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## Fascinating Legal Questions Posed in Recent Criminal Law Cases

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## Fascinating legal questions posed in recent criminal law cases

Each month, as I prepare to draft this column, I place new judicial opinions from the Illinois criminal courts into a file folder. I also add newspaper clips covering all sorts of crime-related topics, from flawed police procedures, to unusual charging decisions, to strange defense strategies, to unlikely convictions and exonerations.

At the end of the month, the folder is an olio of criminal-law topics. But there's always a common thread running through the pieces. On first reading, each item seems counterintuitive or misguided in some way. It leaves me scratching my head and wanting to figure out the unexamined assumptions that led to the rule or practice coming about in the first place.

During the past year, for example, I discussed the case of a convicted murderer who successfully argued that his conviction should be reversed because the judge allowed him to plead guilty in exchange for a prison sentence that was too short.

I also wrote about a murder conviction that was overturned because, at voir dire, the judge asked potential jurors whether they "agreed" with presumption-of-innocence principles, rather than whether they "understood and accepted" them. Or was it the other way around? Either way, the judge used the wrong magic words, and the defendant was given a new trial in the death of a 5-year-old girl.

In other columns I discussed the fallacious reliance on dictionaries by criminal court judges and the police interrogation tactics that have made Chicago the false-conviction capital of the nation.

And on occasion I wrote about some doctrinal oddities that make the hearts of criminal-law geeks flutter. One was the illogical "afterthought" felony murder rule in Illinois, which allows a murder conviction for an accidental killing

so long as the defendant commits a felony not too long after the victim's death.

Of course, each month I can only write about one of these topics. So I thought I would use the remainder of this month's column to outline a few of the other items I considered last year but didn't have the time to cover.

- In Aurora, a robbery conviction was overturned because police, acting without a warrant, tracked the defendant's movement via a GPS monitor they had attached to his girlfriend's car.

The U.S. Supreme Court recently ruled that warrantless monitor installation and tracking of a defendant's car is a trespass that violates the Fourth Amendment. But here, the police seem to have trespassed on a third party's property, not the defendant's.

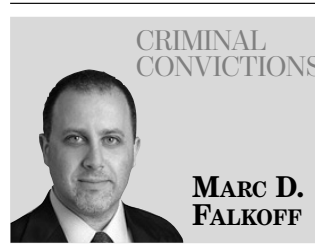
Should evidence from this warrantless search be excluded nonetheless? Should it be kept out because the defendant had a legitimate expectation of privacy in

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his girlfriend's car, or for some other reason?

- The Chicago Tribune reported that police in Illinois are using facial recognition software to compare images stored from surveillance videos against those kept in huge databases including Facebook and state driver's license databases. Coupled with Supreme Court-sanctioned collection of DNA samples during arrests, perhaps we should all take a moment to reflect on how new technologies affect our privacy rights and expectations.

- The newspaper also reported that Chicago police are being urged to make more "street stops" to investigate crime and to fill out more "contact cards" to gather



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age, race and address information. The tactic is one that seems destined to breed animosity toward police in city communities and parallels the type of provocative police behavior that was recently ruled unconstitutional in New York.

- The Illinois Supreme Court recently struck down the provisions of the state's anti-eavesdropping law that made it criminal to record conversations without the consent of all parties. Unchanged, at least for now, are those aspects of the law that govern electronic eavesdropping by police, which typically requires a warrant. The law mandates

that each county report annually how many such warrants are issued and about the outcome of each investigation. The reporting requirement is designed to allow the public to determine whether the warrant authority is being abused.

Initially, counties complied with this requirement, but over the past 10 years, fewer and fewer counties have bothered to issue the reports at all, making the requirement nearly meaningless. How can we force the counties to comply?

- Five officers from Chicago and Glenview were called out for lying on the stand about the circumstances that led to their warrantless search of a stopped vehicle

for drugs.

All five told the same story under oath at the defendant's trial, only to be confronted with a video-recording of the encounter that had been taken, unbeknownst to them, by a camera in the Glenview officer's car, proving they had conspired to manufacture their testimony. Few judges or lawyers would be surprised that police perjury — or "testilying" — happens, but it is quite unusual for officers to be held accountable for it.

What incentives or penalties can we introduce into the system to prevent such perjury in the future?

- U.S. Sen. Mark S. Kirk last year proposed that the police arrest en masse 18,000 persons he suspects are members of the Gangster Disciples on charges of drug dealing and murder. There's something more than a bit crazy about the suggestion, but figuring out why would be a useful exercise.

How exactly do we determine how many Gangster Disciples there really are? How far can the limits of conspiracy theory and vicarious liability be stretched? Where would we detain so many people? The proposal may have been intended as nothing more than a headline grabber, but the conceptual questions it raises are nonetheless provocative.

So many interesting questions remain unexplored.

Should teenagers who "sext" by swapping naked selfies be charged with violating child pornography laws? How should the criminal justice system react to studies showing that shaken baby syndrome is over-diagnosed, as the physician credited with discovering the syndrome now believes?

What does it mean to possess "multiple" images of child pornography when all of your data is stored in the cloud and easily accessible via half a dozen electronic devices?

For better or worse, there should be no shortage of interesting criminal law topics to write about in the coming year.