior restraint.¹⁷⁹ There is no doubt that consistent punishment or even the threat of punishment will chill¹⁸⁰ the speech of citizen journalists, eventually silencing their speech once and for all.¹⁸¹

Unfortunately, although there is a chilling effect, the government is not actually prohibiting the speech, and therefore the speaker is not “injured” within the scope of the Article III¹⁸² standing doctrine.¹⁸³ For example, in *Laird v. Tatum*, the Washington Monthly published an article revealing that the United States military was conducting surveillance on political activist groups.¹⁸⁴ Arlo Tatum was a member of a political activist group and claimed that even though he was not directly prohibited from speaking, he was discouraged from participating in expressive and associational activities.¹⁸⁵ Tatum sued for the chill on his First Amendment rights, and the Supreme Court held that he lacked standing.¹⁸⁶ Therefore, for a citizen journalist to sue for the chill on his or her First Amendment rights would be

¹⁷⁶ Potere, *supra* note 96, at 309.

¹⁷⁷ *Id.* (citing James Madison, *Madison's Reports on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 546, 569 (Jonathan Elliot ed., J. B. Lippincott & Co. 2d. ed. 1876).

¹⁷⁸ Potere, *supra* note 96, at 311.

¹⁷⁹ *Id.*

¹⁸⁰ Jonathan R. Siegel, *Chilling Injuries As A Basis for Standing*, 98 Yale L. J. 905, 906 (1989). The “chilling effect”: government action that deters someone from engaging in First Amendment activity without actually prohibiting it. *Id.*

¹⁸¹ Potere, *supra* note 96, at 311 (citing William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 263 (1982)).

¹⁸² U.S. CONST. ART. III § 2, cl. 1. The Article III standing doctrine requires that federal judicial power extend only to “cases” and “controversies” and further prohibits the Court to answer “abstract questions of wide public significance.” Siegel, *supra* note 180, at 909 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

¹⁸³ Siegel, *supra* note 180, at 905.

¹⁸⁴ *Laird v. Tatum*, 408 U.S. 1, 6 (1972).

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 10.

an uphill battle, as Justice Berger made it perfectly clear that “the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.”¹⁸⁷

Nevertheless, it is reassuring to know that the Supreme Court has decided that subsequent punishments should not be used as a form of prior restraint.¹⁸⁸ In *Thornhill v. Alabama*, the Court considered a state antiunion law that prohibited any public communication on the details of a labor dispute.¹⁸⁹ The Court held this statute unconstitutional because it was unfairly enforced against only those speakers whom the prosecuting officials found unfavorable.¹⁹⁰ In essence, the subsequent punishment became a prior restraint because it was only enforced against certain types of speech, ultimately deterring anyone from speaking on that topic in the future.¹⁹¹

D. Public vs. Private Conversations: Why the Maryland Wiretap Act Does Not Apply

Wiretapping law is a relatively young area of the law, resulting from the obvious technological advancements of the twentieth century.¹⁹² At the heart of these laws lies the Fourth Amendment to the United States Constitution, which most notably protects people from unreasonable searches and seizures.¹⁹³ The Supreme Court first addressed the notion of electronic surveillance law in the case of *Katz v. United States*.¹⁹⁴ In short, FBI agents had been recording Katz’s telephone conversations in a public telephone booth;¹⁹⁵ the Supreme Court found this practice unconstitutional and held that Katz was entitled to privacy even though his conversation was in a public place.¹⁹⁶

Shortly after the decision in *Katz*, Congress enacted the federal wiretapping law, which presumes electronic surveillance unconstitutional unless met by one of the following conditions: “(1) one or more parties to the recorded conversation consented to be recorded, (2) one party to the recorded conversation lacked a reasonable expectation of privacy, or (3) a warrant was

¹⁸⁷ Laird, 408 U.S. at 13-14 (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)).

¹⁸⁸ See *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁸⁹ *Id.* at 104.

¹⁹⁰ *Id.* at 97-98.

¹⁹¹ *Id.* at 101-02.

¹⁹² Kies, *supra* note 85, at 278.

¹⁹³ U.S. CONST. amend. IV.

¹⁹⁴ 389 U.S. 347 (1967).

¹⁹⁵ *Id.* at 348.

¹⁹⁶ *Id.* at 351-52. Notably, the Fourth Amendment “protects people, not places.” *Id.* at 351.

procured by a law enforcement official prior to the recording.”¹⁹⁷ Only a couple of years later, Maryland enacted its own wiretapping law;¹⁹⁸ however, Maryland’s law is exceptionally more stringent than its federal counterpart.¹⁹⁹ The law provides that a person may not “willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communications.”²⁰⁰ Further, a person may not disclose or use the contents of a communication obtained in violation of the Wiretap Act.²⁰¹ Most importantly, an “oral communication” is defined as “any conversation or words spoken to or by any person in private conversation.”²⁰² Accordingly, a citizen’s right to record in the state of Maryland depends on whether the recording was made during a private conversation.²⁰³

If a private conversation is found, then Maryland law requires that all parties to the communication consent to the recording, as Maryland is a “two-party consent state.”²⁰⁴ The statute reads that it is legal “for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and *where all of the parties to the communication have given prior consent to the interception . . .*”²⁰⁵

However, if a private conversation is not found then the communication does not involve an “oral communication” within the scope of the Maryland Wiretap Act and the recording may not be regulated.²⁰⁶ As such, the analysis turns on whether or not a citizen’s encounter with the police is public or private.²⁰⁷ The Court of Appeals of Maryland adopted a two-step reasonable expectation of privacy test to answer this very question.²⁰⁸ Under this analysis, “a person must show an actual expectation of privacy, and the expectation must be a reasonable one under an objective standard.”²⁰⁹

¹⁹⁷ Kies, *supra* note 85, at 280 (citing 18 U.S.C. §2511(2)(d); 18 U.S.C. §2510 (2); 18 U.S.C. §2511(2)(a)(ii)(A)-(B)).

¹⁹⁸ Kies, *supra* note 85, at 283. “Maryland’s wiretapping law was enacted in the 1970’s.” *Id.*

¹⁹⁹ Kies, *supra* note 85, at 282 (citing MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2011)).

²⁰⁰ MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1) (West 2011).

²⁰¹ *Id.* at § 10-402(a)(2)-(3).

²⁰² *Id.* at § 10-401(13)(i) (West Supp. 2013).

²⁰³ See McDonald, *supra* note 158, at 4-6.

²⁰⁴ Humphrey, *supra* note 5, at 781-82.

²⁰⁵ MD. CODE ANN., CTS. & JUD. PROC. § 10-402(3) (West 2011) (emphasis added).

²⁰⁶ McDonald, *supra* note 158, at 10.

²⁰⁷ See Kies, *supra* note 85, at 282.

²⁰⁸ *Whiting v. State*, 389 Md. 334, 348, 885 A.2d 785, 793 (2005) (citing *Katz*, 389 U.S. at 361 (Harlan, J. concurring)).

²⁰⁹ Humphrey, *supra* note 5, at 786 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

Further, when determining whether conversations between police officers and citizens are private, the Supreme Court of Washington identified three relevant factors: “(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party.”²¹⁰ The court then analyzed these factors under the circumstance of a traffic stop.²¹¹ First, the brief and business-like nature of the conversation is weighed against a finding of privacy.²¹² Second, the conversation occurred in public, mostly on public roads with third parties present.²¹³ Third, it is not reasonable that a driver or an officer would expect each other to keep the conversation private, as it is well known that the content of traffic stop conversations is regularly disclosed in reports and/or at hearings.²¹⁴ Maryland should adopt the analysis of the Supreme Court of Washington and apply these factors to the interactions between citizen journalists and police here in Maryland. In fact, in 2000, Maryland Attorney General Joseph Curran, Jr., agreed and offered a similar analysis:

It is also notable that many encounters between uniformed police officers and citizens could hardly be characterized as “private conversations.” For example, any driver pulled over by a uniformed officer in a traffic stop is acutely aware that his or her statements are being made to a police officer and, indeed, that they may be repeated as evidence in a courtroom. It is difficult to characterize such a conversation as “private.”²¹⁵

Additionally, in the Court of Special Appeals of Maryland case *Malpas v. State*, the court articulated a similar sentiment that a person has no expectation of privacy in a statement that he or she “knowingly exposes to the public,” even if that statement was made in his own home.²¹⁶ In this case, the court held that a neighbor’s recording of a man shouting at his wife, which was heard through the walls, did not violate the Wiretap Act.²¹⁷ Chief Judge Murphy also noted that the man who was shouting at his wife could

²¹⁰ *Lewis v. State*, 139 P.3d 1078, 1083 (Wash. 2006) (citing *State v. Clark*, 916 P.2d 384, 393 (Wash. 1996)).

²¹¹ *Lewis*, 139 P.3d at 1083.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Wiretapping & Elec. Surveillance, 85 Op. Att’y Gen. 225, 234 n. 8 (2000).

²¹⁶ *Malpas v. State*, 116 Md. App. 69, 84, 695 A.2d 588, 595 (1997) (quoting *Katz*, 389 U.S. at 511).

²¹⁷ *Malpas*, 116 Md. App. at 84, 695 A.2d at 596.

have reasonably anticipated that there was someone present on the other side of the wall who could hear the conversation.²¹⁸

Judge Murphy's analysis can easily be applied to a citizen journalist attempting to record police conduct. Most importantly, it should follow that if a police officer is involved in an altercation on public property, he should reasonably anticipate that there would be the third-party presence of a passerby who would rid that communication of an expectation of privacy, thereby falling outside of the scope of the Maryland Wiretap Act.

To the same effect, the Court of Appeals of Washington reversed the conviction of a defendant who had recorded his own arrest.²¹⁹ The court rejected "the view that police officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest."²²⁰ Pennsylvania, Illinois, and New Jersey courts have each come to similar conclusions in applying their wiretap statutes.²²¹

Although the Court of Appeals of Maryland has yet to decide whether the Maryland Wiretap Act applies to a citizen journalist recording a police officer,²²² the Maryland Office of the Attorney General expressed its stance that this encounter is most likely not a "private conversation" and therefore does not fall under the Act.²²³ The Office of the Attorney General's opinion "would be consistent with the suggestion made in the 2000 Opinion²²⁴ and with the holdings of the courts in most other states"²²⁵

PART VI: SOLUTION – A CALL FOR A BRIGHT LINE RULE ESTABLISHING A CITIZEN'S RIGHT TO RECORD POLICE CONDUCT

The police are meant to protect and serve the citizenry, but in the unfortunate situations in which this does not occur, the citizenry should have the right to protect and serve as well. *Sharp v. Baltimore City Police Department* provided hope that the United States District Court for the District of Maryland would create a bright line rule affirming this right and

²¹⁸ *Id.*

²¹⁹ McDonald, *supra* note 158, at 8 (citing *State v. Flora*, 845 P.2d 1355, 1358 (Wash. App. 1992)).

²²⁰ *Flora*, 845 P.2d at 1357.

²²¹ McDonald, *supra* note 158, at 8 (*see generally* *Commonwealth v. Henlen*, 564 A.2d 905 (Pa. 1989); *Jones v. Gaydula*, 1989 WL 156343 (E.D. Pa. 1989); *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986); *Hornberger v. American Broadcasting Co.*, 799 A.2d 566 (N.J. Super Ct. App. Div. 2002)).

²²² McDonald, *supra* note 158, at 10.

²²³ *Id.*

²²⁴ *Wiretapping & Elec. Surveillance*, 85 Op. Att'y Gen. at 232-34.

²²⁵ McDonald, *supra* note 158, at 10.

acknowledging every citizen's First Amendment right to record the police. Unfortunately, in a recent turn of events, this did not happen.²²⁶

It is now up to the local police and the Maryland General Assembly to explicitly state that police interaction with citizens is *not* private and in fact, should be public and transparent. The Baltimore City Police Department should accept and implement the recommendations of the DOJ by explicitly addressing the rights afforded by the First Amendment, creating accountability in its training program and specifically outlining the time, place, and manner restrictions on the right to record.

Finally, the Maryland General Assembly should amend the outdated Maryland Wiretap Act to assert that the Act will not be used to prosecute encounters with police officers since officers do not have a reasonable expectation of privacy in that encounter.

²²⁶ Sharp v. Balt. City Police Dep't et al, No. 1:11CV02888 (D. Md. Apr. 8, 2014).