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IS IT JUSTICE OR A CRIME TO RECORD THE POLICE?: A LOOK AT THE ILLINOIS EAVESDROPPING STATUTE AND ITS APPLICATION

STEPHANIE CLAIBORNE*

I. INTRODUCTION

A. *Cook County State's Attorney Prosecutes Man for Recording His Own Arrest*

The Cook County State's Attorney's Office¹ commenced criminal proceedings against Christopher Drew for using a digital voice recorder to record the police during his arrest when he violated the city's anti-peddling law.² In December 2009, Drew, a Chicago artist, intended to break the anti-peddling law³ when he attempted to sell handmade, screen-printed patches for a dollar.⁴

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1. The Cook County State's Attorney's Office, headed by Cook County State's Attorney Anita Alvarez, aims to achieve justice for victims of crimes by prosecuting offenders. Anita Alvarez, *Message from the State's Attorney*, Cook County State's Attorney's Office, <http://www.statesattorney.org/index2/index.html> (last visited Feb. 15, 2012). It is the prosecuting office of the second largest county in the nation. *Id.* The Cook County State's Attorney's Office's mission is to work with communities to "prevent and reduce crime as well as bring the fullest measure of justice to those who have been victimized." *Id.* It also performs civil work. *Id.*

2. Complaint at *1, *Am. Civil Liberties Union of Ill. v. Alvarez*, 2010 WL 4386868 (N.D. Ill. Oct. 28, 2010) (CIV. A. No. 10 C 5235) [hereinafter *ACLU Complaint*]; see Radley Balko, Op-Ed., *Why Is It Illegal to Record On-Duty Cops?*, CHI. SUN-TIMES, May 23, 2010, at 29 (noting that Christopher Drew's eavesdropping charge will be prosecuted in a Cook County court); see also Patricia Manson, *ACLU Sues Over Eavesdropping Act Prohibition*, 156 CHI. DAILY L. BULLETIN 162, 162 (Aug. 19, 2010) (citing a court filing of *People v. Drew*, No. 10CR4601, where there are charges pending in the Cook County circuit court).

3. It is illegal to sell wares without a license in downtown Chicago. CHI., ILL., MUN. CODE § 4-244 (1992).

4. Becky Schlikerman & Kristen Mack, *Suit Hits Ban on Recording the Police; ACLU Challenges State's Eavesdropping Law, Which Makes Violation a*

Drew, as part of the Free Speech Artists' Movement,⁵ set out to sell art on the streets of Chicago, where it is illegal to do so without a permit, as a means of advocating free speech.⁶ Little did he know, he would also find himself in a different fight for free speech.⁷ As expected, the police arrived to arrest Drew, who then recorded his interaction with a digital voice recorder that was inside his poncho.⁸ When the police realized that Drew recorded them without their consent, prosecutors charged him with eavesdropping on top of the illegal peddling charge.⁹ Drew requested to have the eavesdropping charge dropped arguing the law is over-broad.¹⁰ The anti-peddling charge, a misdemeanor, was

Felony, CHI. TRIB., Aug. 20, 2010, at C1; *Often, You Can Film Cops; Just Don't Record Them*, NPR MORNING ED., 2010 WLNR 17409886, at *1 (NPR Morning Ed. Sept. 1, 2010); see Memorandum of Law in Support of Defendant's Motion to Dismiss at 4, *People v. Drew*, No. 10CR4601, (Cir. Ct. of Cook Cnty. May 3, 2010), available at <http://www.c-drew.com/blog/free-speech-artists-movement/motion-to-dismiss-drew-final.pdf> (explaining that Drew is a silkscreen artist who wanted to sell his art and the silkscreen art of other artists on public sidewalks of downtown Chicago).

5. The Free Speech Artist Movement is an organization that uses art to change society and as a form of protest against prohibiting artists from selling their art. See generally FREE SPEECH ARTISTS' MOVEMENT INFORMATION, <http://www.art-teez.org/free-speech.htm> (last visited Feb. 15, 2012) (listing a number of causes and legal challenges that the organization has undertaken).

6. CHI., ILL., MUN. CODE § 4-244-030 (1992); *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1; Schlikerman, *supra* note 4, at C1; see Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 4, at 4 (explaining that on the day of the arrest, Drew sold his art patches in front of the Macy's Department Store in Downtown Chicago at 103 North State Street).

7. Schlikerman, *supra* note 4, at C1. Drew was also quoted as saying, "[people] have the right to defend themselves and bring evidence of what the people said to them in public and bring it into public court." Schlikerman, *supra* note 4, at C1; see *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *2 (remarking that Drew did not expect to be charged with violating the state's eavesdropping law).

8. Chicago Police Officer Robert Mizera approached Drew and told him that Drew could not sell his art on the sidewalk. Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 4, at 4-5. Officer Mizera threatened to arrest Drew if he did not stop and Drew refused. *Id.* The officer then arrested Drew for violating the Chicago ordinance. Schlikerman, *supra* note 4, at C1; see *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1-2 (observing that Drew was wearing a blazing red poncho and police found a small recording device among his belongings).

9. Schlikerman, *supra* note 4, at C1; see *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1-2 (depicting how Drew was charged with two misdemeanors for violating the city ordinance and a felony for violating the Illinois eavesdropping law); Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 4, at 5 (narrating that an Olympus digital audio-recorder was found in Drew's poncho pocket, which the officers listened to and discovered that Drew recorded Officer Mizera arresting Drew).

10. See Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 4, at 3 (arguing that the eavesdropping charge be dismissed

dropped, but a Cook County judge denied Drew's request to have the felony eavesdropping charge dismissed.¹¹

This Comment focuses on the problems of the Illinois Eavesdropping Act, specifically as it relates to the recording of police where there is no expectation of privacy. Part I will: (1) introduce how the current law is utilized today; (2) define the elements of the Illinois Eavesdropping Act; (3) provide a history of the statute and its enforcement; and (4) relay recent trends in technology noting how easy it is to violate the Act. Part II will: (1) discuss the legislative intent from the time of the enactment of the original statute and its current language; (2) highlight exemptions provided in the Act; (3) compare the Illinois Act to other states with similar statutes; (4) provide specific instances of the prosecution of eavesdropping; and (5) give arguments for and against the statute. Part III will propose ways to amend the Illinois statute to allow the recording of police officers performing their duties in public. Finally, Part IV will summarize the Comment and conclude that the current Illinois Eavesdropping Act is unconstitutional and must be amended to allow the recording of police officers performing duties in public where no expectation of privacy exists.

B. Background

The background of the Illinois Eavesdropping Act begins with a discussion on the suit filed by the American Civil Liberties Union of Illinois, which gives a synopsis on how prosecutors enforce the current Act. It then looks at the text of the Act, examining the elements, the sentence, and civil remedies. Finally, this section will look to the history and origins of the Act and how criminalization of police recording came to be.

1. ACLU Filed Suit Challenging the Illinois Eavesdropping Act

On August 19, 2010, the American Civil Liberties Union of Illinois¹² filed a lawsuit against Cook County State's Attorney, Anita Alvarez, challenging the Illinois Eavesdropping Act partly in

because it is unconstitutionally broad and/or there was no "conversation" between Drew and Officer Mizera "as the term 'conversation' has been interpreted under [the Illinois Eavesdropping Act]."; ACLU Complaint, *supra* note 2, at *9 (noting that Drew moved to dismiss the eavesdropping charge as it violated the First Amendment).

11. Tammerlin Drummon, *Video Best Tool Against Police Abuses*, CONTRA COSTA TIMES, June 13, 2010, at 13A; Balko, *supra* note 2, at 29; see ACLU Complaint, *supra* note 2, at *59 (arguing that Defendant Alvarez, or her office, successfully opposed Drew's motion to dismiss the eavesdropping charge).

12. The ACLU is a union designed to promote, protect, and expand the "civil liberties and civil rights of all persons in Illinois." ACLU Complaint, *supra* note 2, at *1.

response to the arrest and prosecution of Chris Drew.¹³ The lawsuit alleges the state law infringes on the First Amendment right to gather information about the police, share the information with the public, and use such information in a grievance or for policy changes.¹⁴ The ACLU claims the law will prevent the commencement of a program it designed to monitor police activity without its consent in public places by using audio/video recording devices.¹⁵ The suit lists four specific instances where citizens have been arrested and prosecuted for recording the police, including Drew's incident.¹⁶ It seeks a declaratory judgment holding that the Act is unconstitutional as it violates the First Amendment, and further requests the court to enjoin the State's Attorney's Office from prosecuting the ACLU and/or any of its members for violating the Act.¹⁷ The district court dismissed the complaint for lack of jurisdiction and failure to state a claim for which relief can be granted.¹⁸ The ACLU filed an appeal and oral arguments were

13. The ACLU filed suit in federal court in the Northern District of Illinois. ACLU Complaint, *supra* note 2, at *1; Manson, *supra* note 2, at 162; Schlikerman, *supra* note 4, at C1; *ACLU Files Eavesdropping Lawsuit*, JACKSONVILLE JOURNAL-COURIER, Aug. 20, 2010, <http://www.myjournalcourier.com/articles/illinois-28482-court-aclu.html>.

14. ACLU Complaint, *supra* note 2, at *1, *4; *ACLU Files Eavesdropping Lawsuit*, *supra* note 13; Schlikerman, *supra* note 4 at C1; *see* Manson, *supra* note 2, at 162 (citing the ACLU as arguing that “[g]overnment officials are trampling on the First Amendment by prosecuting people for recording traffic stops and other public encounters between the police and civilians . . .”).

15. ACLU Complaint, *supra* note 2, at *2; Manson, *supra* note 2, at 162; Frank Main, *Suit Challenges Ban on Recording On-Duty Cops Without Their Permission*, CHI. SUN-TIMES, Aug. 20, 2010, at 11.

16. *See* ACLU Complaint, *supra* note 2, at *59-61 (citing to the Cook County's prosecution of Chris Drew, Champaign County State's Attorney's prosecution in 2004 of *People v. Thompson*, No. 04-CF-1609 (6th Cir. Ct.), Crawford County State's Attorney's prosecution in 2009 of *People v. Allison*, No. 09-CF-50 (2d Cir. Ct.), and DeKalb County State's Attorney's prosecution in 2009 of *People v. Parteet* (16th Cir. Ct.)); *see also* Schlikerman, *supra* note 4, at C1 (citing to the ACLU's complaint which “point[s] to six Illinois residents who have faced felony charges after being accused of violating the state's eavesdropping law for recording police making arrests in public venues.”); Main, *supra* note 15, at 11 (citing to the ACLU's statement that in addition to the charges Drew faces, similar eavesdropping charges have been brought against civilians in Champaign, Crawford, and DeKalb counties).

17. The complaint does not make mention of an injunction against prosecuting citizens not part of the ACLU. ACLU Complaint, *supra* note 2, at *11. However, by declaring the current language of the Illinois Eavesdropping Act unconstitutional and placing a permanent injunction, the court will prevent the State's Attorney from prosecuting any citizen under the Act. ACLU Complaint, *supra* note 2, at *1, *11; Manson, *supra* note 2, at 162; *ACLU Files Eavesdropping Lawsuit*, *supra* note 13; Main, *supra* note 15, at 11.

18. *Am. Civil Liberties Union of Ill. v. Alvarez*, No. 10C5235, 2010 U.S. Dist. LEXIS 115354, at *31-32 (N.D. Ill. Oct. 28, 2010) (motion for amended judgment denied Jan. 10, 2011).

heard on this matter on September 13, 2011.¹⁹ At the time of publication of this Comment, the Seventh Circuit Court of Appeals had not decided this issue.²⁰

2. *The Illinois Eavesdropping Act*

a. The Elements

Illinois is one of twelve states that requires, by statute, the consent of all parties to a communication before that communication may be recorded.²¹ The law is particularly strict in that the statute specifically includes a provision making eavesdropping illegal regardless of whether the parties intended their communication to be private.²² The statute provides in relevant part that:

A person commits eavesdropping when he knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless

19. Brief of Plaintiff-Appellant, Am. Civil Liberties Union of Ill. v. Alvarez, No. 11-1286 (7th Cir. filed Feb. 10, 2011). A copy of the brief filed by the ACLU is available at <http://www.aclu-il.org/wp-content/uploads/2011/04/ACLU%20v%20Alvarez%20-%20appellant%20brief%204-15-11.pdf> (last visited Feb. 15, 2012). Oral arguments can be heard at <http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=11-1286&submit=showdkt&yr=11&num=> (last visited Feb. 15, 2012).

20. Brief of Plaintiff-Appellant, Am. Civil Liberties Union of Ill. V. Alvarez, *supra* note 19.

21. 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2006); Drummon, *supra* note 11, at 13A; see Dina Mishra, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1549 n.6 (May 2008) (noting that Massachusetts and at least eleven other states, including Illinois, prosecute eavesdropping and require the consent of all parties to the communication for recording); see also Balko, *supra* note 2, at 29 (observing, "Illinois is one of a handful of states that require all parties to consent before someone can record a conversation."); Schlikerman, *supra* note 4, at C1 (explaining, "Illinois is one of only a few states where it is illegal to record audio of conversation that take place in public settings without the permission of everyone involved."); Jon Yates, *Rights, Eavesdropping Law Collide in Filmmakers' Case*, CHI. TRIB., Oct. 7, 2004, at C1 (noting, "under Illinois law, it is illegal to record conversations unless everyone gives consent.").

22. See 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West 2010) (defining "conversation" to mean "any oral communication between [two] or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."); ACLU Complaint, *supra* note 2, at *4 (arguing that the current Illinois Eavesdropping Act is abnormal in comparison to the federal ban on audio recording conversations and other states with similar statutes because statutes other than the one in Illinois only apply to private conversations); Balko, *supra* note 2, at 29 (observing that with the exception of Massachusetts, other states include a provision in their eavesdropping laws to include an element of expectation of privacy).

he does so (A) with the consent of all parties to such conversation . . . or (B) in accordance with Article 108A or 108B of the “Code of Criminal Procedure of 1963. . . .”²³

An eavesdropping device is defined as “any device capable of being used to hear or record oral conversation” other than a hearing aid.²⁴ Thus, eavesdropping can only occur when actual sound is recorded; recording video without sound does not constitute eavesdropping.²⁵

b. The Sentence

A conviction for eavesdropping in Illinois is a felony.²⁶ At the very minimum, a person would serve one year in prison if convicted. Simply recording a conversation between citizens, even if the individuals are in a public place and speaking loud enough that others can hear, is a Class 4 felony as a first-time offense.²⁷ A Class 4 felony carries a mandatory minimum prison sentence of one year and a maximum of three years.²⁸ If committed a second time or other subsequent times, the offender faces a Class 3 felony,²⁹ which carries a sentence of two to five years.³⁰ Recording a police officer without his consent, regardless of whether the police officer has an expectation of privacy, is a Class 1 felony as a first-time offense.³¹ Class 1 felonies carry a minimum prison

23. 720 ILL. COMP. STAT. ANN. 5/14-2(a)(1) (West 2010).

24. *Id.* § 5/14-1.

25. See Edith Brady-Lunny, *Snooping or Security? Strict Eavesdropping Law Catches Some By Surprise*, PANTAGRAPH, July 9, 2009, at A1 (depicting how police informed a man from Bloomington, Illinois that a camera that records audio as well as visual activity is against the law and constitutes eavesdropping, but recording visual activity without audio is not); Balko, *supra* note 2, at 29 (declaring that it “is illegal to make audio recordings of on-duty cops and/or any other public officials.”); Celia Guzaldo Gamrath, *A Lawyer’s Guide to Eavesdropping in Illinois*, 87 ILL. B.J. 362, 362 (1999) (explaining, “[i]f a conversation is over-heard without an eavesdropping device, no violation of the statute can occur.”).

26. 720 ILL. COMP. STAT. 5/14-4(a)-(b); see Schlikerman, *supra* note 4, at C1 (noting that two Dekalb county citizens took a plea deal “to attempted eavesdropping, a misdemeanor, to avoid felony convictions”); Brady-Lunny, *supra* note 25, at A1 (explaining how the man who caught the guy that robbed his house on video with audio surveillance cameras would be charged with a felony, and the burglar would be charged with a misdemeanor); Drummon, *supra* note 11, at 13A (depicting how Chris Drew faces a felony charge).

27. 720 ILL. COMP. STAT. ANN. 5/14-4(a) (2010).

28. 730 ILL. COMP. STAT. ANN. 5/5-4.5-45 (2010).

29. 720 ILL. COMP. STAT. ANN. 5/14-4(a) (2010).

30. 730 ILL. COMP. STAT. ANN. 5/5-4.5-40(a) (2010).

31.

The eavesdropping of an oral conversation or an electronic communication between any law enforcement officer, State’s Attorney, Assistant State’s Attorney, the Attorney General, Assistant Attorney General, or a judge while in the performance of his or her official duties,

sentence of four years with a maximum sentence of fifteen years.³² A Class 1 felony is also used for second-degree murders.³³

c. Civil Remedies

The statute further provides civil relief for victims of eavesdropping.³⁴ If a civilian records a police officer without his consent, that officer can sue the civilian that recorded him and obtain a monetary remedy.³⁵ These civil remedies can include actual and punitive damages.³⁶ Thus, a civilian recording of an on-duty police officer making an arrest, even if it is the civilian's own arrest, may be subject to fees as punishment in civil court in addition to a criminal conviction.³⁷

3. History of the Illinois Eavesdropping Act

The language of the Illinois Eavesdropping Act was not always so strict against civilians. The first eavesdropping law in Illinois was passed in 1895.³⁸ The law previously defined eavesdropping as "using an eavesdropping device to hear or record any conversation 'without consent of *any* party thereto.'"³⁹ As long as at least one of the parties to the conversation consented to the recording, there was no eavesdropping. The law was amended in 1976 to require the consent of all of the parties.⁴⁰

People v. Beardsley, decided in 1986, discussed the meaning of requiring all parties to consent.⁴¹ It centered around a man who was stopped for speeding and refused to give the officer his name

if not authorized by this Article or proper court order is a Class 1 felony. 720 ILL. COMP. STAT. ANN. 5/14-4(b) (2010); see Gamrath, *supra* note 25, at 365 (indicating how the bill, which is now law, "penalizes more severely eavesdropping on an oral conversation or an electronic communication between law enforcement officers, judges, or government attorneys while they are performing their official duties.").

32. 730 ILL. COMP. STAT. ANN. 5/5-4.5-30(a) (2010).

33. See *id.* (noting that a charge for second degree murder is a Class 1 felony in which the sentence is a minimum of four years and a maximum of twenty).

34. 720 ILL. COMP. STAT. ANN. 5/14-6 (2010); Michael J. Leech, *Federal, State and Common Law Privacy Issues for the Computer Age*, 631 PRACTISING L. INST. 231, 258 (Oct.-Nov. 2003).

35. 720 ILL. COMP. STAT. ANN. 5/14-6; Leech, *supra* note 34.

36. 720 ILL. COMP. STAT. ANN. 5/14-6; see Leech, *supra* note 34 (explaining that injunctive relief, compensatory damages and punitive damages can be awarded when there are violations of the act).

37. See 720 ILL. COMP. STAT. ANN. 5/14-6 (allowing any person, including a police officer, to obtain a monetary judgment).

38. Gamrath, *supra* note 25.

39. *Id.* at 363 (quoting ILL. REV. STAT. 1961, ch. 38, §§ 206.1, 206.4 (emphasis added)).

40. *Id.*

41. See generally *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986) (depicting the facts of a man stopped for speeding).

or driver's license, but insisted on speaking with a lawyer.⁴² The defendant had a recorder with a microphone attached and when the officer noticed that he was recording, the officer asked the defendant to stop recording the conversation, as he had not consented.⁴³ The defendant told the officer that he would not, and continued to record.⁴⁴ The officer called for backup and placed the defendant under arrest for speeding and failure to produce a driver's license.⁴⁵ When the second officer arrived, they placed the defendant in the back of the squad car while the officers sat in the front and conversed.⁴⁶ The defendant recorded their conversation.⁴⁷ Upon discovering that their conversation was recorded, the officers charged the defendant with speeding *and* eavesdropping.⁴⁸

The defendant was convicted of both charges, but Beardsley only challenged the eavesdropping conviction on appeal.⁴⁹ The Illinois Supreme Court reversed the defendant's eavesdropping conviction and found that because the officers were speaking in the presence of the defendant, they had no reasonable expectation of privacy.⁵⁰ The court held that the eavesdropping statute included an element that there be a reasonable expectation of privacy, although, at the time, privacy was not explicitly included in the statute.⁵¹ In a separate, concurring opinion, Justice Simon

42. *Id.* at 347.

43. *Id.*

44. *See id.* (mentioning how the defendant responded that recording his conversation was legal as long as he, the defendant, consented to the recording).

45. *Id.*

46. *Id.* at 348.

47. *Id.*

48. *See id.* (describing how the tape recorder was found after the defendant was placed in a cell; subsequently, a jury found the defendant guilty of eavesdropping).

49. *Id.* at 347-48.

50. *See id.* at 350, 352 (remarking that the determination of whether a criminal act had occurred was if the "officers/declarants intended their conversation to be of a private nature under circumstances justifying such expectation" and since the officers did not have a private conversation, there was no violation of the statutory prohibition against eavesdropping); *see* ACLU Complaint, *supra* note 2, at *4 (arguing that the *Beardsley* court "held that [the] motorist did not violate the Act, because the conversation was not private."); *see* Gamrath, *supra* note 25, at 364 (emphasizing the state supreme court's holding that "[s]ince the officers carried on their conversation in front of the defendant, they could not have intended for their conversation to be private."); *see* Eric R. Waltmire, *When Are Internet Communications Not "Electronic Communications" Under the Illinois Eavesdropping Statute?*, 20 DCBA BRIEF 32, 34 (Nov. 2007) (explaining how there was no eavesdropping because "[t]he court found the police had no legitimate expectation of privacy with respect to their conversation because they conversed in the defendant's obvious presence.").

51. *See Beardsley*, 503 N.E.2d at 352 (holding that because there was no

argued that the law was clear and there is no expectation of privacy requirement; but because the officers knew Beardsley had a recorder, they impliedly consented.⁵²

In 1994, the Illinois legislature specifically amended the Illinois Eavesdropping Act to overrule *Beardsley*⁵³ and provided the definition of “communication” to be any communication between two or more persons “regardless of whether one or more parties intended their communication to be of a private nature.”⁵⁴

C. Recent Trends in Eavesdropping Technology

Today, it is very easy for a person to record communication between one or more persons. The number of people walking around with an “eavesdropping device” is constantly growing.⁵⁵

reasonable expectation of privacy, there was no eavesdropping violation); ACLU Complaint, *supra* note 2, at *4 (arguing that the *Beardsley* court held that an element of eavesdropping was that parties have to believe that the conversation is private under the circumstances); Manson, *supra* note 2, at 162 (citing the holding in *Beardsley* as the eavesdropping law was only violated if the conversation was private and could not be overheard by anyone acting in a lawful manner).

52. *Beardsley*, 503 N.E.2d at 354 (Simon, J., concurring).

53. A 1994 Illinois Supreme Court decision followed the *Beardsley* precedent in finding that there must be a requisite expectation of privacy in order to violate the Illinois Eavesdropping Act. *People v. Herrington*, 645 N.E.2d 957, 958-59 (Ill. 1994); see Balko, *supra* note 2, at 29 (emphasizing that in 1994, the legislature stripped the requirement that there be an expectation of privacy in response to “an incident in which a citizen recorded his interaction with two on-duty police officers.”); see Steven Helle, Op-Ed., *Eavesdropping Becomes a Complicated Issue in Illinois*, THE STATE JOURNAL-REGISTER, Feb. 28, 1995, at 5 (observing that the legislature recently amended the eavesdropping statute to “declare that a conversation could not be taped regardless of whether a participant intended it “to be of a private nature under circumstances justifying that expectation.”); Yates, *supra* note 21, at C1 (making note of legal experts stating that “legislators toughened the law 10 years ago, removing an exemption that had allowed conversations to be recorded if they took place in public.”); Helen W. Gunnarsson, *Filmmaker Charged Under Eavesdropping Statute: A Filmmaker Who Taped Police Without Their Consent Is Charged Under the Illinois Eavesdropping Statute*, 92 ILL. B.J. 564, 565 (Nov. 2004) (explaining how shortly after a 1994 court decision, which based its holding on *Beardsley*, the legislature amended the statute to overrule *Beardsley*); Gamrath, *supra* note 25, at 364 (commenting that in 1994, Section 14-1 of the eavesdropping statute was amended); ACLU Complaint, *supra* note 2, at *4 (suggesting that eight years after the *Beardsley* decision, Illinois amended the Act with Public Act 88-677); Waltmire, *supra* note 50, at 34 (observing that “[i]n 1994, the Illinois legislature overruled *Beardsley*.”).

54. 1994 Ill. Laws 677; Waltmire, *supra* note 50, at 34; Manson, *supra* note 2, at 162; ACLU Complaint, *supra* note 2, at *4; Gamrath, *supra* note 25, at 364.

55. See *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1 (noting how there is a proliferation of cell phones and other even smaller recording devices that people are capable of carrying around); See Justin

With widespread technology at our fingertips, the world is ready to record at a moment's notice.⁵⁶ Video and audio recorders are not only getting so small that people can put them in their pocket, but they are also getting cheaper.⁵⁷ Many cell phones, MP3 players, and digital cameras are capable of recording audio as well as video, making them eavesdropping devices.⁵⁸ Many people do not realize that it is a crime, especially when recording people in public who have no expectation of privacy.⁵⁹

With so many people walking around with recording devices on their person, people are more likely to utilize them to capture police activity.⁶⁰ There are thousands of postings on YouTube and other media outlets from civilians that have recorded police officers abusing authority while making arrests.⁶¹ The growing trend is that people are becoming less trusting of the police and are turning to their cell phones or other recording devices to

Fenton, *Recording Police Appears Legal*, THE BALT. SUN, July 31, 2010, at 1A (remarking that since the Maryland's wiretapping law was enacted in 1973, the number of video and audio recordings "with hand-held and portable recording devices has exploded.").

56. See 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, 985 (2009) (observing that these devices "allow people to make recordings with the click of a button.")

57. Schlikerman, *supra* note 4, at C1; Phil Elmore, *Keeping Cops Honest*, WORLD NET DAILY, Oct. 8, 2010, <http://www.worldnetdaily.com/index.php?pageId=198065>; see *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *3 (suggesting that there is a proliferation of cell phones and even smaller recording devices).

58. See Skehill, *supra* note 56, at 985 (noting that "[e]veryday devices such as cell phones, digital cameras and MP3 players allow people to make recordings with the click of a button."); see *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1 (implying that people carry around cell phones and other such small recording devices).

59. See, e.g., Fenton, *supra* note 55, at 1A (describing the events of a Maryland woman who was arrested for recording police misconduct and posting the audio-video recording on YouTube—the woman claimed she did not know that recording the incident was a crime); Rummana Hussain, *Woman Charged With Taping Cops Acquitted*, CHI. SUN-TIMES, Aug. 25, 2011, at News 9 (chronicling the acquittal of Tiawanda Moore, an Indiana woman who recorded the Chicago Police after they encouraged her not to file a sexual harassment complaint against a fellow officer—she also did not know it was a crime to record the police).

60. See Schlikerman, *supra* note 4, at C1 (mentioning the fact that cell phones that record audio and video are "in almost every pocket," making it easier to capture public conversations since it is "only a click away").

61. Radly Balko, INSTAPUNDIT.COM (May 20, 2010, 12:33 PM), <http://pajamasmedia.com/instapundit/99685/>; see Skehill, *supra* note 56, at 985 (stating that "[a] recent trend has emerged in which individuals record police misconduct, then post the recordings on the internet."); Drummon, *supra* note 11, at 13A (noting how there are countless videos on YouTube and Facebook that show police officers behaving badly).

capture what they perceive to be police misconduct.⁶² Then they take the recording and post it onto YouTube, Facebook, or some other media outlet for the world to view.⁶³

Because there has been such an increase in citizen-recording of the police in the line of duty, officers are making more and more arrests for violating eavesdropping laws in all-party consent states.⁶⁴ The police are using the eavesdropping laws to their advantage to prevent citizens from recording them or to punish them for doing so.⁶⁵ Since the number of arrests related to citizens recording the police is constantly increasing, so are the prosecutions of those citizens.⁶⁶ Although there has yet to be a conviction for violating the Act in Illinois, with the recent trend of recording the police, it will not be long before a conviction is secured.⁶⁷

62. Drummon, *supra* note 11, at 13A; see Skehill, *supra* note 56, at 985 (noting how citizens posting police brutality on the internet plus sensationalized media coverage raises “serious concerns of the prevalence of police misconduct.”).

63. Skehill, *supra* note 56, at 985; see Drummon, *supra* note 11, at 13A (observing how “[v]ideos by Joe Citizen, uploaded to Facebook and YouTube, have increasingly caught rogue officers red-handed.”).

64. Skehill, *supra* note 56, at 985-86; see Schlikerman, *supra* note 4, at C1 (noting that “more arrests have occurred in recent years because of the prevalence of cell phone cameras that also record audio.”). “Cameras have become the most effective weapon that ordinary people have to protect against and to expose police abuse. And the police want it to stop.” Wendy McElroy, *Are Cameras the New Guns?*, GIZMODO (June 2, 2010, 5:00 PM), <http://gizmodo.com/5553765/are-cameras-the-new-guns>.

65. See Schlikerman, *supra* note 4 (noting that the more videos that appear showing police misconduct, the “more efforts by law enforcement to stop such recordings from being made.”); see *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1 (arguing that the general trend is that “[l]aw enforcement is rebelling, and is refusing to allow public scrutiny of their behavior. And they're using the eavesdropping statute as a weapon against civilians.”); see Yates, *supra* note 21, at C1 (describing that the Champaign, Illinois City Manager wrote a letter to the Champaign County State's Attorney requesting that the eavesdropping charge against two Champaign men be dropped because the desired effect, letting the citizens know that they cannot record the police, had been reached).

66. See *Often, You Can Film Cops; Just Don't Record Them*, *supra* note 4, at *1 (noting that there are more cases involving recording of what is said between police and civilians).

67. At the time of publication of this article, the eavesdropping charges against Chris Drew have not been dismissed and are still pending against him. Manson, *supra* note 2; compare *Commonwealth v. Hyde*, 750 N.E.2d 963, 964-71 (Mass. 2001) (upholding a conviction for a citizen who secretly recorded his interaction with the police during a routine traffic stop).

II. ANALYSIS

A. Legislative Intent

The original purpose of creating the Illinois Eavesdropping Statute was to protect citizens.⁶⁸ The actual definition of eavesdropping is to “listen secretly to a *private* conversation.”⁶⁹ The legislature intended the statute to punish those who used mechanical devices to listen to conversations that went on in the homes of citizens, thus creating an expectation of privacy.⁷⁰ Particularly, there was a concern for unwarranted government intrusion against privacy rights.⁷¹ Even the drafters of the Illinois Constitution associated “eavesdropping” with government intrusion into the privacy rights of citizens.⁷² Courts have extended the meaning of “expectation of privacy” to include conversations that occur outside of the home.⁷³

In 1994, however, the legislature specifically amended the statute to protect the privacy rights of the *government* from intrusion by citizens.⁷⁴ In floor debates, state representatives and senators arguing for the amendment referred directly to *Beardsley* in recognizing that everyone, including the police, has a right not

68. See *Beardsley*, 503 N.E.2d at 349 (citing to the Illinois Eavesdropping Act's Committee Comments that the purpose of the legislation was to “protect the privacy of the individual” (quoting *People v. Klingenberg*, 339 N.E.2d 456, 458-59 (Ill. App. 1975))).

69. OXFORD UNIV. PRESS, THE OXFORD AMERICAN DICTIONARY AND THESAURUS 454 (U.S. ed. 2003); see also BLACK'S LAW DICTIONARY 588 (9th ed. 2009) (defining eavesdropping as “[t]he act of secretly listening to the *private* conversation of others without their consent.” (emphasis added)).

70. See *Beardsley*, 503 N.E.2d at 349 (citing *Klingenberg*, 339 N.E.2d at 459) (referencing the Committee Comments on the Illinois Eavesdropping Statute where the legislature states “[t]he reason for this legislation has, of course, been to protect the privacy of the individual.”).

71. See 720 ILL. COMP. STAT. ANN. 5/14-5 (West 1965) (punishing the government by making it inadmissible for the government to use recordings obtained in violation of the Illinois Eavesdropping Statute; unedited since 1965).

72. “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy or interceptions of communications by eavesdropping devices* or other means.” ILL. CONST. art. I, § 6 (emphasis added).

73. See *Beardsley*, 503 N.E.2d at 352 (holding that there was no expectation of privacy where two police officers spoke to each other in the presence of the defendant inside of the squad car); *Klingenberg*, 339 N.E.2d at 459 (holding that the defendant did not have a reasonable expectation of privacy where a police officer recorded the events of arresting the defendant for driving under the influence); see also *People v. Myles*, 379 N.E.2d 897, 898-900 (Ill. App. 1978) (holding that the defendant had no expectation of privacy where the police recorded defendant's phone call to his wife while at the police station and there was a large sign that read “all calls monitored”).

74. See *supra* Part I.B.3.

to be recorded without his or her consent.⁷⁵ In opposition, some representatives stood firm against the amendment and argued that creating the amendment would infringe on the rights of citizens.⁷⁶ Despite these objections, the Illinois legislature passed the amendment creating the present language of the Illinois Eavesdropping Statute.

There is a part of the statute that does include an element of expectation of privacy.⁷⁷ In 2000, the legislature, recognizing the growing use of the internet and email, amended the electronic communication section of the Act.⁷⁸ The legislature made it unlawful to intercept, record, or transcribe electronic communication⁷⁹ when the sending and receiving parties intended the electronic communication to be private.⁸⁰ Under this amendment, a surreptitious interception or transcription is permissible as long as one of the parties did not intend the communication to be private.⁸¹ Thus, it is clear that the Illinois legislature still sought to protect the privacy of citizens under the Act. However, under the statute, privacy is only relevant when the communication is electronic.

75. See H.R. 1787, 88th Gen. Assemb., Reg. Sess., at 25-26 (Ill. 1993) [hereinafter Ill. H.R. 1787] (arguing that Illinois State Police and Illinois State Bar Association demanded an amendment to overrule *Beardsley* and to make it so that all parties must consent regardless if there is an expectation of privacy); see S. 1352, 88th Gen. Assemb., Reg. Sess., at 56-57 (Ill. 1994) (describing how the bill was designed to overrule *Beardsley* and make safeguards for the police).

76. See Ill. H.R. 1787 at 28-29 (Rep. Davis arguing that he refuses “to vote on any more legislation that takes the freedoms of people, like having a private conversation” and Rep. Johnson arguing that what makes Illinois unique is “the ability to be free from efforts of government to intrude in one’s privacy.”).

77. 720 ILL. COMP. STAT. ANN. 5/14-1(e) (2010).

78. 720 ILL. COMP. STAT. ANN. 5/14-1(e), P.A. 91-657, § 5 (effective Jan. 1, 2000).

79. See *id.* § 5/14-1(e) (defining electronic communication to be “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo electronic or photo optical system”); see also Waltmire, *supra* note 50, at 36 (noting the difference between the statute’s definition of “communication,” which is oral, and the statute’s definition of “electronic communication,” which encompasses non-oral communication, to require an expectation of privacy element).

80. 720 ILL. COMP. STAT. ANN. 5/14-2 (2010); *Id.* § 5/14-1(e).

81. See Waltmire, *supra* note 50, at 36 (differentiating oral communications and non-oral communications and noting that a communication only qualifies as electronic communication when both parties intend the communication to be private).

B. Exemptions in the Statute

There are many exemptions under the Illinois Eavesdropping Act.⁸² In fact, several exemptions allow the *police* to record citizens.⁸³ However, out of more than twenty exemptions outlined in the statute,⁸⁴ not one of those exemptions allows citizen-recording of the police while they are performing their duties in public. The only exemption that could possibly be interpreted as such is 720 ILCS 5/14-3(i), allowing for a person to record his own conversation if he reasonably believes a crime will be committed against him.⁸⁵ Even then, that statute could only pertain to an arrestee or a party to the conversation, not passerby.⁸⁶ It is, however, acceptable for police to keep a camera with audio/visual capabilities either in their car or on their person to record traffic stops or many other types of “stops” without the other party’s consent.⁸⁷ Chicago police cars, in particular, have one of the largest police surveillance equipments in the country with video cameras attached to almost every squad car, ready to record police-citizen interaction via audio and visual means.⁸⁸

82. 720 ILL. COMP. STAT. ANN. 5/14-3 (2010).

83. *See id.* § 5/14-3(g) (allowing the police, with prior notification to the county’s State’s Attorney, to record conversation in the course of an investigation of a forcible felony, drug or gang related activities or a felony offense where a weapon is involved); *see id.* § 5/14-3(g-6) (allowing the police, with prior notification to the county’s State’s Attorney, to record conversation involving an investigation of child sexual abuse or child pornography); *see id.* § 5/14-3(h) (allowing police, *without* having to first notify the State’s Attorney, to record simultaneously with the use of an in-car video camera of oral conversations with those in the presence of the office whenever the officer is conducting an enforcement stop); *see id.* § 5/14-3(h-5) (allowing the police, *without* having to notify the State’s Attorney, to record “utterances” made by a person while in the officer’s presence in the police squad car); *see also id.* § 5/14-3(h-10) (allowing the police to record simultaneously with a video camera during the use of a taser or similar weapon by an officer if the weapon is equipped with a camera).

84. *Id.* § 5/14-3.

85. *Id.* § 5/14-3(i). Recording is permissible for a citizen “who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household.” *Id.*

86. *Id.*

87. Schlikerman, *supra* note 4, at C1; *see* 720 ILL. COMP. STAT. ANN. 5/14-3(h) (2010) (defining “enforcement stop” to be “an action by a law enforcement officer in relation to enforcement and investigation duties, including but not limited to, traffic stops, pedestrian stops, abandoned vehicle contacts, motorist assists, commercial motor vehicle stops, roadside safety checks, requests for identification, or responses to requests for emergency assistance”); *see also id.* § 5/14-3(h-10) (allowing for police to have weapons equipped with cameras).

88. *Cops on Camera: Police Record Citizens. Why Not the Other Way Around?*, CHI. TRIB., Aug. 27, 2010, http://articles.chicagotribune.com/2010-08-27/news/ct-edit-recording-20100827_1_police-officers-chicago-police-vehicles-law-enforcement.

C. Comparison to Federal and Other State Statutes

The federal wiretapping statute⁸⁹ is nowhere near as rigid as the Illinois Eavesdropping Statute. First, the federal statute does not require all parties to consent.⁹⁰ It only requires the consent of one party to audio record a communication.⁹¹ Second, the federal statute includes an expectation-of-privacy element in its wiretapping law, the functional equivalent to eavesdropping.⁹²

There are eleven other states that require all parties to consent.⁹³ State courts in New Jersey, Washington, and Pennsylvania have upheld the citizen's right to record police officers, proving that a state can still allow citizen-recording while still being an "all party consent state."⁹⁴ With the exception of Massachusetts, the other states have an expectation of privacy provision specifically drafted into their statutes.⁹⁵ The Massachusetts Supreme Court held that the expectation of privacy was not a factor under the state's wiretapping law and upheld a conviction for recording an on-duty police officer.⁹⁶ However, distinct from Illinois, Massachusetts only criminalizes

89. Foreign Intelligence Surveillance Act, 18 U.S.C. § 2511 (2006).

90. *Id.* § 2511(2)(d).

91. *Id.*

92. *See id.* § 2510(2) (defining an oral communication as "communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such interception"); *see also* Congressional Findings, Pub. L. No. 90-351, § 801 (codified as 18 U.S.C. § 2510) (explaining that the statute was meant to protect the privacy of oral communication because they found that electronic, mechanical and other intercepting devices were used to hear oral conversations made in private).

93. *See supra* note 21 and accompanying text.

94. *Online Posting of Motorcyclist's Traffic Stop Sets Off Debate on Wiretap Law*, FOXNEWS.COM (June 17, 2010), <http://www.foxnews.com/politics/2010/06/17/online-posting-motorcyclists-traffic-stop-sets-debate-wiretap-law/>; Fenton, *supra* note 55, at 1A; *see* Skehill, *supra* note 56, at 991 (citing to *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 626-27 (N.J. 2002) and *Washington v. Flora*, 845 P.2d 1355, 1358 (Wash. 1992) when referring to states dismissing suits against recording the police because the courts are concerned about granting equal privacy rights to on-duty police officers).

95. CAL. PENAL CODE § 632 (West 2010); DEL. CODE ANN. tit. 11, § 1335(a) (West 2010); FLA. STAT. ANN. § 934.03(2)(d) (West 2010); HAW. REV. STAT. ANN. § 711-1111(1)(d-e) (West 2010); KAN. STAT. ANN. § 21-4001(a) (West 2010); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2010); MICH. COMP. LAWS. ANN. § 750.539c-d (West 2010); MONT. CODE ANN. § 45-8-213(1)(c) (West 2010); N.H. REV. STAT. ANN. § 570-A:2(I) (West 2010); 18 PA. CONS. STAT. ANN. § 5704(4) (West 2010); WASH. REV. CODE ANN. § 9.73.030(1) (West 2003).

96. *Hyde*, 750 N.E.2d at 964; *see* Radley Balko, *How to Record the Cops: A Guide to the Technology for Keeping Government Accountable*, REASON.COM (Sept. 20, 2010), <http://reason.com/archives/2010/09/20/how-to-record-the-cops> (stating that "Massachusetts is the only state to explicitly uphold a conviction for recording on-duty cops").

surreptitious recordings.⁹⁷

On the other hand, Maryland prosecutors are exploring a way to prosecute citizens for recording the police despite explicit language in Maryland's state statute that requires there be an expectation of privacy.⁹⁸ Recently, lawmakers in Maryland became concerned that the statute was being misapplied and that the police were twisting the law to prevent citizens from recording them.⁹⁹ In response, Maryland's Attorney General issued an advisory opinion stating that not only does the statute have an expectation of privacy provision, but that the statute was not meant to be used against citizens to prevent them from videotaping the police.¹⁰⁰ The letter further went on to state that those involved in a traffic stop do not have an expectation of privacy.¹⁰¹ The Maryland State's Attorney sees it differently and is utilizing his right not to follow the opinion of the Attorney General by prosecuting citizens who record the police.¹⁰² Because the Attorney General's opinions are not binding in state courts, the State's Attorney is under no obligation to follow them.¹⁰³ The Maryland court agreed with its Attorney General and found that there is no expectation of privacy in a traffic stop; thus, the defendant in that case did not violate the state's wiretapping statute.¹⁰⁴

97. See *Hyde*, 750 N.E.2d at 964 (holding that surreptitious recording is prohibited under the statute, but open and obvious recording is legal).

98. *Elmore*, *supra* note 57. After Anthony Graber posted his encounter with a Maryland State Trooper during a traffic stop he was arrested for violating the state's wiretapping law. *Id.* A plainclothes officer in an unmarked car pulled over Graber who was driving a motorcycle after he noticed Graber driving erratically on the highway. *Id.* The officer drew his gun and yelled at Graber before identifying himself as an officer. *Id.* Graber recorded the entire encounter on a video camera in his helmet. *Id.* Graber faced sixteen years in prison if convicted. *Id.*; but see *Maryland v. Graber*, No. 12-K-10-647 2010 Md. Cir. Ct. LEXIS 7, at *19 (Md. Cir. Ct. Sept. 27, 2010) (dismissing anti-wiretapping counts because the police officer did not have an expectation of privacy during the traffic stop).

99. Fenton, *supra* note 55, at 1A; see Letter from Robert N. McDonald, Chief Counsel of the Office of the Att'y Gen., to Samuel I. Rosenberg, Del. of Md. H.R. (July 7, 2010), available at http://www.oag.state.md.us/Topics/WIRETAP_ACT_ROSENBERG.pdf (responding to a Maryland delegate's inquiry of the use of cameras to record the police).

100. Letter from Robert N. McDonald, *supra* note 99 at 10-11.

101. *Id.* at 6 (citing to Wiretapping and Electronic Surveillance, 85 Op. Att'y Gen. 225 (2000)).

102. See Radley Balko, *Police Officers Don't Check Their Civil Rights at the Station House Door*, REASON FOUND. (Aug. 9, 2010), <http://reason.org/news/show/police-officers-civil-rights> (criticizing how the prosecutor believes that the State Trooper had an expectation of privacy while conducting the traffic stop).

103. *Id.*; Fenton, *supra* note 55, at 1A.

104. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *19.

D. Specific Instances of Eavesdropping in Illinois

As in Massachusetts, prosecutors in Illinois have charged citizens with eavesdropping for recording police-citizen interaction during enforcement stops.¹⁰⁵ Drew's arrest is not the first time a citizen has been arrested and charged in Illinois for violating the Illinois Eavesdropping Act.¹⁰⁶ The ACLU complaint lists three other instances where citizens have been arrested and charged for recording the police since the amended 1994 Act.¹⁰⁷

1. Patrick Thompson

In 2004, Martel Miller and Patrick Thompson recorded police activities around the area of Champaign, Illinois.¹⁰⁸ They used the recordings to create a documentary of the disparities of law enforcement treatment of white citizens compared to the treatment of black citizens in public,¹⁰⁹ claiming that the police unfairly targeted black citizens.¹¹⁰ The two men captured numerous footage of police interactions and arrests of citizens, both black and white.¹¹¹

However, one evening they were arrested for videotaping the police and charged with eavesdropping.¹¹² The Champaign County State's Attorney's Office dropped the eavesdropping charge against Martel Miller, but the charge against Patrick Thompson remained, citing to other unrelated charges.¹¹³ The ACLU stepped in and filed an amicus brief on behalf of Thompson.¹¹⁴ Because of a strong public outcry and the State's Attorney's belief that the Act is bad law, the State's Attorney decided not to prosecute Thompson for eavesdropping.¹¹⁵

Patrick Thompson sued the City of Champaign and its police officers for violating his First Amendment right to gather and

105. See ACLU Complaint, *supra* note 2, at *5 (listing various instances of different county prosecutors charging citizens with eavesdropping against a police officer).

106. ACLU Complaint, *supra* note 2, at *5.

107. *Id.*

108. Yates, *supra* note 21, at C1.

109. *Id.* Thompson and Miller were able to submit the documentary to the Urbana Public Television which aired, but prosecutors eventually confiscated it. *Id.*

110. *Id.*; Gunnarsson, *supra* note 53, at 564.

111. Yates, *supra* note 21, at C1.

112. See *id.* (explaining that the police arrested Miller and Thompson and seized their camera after they videotaped the officer issuing a citation to an African-American man for riding a bicycle without a headlight).

113. *Id.*

114. *Id.*; Gunnarsson, *supra* note 53, at 564.

115. Yates, *supra* note 21, at C1; see Gunnarsson, *supra* note 53, at 564 (noting how the Assistant State's Attorney of Champaign County, who was prosecuting Thompson and Miller, wanted to see the statute be amended to permit one-party consent to conversations).

disseminate information by recording the actions of the police while performing their duties in public.¹¹⁶ That case was settled for an undisclosed amount.¹¹⁷

2. *Adrian and Fanon Perteet*

In November 2009, Adrian and Fanon Perteet drove to a McDonald's in DeKalb County.¹¹⁸ As they were leaving, a police officer pulled the vehicle over for a traffic stop.¹¹⁹ Concerned about police abuse and brutality, Fanon recorded the interaction using the camera on his phone, which was capable of recording sound as well as video.¹²⁰ Once the officer realized that Fanon recorded the events, the officer arrested Fanon and placed him in the squad car.¹²¹ At that point, Fanon's brother, Adrian, pulled out his cell phone camera and began to record his brother's arrest.¹²² The police officer confiscated their cell phones, arrested both men, and charged them with eavesdropping.¹²³ To avoid a felony conviction, the Perteet brothers accepted a plea agreement for attempted eavesdropping, a misdemeanor.¹²⁴

3. *Michael Allison*

Michael Allison was charged with eavesdropping in 2009.¹²⁵ He began recording the conversations he had with the police after local authorities issued him a citation for the storage of unregistered or inoperable vehicles on private property.¹²⁶ He also took his digital recorder with him to court while contesting the citation because he was told that there would be no transcript of the proceeding.¹²⁷ The judge immediately charged Allison with eavesdropping, stating that he had violated her privacy.¹²⁸ Allison

116. Schlikerman, *supra* note 4, at C1.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Jacob Sullum, *Eavesdropping Law Shields Officials*, CHI. SUN-TIMES, Sept. 28, 2011, at Commentary 26.

126. Balko, *supra* note 102; Mike Masnik, *Man Facing 75 Years In Jail For Recording The Police; Illinois Assistant AG Says No Right To Record Police*, TECHDIRT (Sept. 2, 2011, 11:10 AM), <http://www.techdirt.com/articles/20110902/04163415790/man-facing-75-years-jail-recording-police-illinois-assistant-ag-says-no-right-to-record-police.shtml>; *see also* Balko, *supra* note 61 (glossing over Allison's prosecution, although not specifically mentioning Allison by name, by noting that some of the recordings took place on Allison's property).

127. Sullum, *supra* note 125, at Commentary 26.

128. *Id.*

was charged with five counts of eavesdropping and faced seventy-five years in prison if convicted; Allison then filed a Motion to Dismiss.¹²⁹ In September 2011, the court granted Allison's motion, declaring not only that the Act as applied is unconstitutional, but it violated Allison's substantive due process rights.¹³⁰ The State filed a direct appeal to the Illinois Supreme Court on October 27, 2011.¹³¹ At the time of the publication of this Comment, the Illinois Supreme Court had not decided the case.¹³²

4. *Tiawanda Moore*

Not listed in the ACLU report is the arrest of Tiawanda Moore. In August 2010, Tiawanda Moore recorded her conversation with two Chicago Internal Affairs police officers after she tried to file a complaint against an officer she claimed sexually harassed her.¹³³ Moore asserted that an officer sexually harassed her after the police were called to her residence in response to a domestic violence altercation between her and her boyfriend.¹³⁴ She allegedly tried to file a complaint on numerous occasions only to be encouraged to drop her complaint against the officer.¹³⁵ Moore then decided to record the conversations she had with Internal Affairs on her cell phone to show that they were unwilling to help her.¹³⁶ The police discovered her actions and she was charged with two counts of eavesdropping.¹³⁷ At trial, Moore's defense was that her actions fell under the exemption that allowed

129. *Id.*; ACLU Complaint, *supra* note 2, at *5.

130. *People v. Allison*, No. 09-CF-50 (Ill. 2d Cir. Ct. 2011), available at <http://iln.isba.org/blog/2011/09/16/cell-phones-and-eavesdropping>. The court considered whether the statute was void for vagueness, whether it violated due process, and whether the Act was unconstitutional. *Id.* at 2-3, 7. The court held that the statute was not void for vagueness, finding that the language of the statute is clear in its application of Allison's conduct. *Id.* at 3. In looking at due process, the court found that the Act punishes a "wide array of wholly innocent conduct" that has nothing to do with intrusion into citizens' privacy, the very purpose of the statute. *Id.* at 6. It further found that the Act lacks a culpable mental state. *Id.* at 7. In finding the Act unconstitutional, the court found—and other jurisdictions have recognized—a First Amendment right "to gather information by audio recording public officials involved in performing their public duties." *Id.* at 11. It also recognized that there has to be "time, place, and manner restrictions." *Id.* at 11.

131. See Helen W. Gunnarsson, *Is the Illinois Eavesdropping Act Unconstitutional? The Saga Continues*, 99 ILL. B.J. 604, 605 (Dec. 2011) (referring to the court filing of the case in the Illinois Supreme Court under Docket No. 113221).

132. *Id.*

133. Don Terry, *Eavesdropping Laws Mean That Turning on an Audio Recorder Could Send You to Prison*, N.Y. TIMES, Jan. 22, 2011, at A29B.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

her to record if she believed a crime was being committed against her.¹³⁸ On August 25, 2011, a jury acquitted Moore of the charges, taking less than an hour to deliberate.¹³⁹

E. Arguments for the Prosecution of Citizen-Recording

Police officers have privacy rights as they are citizens as well as law enforcement officials.¹⁴⁰ They are entitled to have their conversations held private as their conversations tend to be pertinent to criminal investigations.¹⁴¹ Officers dislike the use of cameras because they pose a threat to their independence and exercise of discretion.¹⁴² They argue that they cannot effectively do their job with cameras around as it could possibly affect their performance if they have to constantly worry about cameras or being recorded.¹⁴³ Therefore, officers argue that recording the police impairs and infringes on an officer's duty to investigate, and that the person recording commits a crime of interfering with a

138. Hussain, *supra* note 59 (referring to 720 ILCS 5/14-3(i)); Jason Meisner & Ryan Haggerty, *Eavesdropping Case Was Waste of Time; Jury Quickly Acquits Woman Accused of Recording Cops*, CHI. TRIB., Aug. 25, 2011, at News C1. The jury was able to hear the recording that Moore made. *Id.* One of the internal affairs officers can be heard telling Moore that she would be wasting her time filing a complaint and that they could "almost guarantee" that the officer would never bother her again. *Id.* It was never actually asserted that the officers committed a crime against Moore, only that she reasonably believed the officers committed a crime against her. *Id.*

139. *Id.* A juror, who spoke to the press, expressed that "[e]verybody thought it was just a waste of time" and agreed that Moore never should have been prosecuted. *Id.* Prior to her trial, Moore did go back and file a complaint of sexual harassment against the officer. *Id.* There is no information regarding the complaint available to the public. *Id.*; Hussain, *supra* note 59. The internal affairs officers were never investigated and one of them was even promoted. Meisner, *supra* note 138.

140. See *Washington v. Flora*, 845 P.2d 1355, 1357 (Wash. Ct. App. 1992) (state arguing that the police have a personal privacy interest in statements they make when effectuating an arrest); see also Balko, *supra* note 102 (arguing that in order for the State's Attorney in Maryland to bring charges against Anthony Graber, that state's attorney would have to believe that on-duty police officers have privacy rights); but see *Flora*, 845 P.2d at 1357 (rejecting the State's argument).

141. See Balko, *supra* note 102 (referencing the Harford County State's Attorney as saying that not everything a police officer does on the job is for public consumption).

142. See Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 801 (2005) (referring to the use of internal police cameras in squad cars and on their person).

143. *Id.*; Schlikerman, *supra* note 4, at C1; see Terry, *supra* note 133, at A29B (interviewing the president of the Chicago Fraternal Order of Police, Mark Donahue, who stands by the current application of the Illinois Eavesdropping Act).

criminal investigation.¹⁴⁴

Another concern supporters of the current law have is that there is no way to establish a chain of custody of the recording.¹⁴⁵ Today, it is very easy to manipulate recordings and video to an altered perception of accounts.¹⁴⁶ Supporters of the law argue that unless the recordings are immediately seized at the time the recording is completed, there is no way to know if the recording was edited.¹⁴⁷

F. Arguments Against the Prosecution of Recording Police Officers

Those against the statute argue that the Illinois Eavesdropping Act, as applied against citizens who record the police, violates the First Amendment.^{148,149} Critics argue that denying citizens the right to record the police denies them the right to gather, receive, and record information.¹⁵⁰ Critics of the law claim that there need to be checks and balances on the government, and recording the police is an effective way to accomplish that goal.¹⁵¹ By recording the police, officers can be

144. See *Cops on Camera*, *supra* note 88 (stating that the Fraternal Order of Police of Chicago argues that allowing citizen-recording would inhibit an officer from proactively doing his job).

145. Balko, *supra* note 102.

146. *Id.* (arguing that although a video could be altered, it would be pretty easy to discern).

147. *Id.*

148. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

149. ACLU Complaint, *supra* note 2, at *1; Motion to Dismiss at 8, *People v. Drew*, No. 10 cr 4601 (Ill. 1st Cir. Ct. 2010) [hereinafter *Drew Motion to Dismiss*], available at <http://www.c-drew.com/blog/free-speech-artists-movement/motion-to-dismiss-drew-final.pdf>; see *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that citizens have a First Amendment right to record what public officials do on public property, specifically when it is a matter of public interest).

150. ACLU Complaint, *supra* note 2, at *2; *Drew Motion to Dismiss*, *supra* note 149, at 9.

151. See ACLU Complaint, *supra* note 2, at *3 (noting that some officers abuse their authority and that there have been many occasions where audio/video recordings made by civilians of police-civilian encounters have helped resolve disputes about alleged police misconduct); see *Hyde*, 750 N.E.2d at 976 (Marshall, C.J., dissenting) ("[C]itizens have a particularly important role to play when the official conduct at issue is that of the police. . . . Their role cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording . . . an interaction between a citizen and a police officer."); see *ACLU Files Eavesdropping Lawsuit*, *supra* note 13, at State and Regional News (quoting Richard O'Brien, a Chicago lawyer as saying, "If this law stays in force, it will remain difficult for many citizens in Illinois to monitor and seek reform of police practices.").

held accountable for their abuse of authority.¹⁵² Allowing citizens to record the police would encourage law enforcement officials to be on their best behavior.¹⁵³

Audio and video recording is also important in giving citizens and juries a better perspective on police activities.¹⁵⁴ Juries, for example, tend to take the police officer's word over the defendant's.¹⁵⁵ Likewise, a citizen-recording of an arrest may be beneficial to the police officer.¹⁵⁶ When faced with allegations of police misconduct, it is possible that the police officer could use the citizen's recording to vindicate himself.¹⁵⁷ An unedited recording will give a better account as to the facts of an arrest than any police officer, defendant, or eyewitness can verbally attest to.¹⁵⁸

Critics agree that there should be limits on citizen-recording.¹⁵⁹ For example, they believe that citizens should remain far enough away as to not interfere with police investigations.¹⁶⁰ They also agree that police have a certain level of privacy, although it is in a diminished capacity.¹⁶¹ When the police are speaking privately amongst themselves or on their own personal time, a citizen should not be able to record them.¹⁶² However, when the officers are performing their duties in public where there is no expectation of privacy, such as making arrests or traffic stops, citizens must be allowed to record the police as a matter of

152. See McElroy, *supra* note 64 (explaining that there have been convictions of police officers based on evidence obtained from a videotape).

153. Mishra, *supra* note 21, at 1553; see Drew Motion to Dismiss, *supra* note 149, at 14 (arguing that audio recordings are "effective monitoring techniques, creating an objective record of interactions between police officers and civilians and serving as an effective means of diminishing police misconduct."); see Helle, *supra* note 53 ("A tape recording eliminates or lessens the deniability factor A person who knows he or she is being recorded tends to choose words more carefully, or might decline to speak altogether.")

154. See Mishra, *supra* note 21, at 1554 (discussing how citizen recordings help eliminate jury bias favoring police credibility and allow incidents of law enforcement abuses to be publicized).

155. *Id.*; Skehill, *supra* note 56, at 998; see Gunnarsson, *supra* note 53, at 563 (quoting Professor William Schroeder of the Southern Illinois University School of Law as saying "[w]ithout a recording, it will always be the citizens' word against the official's and the official will always win.")

156. See Skehill, *supra* note 56, at 1008 (arguing that surreptitious citizen recordings could thwart frivolous civil suits against police officers).

157. *Id.*; see Manson, *supra* note 2, at 162 (relating how an ACLU attorney argued that recordings protect the police from false accusations of wrongdoing).

158. See Skehill, *supra* note 56, at 997 (stating that recordings of police-citizen interactions may be used to bring "clarity" to courtroom proceedings); Mishra, *supra* note 21, at 1553; Elmore, *supra* note 57.

159. Drew Motion to Dismiss, *supra* note 149, at 14–15.

160. *Id.* at 15.

161. Hyde, 750 N.E.2d at 976 (Marshall, C.J., dissenting).

162. See Skehill, *supra* note 56, at 1006 (concurring that off-duty police officers should enjoy privacy rights equal to those afforded regular citizens).

public policy.¹⁶³ The police fear citizens with cameras because they are afraid of being confronted with damaging or embarrassing material, but officers tend to look the other way when the camera-holders capture footage that is flattering to the police or otherwise displays their heroism.¹⁶⁴ Critics claim that if police officers are doing their jobs lawfully and correctly, they should not fear onlookers and those with cameras.¹⁶⁵

III. PROPOSAL

A. *The Legislature Must Amend the Act to Include an Element of Expectation of Privacy*

Chris Drew is correct: the Illinois Eavesdropping Act is overbroad as it applies to citizen-recording of the police.¹⁶⁶ Citizens have a constitutionally protected right to record the police while they are performing their public duties.¹⁶⁷ The Illinois Eavesdropping Act must be amended to reflect this right. The best way to do this is to restore the statute to the *Beardsley* standard, which required that an expectation of privacy be present.¹⁶⁸ It is undisputed that police officers, along with other public officials, do not have the same privacy rights as regular citizens.¹⁶⁹ They have

163. See *Hyde*, 750 N.E.2d at 977 (Marshall, C.J., dissenting) (reiterating that citizens have an important role in recording police conduct); see also *Flora*, 845 P.2d at 1357 (holding that the state's argument that police have a privacy interest when they are performing their official duties in public where passersby could hear is wholly without merit); see *ACLU Files Eavesdropping Lawsuit*, *supra* note 13 (quoting the legal director of the ACLU of Illinois as saying "[o]rganizations and individuals should not be threatened with prosecution and jail time simply for monitoring the activities of police in public, having conversations in a public place at normal volume of conversation.").

164. McElroy, *supra* note 64.

165. Gunnarsson, *supra* note 53, at 564; *Cops on Camera*, *supra* note 88.

166. Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 4, at 3.

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

168. *Supra* Part I.B.3.

169. See *Cassidy v. Am. Broad. Co.*, 377 N.E.2d 126, 131-32 (Ill. App. 1978) (holding that a police officer is a public official and where he is performing a public service and discharging a public duty, "no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties."). The Illinois legislature specifically added language to dismiss the expectation of privacy element and effectively overrule *Beardsley*. *Supra* Part II.A. However, the amendment to the statute does not negate the fact that police officers do not have the same level of privacy as citizens. In fact, by eliminating the expectation of privacy element, it implicitly supports the basic assumption that the police have a diminished privacy level while at the same time putting the police, as well as other public officials, on the same level of privacy as citizens for purposes of eavesdropping.

diminished privacy rights.¹⁷⁰ By amending the Illinois Eavesdropping Act, what the 1994 legislature effectively did was give police officers the same privacy rights as ordinary citizens when it comes to being recorded.¹⁷¹ However, when police officers are performing a public function in a public place, they have no expectation of privacy.¹⁷² Eavesdropping laws were put in place to prevent the government from arbitrarily recording conversations of citizens, not the other way around.¹⁷³ The purpose of eavesdropping laws is to recognize the privacy rights of citizens.¹⁷⁴

The best way to keep Illinois an “all-party consent state” and allow for the recording of the police is to amend the definition of “conversation.”¹⁷⁵ A simple way to accomplish this would be to define “conversation” as “any oral communication between two or more persons where one or more parties reasonably expects the communication to be private.”¹⁷⁶ Thus, the language would be restored to the subjective and objective requirement of expectation of privacy.¹⁷⁷ However, the objective requirement would be the most operative. If this language were to be adopted, the original intent of the legislature and the drafters of the Illinois

170. Skehill, *supra* note 56, at 992-93; *Hyde*, 750 N.E.2d at 976 (Marshall, C.J., dissenting).

171. See Skehill, *supra* note 56, at 993 (arguing that giving police officers equal privacy rights as private citizens in anti-wiretapping or eavesdropping laws “contradicts the constitutional framers’ intent to limit police power.”).

172. *Cassidy*, 377 N.E.2d at 838.

173. See Skehill, *supra* note 56, at 982 (discussing how the Massachusetts eavesdropping law in particular was initially enacted to protect private citizens from secret recordings).

174. *Id.*

175. See CAL. PENAL CODE § 632 (2012) (clarifying “communication” to mean “confidential communication”); DEL. CODE ANN. tit. 11, § 1335(a) (2011) (punishing recordings and interceptions of private communications or other sounds meant to be private); N.H. REV. STAT. ANN. § 570-A:1(II) (2011) (defining “oral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”); 18 PA. CONS. STAT. ANN. § 5702 (2011) (defining “oral communication” similarly, as “[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.”); see also MONT. CODE ANN. § 45-8-213 (2011) (recognizing a privacy right in communication); compare MICH. COMP. LAWS ANN. § 750.539a (2011) (defining “eavesdropping” as “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse.”).

176. Compare to 720 ILL. COMP. STAT. ANN. 5/14-1(d) where the present language of the definition of “communication” is “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 . . .”).

177. *Scope of the Prohibition on the Eavesdropping of Conversations*, 1-10 ILL. CRIM. L. § 10.14 (2010).

Constitution would be upheld.¹⁷⁸ When there are two parties to a conversation and one of the parties records the conversation while the other party does not consent *and* reasonably believes the conversation will be kept private, the person recording the conversation has committed eavesdropping. In contrast, when a police officer stops a citizen for a traffic or enforcement stop and the citizen records the conversation, the citizen has not committed eavesdropping because the police officer could not have reasonably expected their conversation to be private.¹⁷⁹ Since there is no expectation of privacy by either the citizen or the police officer during a traffic or enforcement stop,¹⁸⁰ if the statute is amended, a citizen not a party to the conversation may also record the conversation without violating the eavesdropping law.¹⁸¹

This change would not only uphold a person's First Amendment right to record the police, but may also prevent criminalization of recordings of other public concern. The following examples are hypothetically punishable under the current language of the law: recording of a political candidate holding a public forum in a park, a news broadcast of a town hall meeting,¹⁸² and student, teacher, or school administration recordings of a classroom.¹⁸³ Hypothetically, under the current law, the recently convicted murderers of Derrion Albert, a Chicago honor student

178. See *Klingenberg*, 339 N.E.2d at 458-59 (recognizing the Illinois legislature's intent to make the previous law apply only to private conversations, which conforms with the widely accepted definition of "eavesdropping").

179. See, e.g., *supra* Part II.D.2 (discussing the Perteet brothers' arrest for violating the Illinois Eavesdropping Act by recording their encounter with police during a traffic stop).

180. See e.g., *Flora*, 845 P.2d at 1357-58 (holding that there can be no expectation of privacy in an arrest within the sight and hearing of a passerby); Letter from Robert N. McDonald, *supra* note 99, at 6-9.

181. See, e.g., *supra* Part II.D.1 (depicting Patrick Thompson's arrest for violating the Eavesdropping Act when he recorded traffic stops in which he was not a party to the stop or conversation); Compare *Beardsley*, 115 Ill.2d at 58-59 (holding that defendant could record the conversation between the two police officers where defendant was not a party because the officers did not have an expectation of privacy).

182. A current exemption for television and radio broadcasts applies to *incidental* conversations only, not purposeful conversations that are a matter of public concern. 720 ILL. COMP. STAT. ANN. 5/14-3(c) (2010).

183. See *Plock v. Bd. of Educ.*, 920 N.E.2d 1087 (Ill. App. 2009) (granting summary judgment to plaintiff school teachers against a school board for violating the Act by recording in their classrooms). It is widely accepted that there is no expectation of privacy in the classroom setting. Compare with *Plock v. Bd. of Educ.*, 545 F. Supp. 2d 755 (N.D. Ill. 2007) (holding that society is not willing to recognize an expectation of privacy in the classroom); see also *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107 (Tex. App. 1990) (teaching in a public school does not fall within expected zone of privacy); see also *Evans v. Super. Ct. of L.A. County*, 77 Cal. App. 4th 320, 324 (recognizing that classroom communications are not reasonably expected to be private).

beaten to death by members of a gang, would be able to sue the person who recorded the beating that led to their convictions.¹⁸⁴ That person, who brought nation-wide awareness to the dangers of youth violence by recording the video with her cell phone, could have been prosecuted for making this recording as it undoubtedly picked up the conversations of those committing the crime.¹⁸⁵ Is this the kind of justice the legislature wants to protect? We should be encouraging these kinds of recordings, not prohibiting them. The best thing to do is to change the statute to reflect its original purpose and meaning, which is to protect *private* conversations.

*B. In the Alternative, the Legislature Should Add an Exemption
Allowing for Citizen-Recording*

1. Permit All Citizens to Record the Police

If the legislature truly believes that keeping the current definition of “communication” is the best way to prevent people from intruding on the conversations of other citizens, then an alternative proposal would be to add an exemption explicitly allowing for citizen-recording of the police. This exemption would not only comport with the current language of the statute, but would effectively restore the individual’s First Amendment right to record the police as a means to gather information and petition the government for redress. The exemption could be effectuated under the list of exempt activities under 720 ILCS 5/14-3.¹⁸⁶ This section provides “[t]he following activities shall be exempt from the provisions of this Article . . . [.]”¹⁸⁷ and among those listed activities should be “recordings of an oral conversation between a uniformed peace officer and a person in the presence of the peace officer whenever the peace officer is performing his duties in a public place and within range where others can audibly hear without the assistance of a hearing device.”¹⁸⁸

184. 720 ILL. COMP. STAT. ANN. 5/14-6 (2010). Six people were convicted of murder for the beating death of Chicago honor student Derrion Albert. Don Babwin, *32 Years in Derrion Albert Beating; Videotaped Attack*, CHI. SUN-TIMES, Aug. 30, 2011, at 4. The video was used to identify the suspects and played before a jury. *Id.*; Karen Hawkins, *Beating Death of Derrion Albert, 16, Caught on Video*, HUFFINGTON POST (Nov. 27, 2009, 5:12 AM), www.huffingtonpost.com/2009/9/27/beating-death-of-derrien_n_301319.html.

185. Babwin, *supra* note 184, at 4; Hawkins, *supra* note 184. The video and audio footage of Derrion Albert’s death is available at www.huffingtonpost.com/2009/9/27/beating-death-of-derrien_n_301319.html.

186. 720 ILL. COMP. STAT. ANN. 5/14-3 (2010).

187. *Id.*

188. Compare to similar language in exemption (h), which states “[r]ecordings made simultaneously with the use of an in-car video camera recording of an oral conversation between a uniformed peace officer . . . and a person in the presence of the peace officer whenever [] an officer assigned a patrol vehicle is conducting an enforcement stop” *Id.* § 5/14-3(h).

Along with this exemption, the legislature can put limits in place for citizen-recording to ensure that it does not intrude or interfere with official police conduct. The legislature could impose limits requiring the citizen to stand ten feet away, for example. Although not necessary, it could also require that citizens hold their recording devices in plain view so that the officer is aware or at least should be aware that a recording of the events is taking place.¹⁸⁹ Although it is not the position of this Comment that surreptitious recordings should be prosecuted, as a compromise the legislature can properly allow citizen-recording while simultaneously balancing the interests of police officers.

In balancing these interests, it is important to again emphasize the need for language that includes an element for “expectation of privacy.” If the legislature would include in the statute that the term “conversation” refers to oral conversations where the parties have an expectation of privacy, the interests of the uniformed peace officer would be served when a police officer is, for example, speaking on the phone with his family. However, the interests of the public at large to have a First Amendment right to record the police outweigh the police interests of privacy while they perform their public duties.¹⁹⁰ Therefore, specific language allowing for citizen-recording of police officers must be added to the Act. At the time of the publication of this Comment, the Illinois House of Representatives had introduced a bill specifically providing for recording of the police where the officer has no expectation of privacy—it is currently under review.¹⁹¹

2. *Allow Arrestees to Record Their Conversations with the Police*

Although the first two proposed solutions should be considered first, as a last resort at upholding fairness and restoring the citizens’ constitutional right to record the police, the legislature could create an exemption specifically allowing for recording by the arrestee or party to the conversation with the police officer.¹⁹² As previously discussed, there are many explicit exemptions to provide for the recording of citizens by police officers.¹⁹³ One such exemption permits officers to record citizens during traffic or enforcement stops.¹⁹⁴ More importantly, there is

189. This would eliminate confusion over whether surreptitious recording is prohibited. *See Hyde*, 750 N.E.2d at 964 (holding that surreptitious recording of the police violates wiretapping laws).

190. Skehill, *supra* note 56, at 1001 (citing *Massachusetts v. Glik*, No. 0701 CR 6687, slip op. at 2-3 (Bos. Mun. Ct. Jan. 31, 2008)).

191. H.R. 3944, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

192. *See, e.g.*, Part I.A. (chronicling Chris Drew’s prosecution for recording his own arrest).

193. *Supra* Part II.B.

194.

Recordings made simultaneously with the use of an in-car video camera

an exemption that permits officers to record citizens while in the squad car.¹⁹⁵ However, the legislature specifically overruled *Beardsley* with its 1994 amendment that effectively prevents citizens, while in the squad car, from recording the police.¹⁹⁶ Whether in a squad car or not, it remains a crime for a citizen to reciprocate with his own recording.¹⁹⁷

A current exemption that could possibly be construed to allow for citizen-recordings of police is the exemption that allows a citizen who is a party to a conversation to record that conversation if he reasonably believes the other party to the conversation is committing, is about to commit, or has committed a criminal offense against that person.¹⁹⁸ However, as Chris Drew, Michael Allison, and Tiawanda Moore learned, this exemption is not a shield from prosecution.¹⁹⁹ People in the state of Illinois are still prosecuted for recording their own encounters with the police despite this exemption. This is a blatant double-standard. This alone should be enough to encourage the legislature to amend the statute out of fairness. The legislature, perhaps in recognizing this double-standard, began working on a bill to allow for persons in

recording of an oral conversation between a uniformed peace officer, who has identified his or her office, and a person in the presence of the peace officer whenever (i) an officer assigned a patrol vehicle is conducting an enforcement stop; or (ii) patrol vehicle emergency lights are activated or would otherwise be activated if not for the need to conceal the presence of law enforcement.

720 ILL. COMP. STAT. ANN. 5/14-3(h) (2010).

195.

Recordings of utterances made by a person while in the presence of a uniformed peace officer and while an occupant of a police vehicle including, but not limited to, (i) recordings made simultaneously with the use of an in-car video camera and (ii) recordings made in the presence of the peace officer utilizing video or audio systems, or both, authorized by the law enforcement agency

Id. § 5/14-3(h-5).

196. *Beardsley*, 503 N.E.2d at 352; *see also supra* Part II.A. ¶ 2 (relating how the legislature amended the statute, effectively overturning *Beardsley*).

197. *See* 720 ILL. COMP. STAT. ANN. 5/14-1 (2010) (making it a crime to record a conversation between two or more parties without the consent of all parties, regardless of whether the conversation is of a private nature); *see also id.* § 5/14-3 (listing various exemptions to the Illinois Eavesdropping Act, but none of them lists some form of citizen-recording of the police).

198. The exact language of the statute reads:

Recording of a conversation made by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording.

Id. § 5/14-3(i).

199. *Supra* Parts I.A, II.D.2, II.D.3.

vehicles who are being detained to record the police.²⁰⁰ The proposed language was over-broad, but it shows the legislature's recognition that change should occur. However, that bill did not make it out of committee and effectively died.²⁰¹

C. *Federal and State Courts Must Declare It Unconstitutional to Criminalize Citizen-Recording of the Police*

If the Illinois legislature is not willing to amend the statute to allow for citizen-recording of the police, it will be up to the federal and state courts to declare that the law is unconstitutional. The District Court for the Northern District of Illinois had this opportunity with the *Alvarez* case.²⁰² The court found that there was no precedent on this issue and that members of the ACLU faced no real threat of prosecution as there had not been many prosecutions by Cook County State's Attorney Anita Alvarez.²⁰³ This Comment respectfully disagrees with both contentions. First, the District Court could have looked to other federal courts for guidance as other jurisdictions have recognized a First Amendment right to record the police.²⁰⁴ Second, although it is not mentioned in the ACLU complaint, the Cook County prosecution of Tiawanda Moore shows that the prosecution of citizen-recording of the police is very much a concern for the citizens of Cook County.²⁰⁵

The matter is now in the hands of the Seventh Circuit Court of Appeals.²⁰⁶ The Seventh Circuit must find the current Illinois law, as applied to citizens who record the police, unconstitutional. Hopefully this issue will reach the United States Supreme Court, which should declare bans on citizen-recording of the police where there is no expectation of privacy unconstitutional, as such bans violate citizens' First Amendment rights to gather information and

200. James Covington, *Cell Phones Could Make Us All Felons*, ILL. LAWYER NOW (Mar. 23, 2011), <http://iln.isba.org/2011/03/23/cell-phones-could-make-us-all-felons>; H.R. 2018, 97th Gen. Assemb., Reg. Sess. (Ill. 2011). If the bill had become law, it would have been codified as an exemption to the Act under 720 ILCS 5/14-3(h-20). *Id.* The proposed exempt activity was

[r]ecordings made by a person who is not a peace officer of an oral conversation between a uniformed peace officer, who has identified his or her office, and the person who is not a peace officer, in the presence of the peace officer while an occupant of a vehicle other than a police vehicle, provided that all parties to the conversation have knowledge that a recording is being made.

Id.

201. Covington, *supra* note 200; H.R. 2018.

202. *Alvarez*, 2011 U.S. Dist. LEXIS 2088.

203. *Id.* at *10.

204. *E.g., Cumming*, 212 F.3d at 1333.

205. *See supra* Part II.D.4 (discussing the case against Tiawanda Moore).

206. Brief of Appellant, *Am. Civil Liberties Union of Ill. v. Alvarez*, No. 11-1286 (7th Cir. filed Feb. 10, 2011).

petition the government for redress. The First Circuit Court of Appeals recently came to this conclusion,²⁰⁷ and with any luck, the Seventh Circuit will follow suit.

The Illinois Supreme Court also has the power to declare the Act unconstitutional.²⁰⁸ The case of Michael Allison is currently on the Illinois Supreme Court's docket, with the current holding from the circuit court being that the law is unconstitutional.²⁰⁹ Judge David Frankland could not have said it better: "A statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties."²¹⁰ Change should begin with the Illinois legislature. However, it might take some persuasion from the Illinois Supreme Court.

IV. CONCLUSION

The best way to uphold the Illinois "Eavesdropping" Act is for the legislature to amend the statute to conform with the true definition of "eavesdropping": listening to conversations said in *private*.²¹¹ Based on more recent amendments, it is clear the legislature still cares about privacy as it pertains to interceptions of conversations.²¹² It would be logical to make eavesdropping a crime involving *all private* conversations, not just the electronic ones. The people should be able to record the police without fear of criminal prosecution. Recording the police is what keeps checks and balances in our democracy. It is our First Amendment right.

207. *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). In *Glik*, the plaintiff sued Boston police officers after they arrested him for using his cell phone to audio and video record them arresting another citizen. *Id.* at 79. He did this believing the officers were using excessive force upon that citizen after he saw one of them punch the citizen. *Id.* at 79-80. The court held 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." *Id.* at 85. The right is guaranteed to all people, whether or not a party to the conversation. *See id.* (holding that the bystander, who was not a party to the conversation, had a First Amendment right to record).

208. Ill. Sup. Ct. R. 18.

209. *Allison*, No. 113221.

210. *Allison*, No. 09-CF-50.

211. *See supra* note 69 (defining "eavesdropping").

212. *See supra* Part II.A.¶ 3 (referencing how the legislature intended for *electronic* communications to be private, but not oral communications).