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Watching the Watchmen: The People's Attempt to Hold On-Duty Law Enforcement Officers Accountable for Misconduct and the Illinois Law that Stands in Their Way

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I. INTRODUCTION

"The two enemies of the people are criminals and government, so let us tie the second down with the chains of the Constitution so the second will not become the legalized version of the first."[1]

Thomas Jefferson, Third President of the United States

On one brisk autumn evening after many hours spent accompanied by highlighters, pens, and excruciatingly dry textbook passages, a young man decided to take a break from his academic pursuits and join his brother on a brief trip to the neighborhood McDonald's restaurant. The two brothers were pulled over by a local police officer as they arrived at their destination on the suspicion of driving under the influence. Uneasy about encounters with police, given the extensive documentation of police misconduct around the country,[2] the brothers attempted to document their encounter with the officers via their cell phone video cameras. Before long, they both found themselves handcuffed in the back of the squad car faced with possible felony convictions and jail time for violating the Illinois Eavesdropping Act ("Act").[3]

Unfortunately, this is not an Orwellian fable told to foment unnerving chills; this actually happened to Fanon and Adrian Perteet of DeKalb, Illinois in November of 2009.[4] Despite its lack of notoriety, the Illinois Eaves-

1. *Quotations*, THOMAS JEFFERSON MONTICELLO, http://www.monticello.org/site/jefferson/two-enemies-people-are-criminals-and-governmentquotation (last visited Apr. 1, 2012).

2. *See* Matthew Hickman, *Citizen Complaints About Police Use of Force*, BUREAU OF JUS. STATISTICS, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=553 (last updated Apr. 16, 2010) (referencing statistics from a 2002 national report on large state and local police departments, which revealed 26,556 total citizen complaints about excessive police force, just over two-thousand cases of which were sustained); *see also* Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. FOR SOC. JUST. 251, 265 (2008). This statistical study of Chicago police misconduct from 2002 to 2004 reported that a total of 10,149 complaints were filed on the grounds of brutality, illegal searches, sexual harassment/abuse/rape, racial abuse, and finally, planting evidence and false arrest. *Id.* at 267; 2010 Annual Report, *Injustice Everywhere: The National Police Misconduct Statistics and Reporting Project*, Figure 10, INJUSTICE EVERYWHERE, http://www.injusticeeverywhere.com/?page_id=4135 (last visited Oct. 24, 2011) (indicating how, in a national statistical analysis, police officers commit more assaults, sexual assaults and murders, per capita, than the rest of society combined).

3. 720 ILL. COMP. STAT. 5/14 (2008).

4. Becky Schlikerman & Kristen Mack, Editorial, *Suit Hits Ban on Recording the Police ACLU Challenges State's Eavesdropping Law, which Makes Violation a Felony*, CHI. TRIB., Aug. 20, 2010, at C1.

dropping Act has been used several times throughout recent years to prosecute individuals across the State for audio recording on-duty police officers and other public officials.[5] At its most basic level, this is not how a truly free society is supposed to operate.

The Act, as currently constructed, impedes upon citizens' constitutional First Amendment[6] rights, implicates Fourth Amendment privacy[7] and Fourteenth Amendment due process issues,[8] and finally, conflicts with compelling public policy concerns that indicate reform is necessary.[9] Given the constitutional and public policy arguments favoring modification, along with the breadth of ongoing police abuses of citizens, not only in Illinois,

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5. For a compilation of cases, see Amended Complaint at ¶ 40, ACLU v. Alvarez, No. 10-CV-05235 (N.D. Ill. Nov. 18, 2010), *available at* http://www.aclu-il.org/wp-content/uploads/2011/02/Amended-Complaint-proposed-11-18-10.pdf [hereinafter ACLU Amended Complaint]. Since the fall of 2010, when this Note was initially drafted, the media attention granted to the now infamous Illinois Eavesdropping Act has been anything but lacking. *See e.g.*, *infra* note 65. In fact, the Illinois Eavesdropping Act and its moratorium on audio recording of public officials, namely police officers, in public ways has been a hot topic of discussion for national news pundits across the cable news network spectrum. *See e.g.*, Judge Napolitano on Illinois Judge Ruling Eavesdropping Law Unconstitutional, FOX NEWS INSIDER (Mar. 12, 2012, 4:47 PM), http://foxnewsinsider.com/2012/03/12/judge-napolitano-on-illinois-judge-ruling-eavesdropping-law-as-unconstitutional/. Beyond its expanding notoriety, there have been a few recent noteworthy developments on this issue since the dawning of the 2012 new year. In one such development, on March 2nd, Cook County Judge Stanley Sacks held in a 12-page opinion that the Illinois Eavesdropping Act's current construction, with respect to audio recording on-duty law enforcement officers in public ways, is unconstitutional due to its overbroad application and potentiality for criminalizing "'wholly innocent conduct.'" Jason Meisner, *Eavesdropping Law Unconstitutional, Court Says: Victory for Activists who Want to Record Police Officers*, CHI. TRIB. (Mar. 3, 2012), http://www.chicagotribune.com/news/local/ct-met-eavesdropping-law-ruling-0303-20120303,0,3808980.story. The decision comes on the eve of preparations for the G-8 financial summit which was to be held in the city of Chicago at the end of May, until less than a week after the March 2nd opinion was rendered, the Obama Administration revealed it would move the gathering to Camp David Maryland in the hopes to ensure a "'more intimate setting.'" Rick Pearson, *Obama Explains Decision to Move G-8 Summit from Chicago*, LA TIMES (Mar. 6, 2012), http://articles.latimes.com/2012/mar/06/news/la-pn-obama-chicago-g8-summit-20120306. Coincidence? Or as some have speculated in the wake of Judge Sacks' opinion, tactical political chess move in the efforts to avoid thousands of expected grass-roots financial protesters and the negative publicity that often coincides with such demonstrations as a consequence of police brutality and threats captured via cell-phone video/audio equipment? *See id.* In other related news, in a 59 to 45 vote, the Illinois House of Representatives recently voted down proposed legislation that would have decriminalized audio recording law enforcement officers in public ways. *Illinois Eavesdropping Amendment Bill Killed in Illinois House*, HUFFINGTON POST, (Mar. 23, 2012 9:56 AM), http://www.huffingtonpost.com/2012/03/23/illinois-eavesdropping-am_n_1373688.html.

6. *See infra* Part III.A.2.

7. *See infra* Part III.B.1.

8. *See infra* Part III.A.1.

9. *See infra* Part III.B.2.

but also around the entire nation,[10] the Act as it applies to on-duty police officers should be altered so as to not include a reasonable and/or subjective expectation of privacy for on-duty police officers when "(a) the officers are performing their public duties, (b) the officers are in public places, (c) the officers are speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful."[11]

In Part II, this Comment discusses the history and background of the Act by taking a look at the current law and its legislative and precedential history, including Illinois specific cases challenging or dealing with the Act. Next, this Comment briefly analyzes a few other jurisdictional eavesdropping laws in order to help clarify and distinguish the current Illinois Act. Finally, Part III analyzes the rationale, both constitutional and otherwise, of why the Act needs to be altered as soon as possible.

This Comment argues that because of certain exemptions allowing police officers to record citizens without their consent, the Act creates open viewpoint speaker discrimination. Accordingly, since the Act would be subject to a strict scrutiny analysis under a constitutional challenge for this type of discrimination, it would be struck down. On the other hand, if strict scrutiny is deemed inappropriate, intermediate scrutiny would be appropriate, and under this standard of review, the Act would be struck down as well.[12] Part III also discusses the unreasonableness of holding valid expectations of privacy when police officers and other public officials are in public ways speaking to citizens. Lastly, this Comment analyzes compelling public policy reasons for why criminalizing audio recording of public police conversations with citizens is vehemently against the best interests of the people.[13]

II. BACKGROUND

A. THE ILLINOIS EAVESDROPPING ACT AS IT IS CURRENTLY CONSTRUCTED

The Illinois Eavesdropping Act is a criminal statute that makes it illegal to use any type of recording device to document any conversation, even

10. *See* Hickman, *supra* note 2; *see also, e.g.*, Futterman, *supra* note 2.

11. Complaint at 1, ACLU v. Alvarez, No. 10-CV-05235 (N.D. Ill. Aug. 19, 2010), *available at* http://www.aclu-il.org/wp-content/uploads/2011/02/COMPLAINT-in-ACLU-v.-Alvarez-FILED-8-19-10.pdf [hereinafter ACLU Complaint]. This was the central thesis utilized by the ACLU in its federal suit against Cook County State's Attorney, Anita Alvarez, which challenged the Act as an unconstitutional barrier against the protected First Amendment right to gather, receive, and record public information, more specifically, public police conversations with citizens. *Id.* at ¶ 39; *see also infra* Part II.E.4. Accordingly, the ACLU suit will be referenced often.

12. *See infra* Part III.A.

13. *See infra* Part III.B.

if such conversations are not private, without the consent of all of the parties involved.[14] The specific elements of the offense include: first, "[k]nowingly and intentionally us[ing] an eavesdropping devise for the purpose of hearing or recording all or any part of any conversation or intercept[ing], retain[ing], or transcrib[ing] electronic communication . . . .";[15] and second, to do so "with[out] the consent of all of the parties to such conversation . . . ."[16] According to the Act, a "conversation means 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."[17] To summarize, the Act disregards expectations of privacy and requires dual consent between conversing parties before any type of legal recording may take place for any kind of conversation.[18]

The Act defines an "eavesdropping device" as "any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means . . . ."[19] In its general application, the Act states that first time offenders may be convicted of a Class 4 felony and that for any subsequent offenses, Class 3 felony convictions may be in order.[20] These levels of felony charges are only for general violations of the Act, such as those committed between two private citizens.[21] Far more extreme penalties are in store for those who violate the Act against any public official, including law enforcement officers.[22] Specifically, the Act states that "eavesdropping of . . . conversation[s] . . . between any law enforcement officer, State's Attorney . . . or a judge, while in the performance of his or her official duties . . . is a Class 1 felony,"[23] which is equivalent to a criminal sexual assault conviction,[24] punishable by up to fifteen years incarceration[25] and possible fines amounting to $25,000.[26]

14. *See* Illinois Eavesdropping Act, 720 ILL. COMP. STAT. 5/14-2(a)(1)(A) (2006).
15. 720 ILL. COMP. STAT. 5/14-2(a)(1) (2006).
16. *Id.* at (a)(1)(A).
17. 720 ILL. COMP. STAT. 5/14-1(d) (2008).
18. *See* 720 ILL. COMP. STAT. 5/14-2(a) (2006).
19. 720 ILL. COMP. STAT. 5/14-1(a) (2008).
20. *See* 720 ILL. COMP. STAT. 5/14-4(a) (2000).
21. *See id.*
22. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2000).
23. *Id.*
24. 720 ILL. COMP. STAT. 5/12-13(b)(1) (2010).
25. 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2010).
26. 730 ILL. COMP. STAT. 5/5-4.5-50(b) (2010).

B. THE LEGISLATIVE HISTORY AND INTENT OF THE ACT

There was a time in Illinois when audio recording an on-duty police officer was a legal act in situations where the officer had no constitutionally protected expectation of privacy.[27] The 1994 Amendment to the Act made "eavesdropping" of on-duty police officers an offense,[28] in spite of the 1986 Illinois Supreme Court case *People v. Beardsley* holding to the contrary.[29]

In *Beardsley*, a motorist was arrested for not producing a valid driver's license after being pulled over for speeding.[30] The defendant was then placed in the back of the squad car. While the defendant and the two arresting deputy sheriffs waited for the defendant's car to be removed by a tow truck, the defendant recorded the conversation taking place between the two deputy sheriffs in the front of the squad car.[31] Consequently, the defendant was charged with violating the Act even though the officers were fully aware that the defendant was audio recording them.[32]

After a series of appeals, the Illinois Supreme Court exculpated the defendant from the charges because, under the circumstances, the two deputy sheriffs did not intend their conversation to be private and had "impliedly consented to the recording of their conversation."[33] In other words, the court held that when police officers are acting in their official public duties, when they are in public places, and when they are exchanging dialogue at volumes that are easily overheard by the unaided human ear, law enforcement officers have no "expectation of privacy."[34]

Less than a decade later, by Public Act 88-677, the Illinois Legislature amended the Act to formally define "conversation" as it is presently characterized—"any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."[35] Prior to this Amendment, there was no definition for "conversation" in the Act,[36] which left ambiguity for courts to interpret the Act to allow implicit consent

27. *See* People v. Beardsley, 503 N.E.2d 346, 352 (Ill. 1986) (holding that police officers, while in their squad cars with a detained suspect in the backseat, are not entitled to a reasonable, constitutionally protected expectation of privacy).
28. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2000).
29. *See Beardsley,* 503 N.E.2d at 352-53.
30. *See id.* at 347-48.
31. *See id.* at 347.
32. *See id.* at 348.
33. *Id.* at 352.
34. *See Beardsley*, 503 N.E.2d at 352.
35. 720 ILL. COMP. STAT. 5/14-1(d) (2008).
36. Eavesdropping Act, Pub. Act 88-677, 1994 Ill. Laws 677, ch. 38, ¶ 14-1, § (d).

of recorded conversations, given the context of how and when the conversation at issue took place.[37]

The legislative intent of the Act is discernible from an analysis of the floor debates discussing Public Act 88-677, which reveal that the legislature sought to protect law enforcement officers from being unexpectedly recorded by unapproved parties.[38] During the third Senate floor reading of the proposed bill on May 20, 1994, Senate sponsor Walter Dudycz, asserted that the very purpose of the bill was "to reverse the Beardsley eavesdropping case . . . [as a] necess[ity] for officer safety . . . ."[39]

C. EAVESDROPPING LAWS OF OTHER JURISDICTIONS

At this point, in order to more fully understand the principles guiding the current Act, it is essential to analyze the eavesdropping laws of other jurisdictions. Recently, in *State v. Graber*, a citizen of Maryland was arrested for violating the eavesdropping law of that state.[40] In *Graber*, defendant Anthony Graber was recklessly driving his motorcycle down a highway near Baltimore in March of 2010 when suddenly an unmarked police car cut him off, and abruptly brought his joy ride to an end.[41]

Graber had a helmet camera operating in order to capture his trip on film and never had a chance to turn it off before the officer who swerved in front of him came out of his vehicle in plain attire brandishing a firearm.[42] Later, when Graber had returned home, he posted the incident on "YouTube" and as a result, was arrested and imprisoned for violating the Maryland version of the Act.[43] The eavesdropping charges were eventually dismissed at trial because the trial judge found that the officer, in the context of the situation, had "no reasonable expectation of privacy . . . ."[44]

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37. *See Beardsley*, 503 N.E.2d at 352.

38. *See* Senate Transcripts, H.R. 356, 88th Gen. Assemb., Reg. Sess., at 42 (Ill. 1994), *available at* http://www.ilga.gov/senate/transcripts/strans88/ST052094.pdf.

39. *Id.* Exactly why the legislature felt compelled to protect the safety of on-duty law enforcement officers with regards to eavesdropping will be touched upon in the "Exemptions" section *infra* Part II.D.

40. *See* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (3d Cir. Ct. Sept. 27, 2010).

41. *Id.* at *4.

42. *See id.*

43. *See id.*

44. *Id.* at *13-14; *accord* Commonwealth v. Henlen, 564 A.2d 905, 906 (Pa. 1989) (holding that a prison guard, under similar circumstances, "would not have been justified in expecting that his conversation would not be subject to interception."); *accord* State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (holding that, under the same basic facts, an arrestee could legally tape record an officer because in that situation, the officer had no reasonable expectation of privacy).

Maryland, just like eleven other jurisdictions, including the federal government, distinguishes heavily between non-private and private conversations in its eavesdropping laws.[45] Maryland mandates that consent of all of the parties involved in a conversation is only required in the latter situation when there is, in-fact, a reasonable expectation of privacy.[46] In those jurisdictions, non-private conversations, for example, those that take place on a public highway, are not entitled to any type of reasonable expectation of privacy and do not require consent by all parties involved in order for a legal audio or video recording of the conversation to take place.[47]

Conversations involving law enforcement officers in public places have generally been held to be of the *non-private* kind in those jurisdictions.[48] For that reason, recording an on-duty police officer conducting his or her public duties in a public place while the officer is exchanging dialogue at volumes easily ascertainable by the unaided human ear is not deemed an illegal act in those jurisdictions.[49] All other jurisdictions which possess some form of eavesdropping laws only require one person to consent to a recording for any type of electronic documentation to be legal.[50]

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45. *See* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 928-30 (1998) (charting all fifty state and the federal eavesdropping laws of which the federal government, California, Connecticut, Delaware, Florida, Maryland, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington all distinguish between private and non-private conversations).

46. *See* 18 U.S.C. § 2510(2) (2010) (defining "oral communication," also known as "conversation," as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . ."); *see also* Bast, *supra* note 45, at 928-30; *Graber*, 2010 3d Cir. Ct. LEXIS 7, at *13-14.

47. *See, e.g.*, State v. Goetz, 191 P.3d 489 (Mont. 2008) (upholding defendant's motion to suppress electronically recorded conversations he had with an informant, since, under the circumstances, he had a "reasonable expectation of privacy"); Gibson v. State of Maryland, 771 A.2d 536, 544 (Md. Ct. Spec. App. 2001) (holding that there is no "expectation of privacy" while traveling on a public right of way); Dept. of Agric. & Consumer Servs. v. Edwards, 654 So. 2d 628, 632 (Fla. Dist. Ct. App. 1995) (holding that "[f]or an oral conversation to be protected . . . the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable"); Bast, *supra* note 45, at 882. Under the federal wiretapping statutes and the eavesdropping and wiretapping statutes of many states, a private conversation may not be recorded without the consent of at least one participant; however, the conversants lose their expectation of privacy if their conversation is loud enough to allow it to be overheard unaided by any electronic audio interception device. *Id. See also id.*, at 928-30.

48. *See id.*; *see, e.g.*, *Henlen*, 564 A.2d at 906; *Flora*, 845 P.2d at 1358; *see also* Wiretap and Electronic Surveillance, 85 Op. Att'y Gen. 225, n.8 (Md. 2000) (stating that "many encounters between uniformed police officers and citizens could hardly be characterized as 'private conversations[,]'" and that it would be difficult to consider otherwise).

49. *See, e.g.*, *id.*

50. *See* Bast, *supra* note 45, at 928-30.

Of the fourteen "two-party consent" jurisdictions, Massachusetts[51] and Illinois[52] are the only states which do not distinguish between private and non-private conversations. In both of these states, it is unlawful to audio record *any* conversation without the prior consent of all of those involved, regardless of whether or not the parties implicated had intended their conversations to be particularly private in nature.[53] As a result, Illinois is one of only two jurisdictions throughout all of the United States that makes it a criminal act to audio record on-duty law enforcement officers when the officers have no "reasonable expectation of privacy."[54]

D. EXEMPTIONS IN THE ILLINOIS EAVESDROPPING ACT

The dual consent principle that the Act was built upon, conflicted with law enforcement efforts to record interactions with citizens. In order to remedy that very issue, the Illinois Legislature created exemptions for police officers to electronically document conversations between themselves and civilians without civilian consent.[55]

The Act states, in pertinent part, that exemptions for law enforcement officers include "[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 . . . [during] enforcement stop[s] . . . ."[56] Exemptions also include "[r]ecordings of utterances made by a person while in the presence of a uniformed peace officer and while an occupant of a police vehicle . . ."[57] and "[r]ecordings made simultaneously with a video camera recording during the use of a taser or similar weapon . . . ."[58] Put simply, these exemptions allow police officers to record almost anything that any civilian says while in the officer's presence, regardless of whether or not that individual had an expectation of privacy when the speech at issue was uttered.

This explicit double standard of allowing police officers to record civilians without their consent, without exception, is rationalized by the Illi-

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51. *See id.* at 857-59; *see also* MASS. GEN. LAWS ch. 272, § 99(B)(2) (2010) ("'[O]ral communication' means speech . . . .").

52. 720 ILL. COMP. STAT. 5/14-1(d) (2010) (according to the Act, a "conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation").

53. *See id.*; *see also* MASS. GEN. LAWS ch. 272, § 99(B)(2) (2010); *see also* Bast, *supra* note 45, at 857-59.

54. *See supra* Part II.A-C.

55. *See* 720 ILL. COMP. STAT. 5/14-3 (2010).

56. 720 ILL. COMP. STAT. 5/14-3(h) (2010).

57. 720 ILL. COMP. STAT. 5/14-3(h-5) (2010).

58. 720 ILL. COMP. STAT. 5/14-3(h-10) (2010).

nois Legislature, as alluded to previously, under the guise of officer safety.[59] The Illinois Legislature amended the exemption sections of the Act in 2009 to its current construction with adjustments to section (h), and also introduced sections (h-5), (h-10), and (h-15)[60] with the intent to better protect law enforcement officers from false accusations.[61]

On April 2, 2009, Illinois House of Representatives sponsor Lisa Dugan, stated of the introduced legislation that "it's a tool for law enforcement, but I also believe it is a tool for the citizens, too, because then there is actual proof of what was said or what was done."[62] Recognizing the necessity for electronic documentation in citizen-officer encounters, instead of abandoning dual consent, the Legislature was willing to carve out an exception to the dual consent principle for the sole use of police officers in order to better protect officer interests while secondarily protecting the rights and interests of citizens,[63] a very commendable rationale indeed.

E. ILLINOIS CASES DEALING WITH THE CURRENT ACT

Since the 1994 Amendment to the Act eliminated the necessity for the trier of fact to determine "reasonable expectation of privacy" via adopting a broad definition for "conversation,"[64] there have been a number of cases that have specifically dealt with citizens electronically documenting public police conduct.[65] The state's attorneys' new effective weapons against pub-

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59. *See* Senate Transcripts, H.R. 356, 88th Gen. Assemb., Reg. Sess., at 42 (May 20, 1994), *available at* http://www.ilga.gov/senate/transcripts/strans88/ST052094.pdf.

60. *See* 720 ILL. COMP. STAT. 5/14-3 (2010).

61. *See* House Transcripts, H.R. 1057, 96th Gen. Assemb., Reg. Sess., at 83-84 (Apr. 2, 2009), *available at* http://www.ilga.gov/house/transcripts/htrans96/09600038.pdf.

62. *Id.* (referencing filed complaints by disgruntled citizens).

63. *See id.*

64. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2010).

65. *See* Complaint at 1, Illinois v. Parteet, No. 10-CF-48 (16th Cir. Jan. 2, 2010); *see also* Complaint at 1, Illinois v. Allison, No. 09-CF-50 (2nd Cir. Apr. 3, 2009); Memorandum of Law in Support of Defendant's Motion to Dismiss at 1-17, Illinois v. Drew, No.10-CR-4601 (Cook Cnty. Cir. Ct. Ill. March 26, 2010); Indictment, Illinois v. Thompson, No. 04-CF-1609 (6th Jud. Cir. Ct. Ill. Sept. 2, 2004) (This is a non-exhaustive list of cases). *See* ACLU Amended Complaint, *supra* note 5, at ¶¶ 25(e), 40 (noting that there have been at least nine total defendants prosecuted for violating the Act against police officers in the State of Illinois since the 1994 amendment). *Illinois v. Allison*, No. 09-CF-50 (2nd Jud. Cir. Ct. Ill. Sept. 15, 2011), is a particularly interesting case, as it has seen extensive national media coverage since September of 2011 from outlets such as the HUFFINGTON POST, Glenn Beck, and the DRUDGE REPORT. Sarah Ruholl, *State to appeal Allison decision*, DAILY NEWS ONLINE, (Sept. 23, 2011), http://www.robdailynews.com/Main.asp?SectionID=2&SubSectionID=2&ArticleID=9114. In *Allison*, the defendant, Michael Allison, was charged with five counts of violating the Act stemming from an ordinance violation dispute. Order on Motion to Declare 720 ILCS 5/14 Unconstitutional at 2, Illinois v. Allison, No. 09-CF-50 (2nd Jud. Cir. Ct. Ill. Sept. 15, 2011),

lic official eavesdropping perpetrators—the broad definition of conversation, coupled with the harsh penalties at stake for violating the law against those public officials,[66] have proven to be formidable foes for each of the defendants who have been subjected to prosecution under the Act.

1. The Filmmaker

Ten years after the Illinois Legislature ratified the new broad definition of "conversation" to the Act, in *People v. Thompson*, a couple of individuals were subjected to prosecution for violating the Act against a police officer.[67] In *Thompson*, defendant Patrick D. Thompson, along with his partner Martel Miller, chose to make a documentary of police interaction with citizens of the City of Champaign due to a number of complaints over the years about police mistreatment of African Americans in the community.[68] Thompson and his partner filmed several encounters over a span of nearly three months without incident until August 7, 2004, when they filmed an African-American bicyclist receiving a citation from a Champaign police officer for riding without a headlight.[69] After the officer they were filming suspected what the two men were up to, the camera was con-

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available at http://iln.isba.org/sites/default/files/blog/2011/09/Cell%20phones%20and%20eavesdropping/Allison%20order.pdf. If convicted, Allison could face up to seventy-five years in prison. *Id.* The presiding Judge David K. Frankland sustained the defendant's motion to dismiss the charges for the Act's unconstitutional violations of substantive due process and the First Amendment right to gather information. *Id.* at 12. The court pointed out that, "[t]here are no limitations [to the Act]. There are no time, place and manner restrictions to consider under the statute as it imposes a blanket rule on forbidding all recordings in such case without the consent of the public servant." *Id.* at 11-12. Unfortunately for the defendant, his fate is still undetermined, as the state chose to appeal the court ordered dismissal directly to the Illinois Supreme Court on October 14, 2011. *Allison Ruling Will Go to Illinois Supreme Court*, DAILY NEWS ONLINE, (Oct. 18, 2011 1:20:00 PM), http://www.robdailynews.com/main.asp?SectionID=2&SubSectionID=2&ArticleID=9223.

66. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2010) (violating the Act against a public official is a Class 1 felony); *see also* 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2010) (violating the Act against a public official is punishable by up to 15 years incarceration); 730 ILL. COMP. STAT. 5/5-4.5-50(b) (2010) (stating that fines for violating the Act against a public official could amount to $25,000).

67. Motion to Dismiss at 1, Illinois v. Thompson, No. 04-CF-1609 (6th Jud. Cir. Ct. Ill. Oct. 4, 2004); *see also* Jon Yates, Editorial, *Rights, Eavesdropping Law Collide in Filmmakers' Case*, CHI. TRIB., Oct. 7, 2004, § Metro; Zone C, at 1.

68. *See* Champaign Police Department Supplemental Narrative Report at 1, Illinois v. Thompson, No. 04-CF-1609 (6th Jud. Cir. Ct. Ill. Sept. 3, 2004); *see also* Yates, *supra* note 67, at 1.

69. *See* Champaign Police Department Supplemental Narrative Report, *supra* note 68, at 1; *see also* Yates, *supra* note 67, at 1.

fiscated.[70] Subsequent to sending their documentary to a local television station, the two men were indicted for violating the Act.[71]

The Champaign County State's Attorney eventually dropped the charges against Miller after the City Manager and Police Chief requested that the eavesdropping charges against both men be dismissed.[72] Following a series of setbacks, the eavesdropping charges against Thompson were dropped as well.[73] Both Thompson and Miller ultimately filed a civil action in federal court against the City of Champaign and county officials as well as the city's police officers for violating their constitutionally protected First Amendment rights.[74] Regrettably though, the case was settled for an undisclosed sum and a decision on the Act's validity was never held.[75]

2. The Student

As mentioned earlier, there has been a recent case in DeKalb, Illinois specifically dealing with the electronic documentation of police officers, *People v. Parteet*.[76] In *Parteet*, two brothers, Adrian and Fanon Parteet, on November 24, 2009, were passengers in a vehicle that was pulled over in the parking lot of a McDonald's restaurant on the suspicion of driving under the influence.[77] The two brothers were eventually arrested for violating the Act after using their cell-phones to record the conversation taking place between themselves and the officers without the prior consent of the officers.[78]

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70. *See* Champaign Police Department Supplemental Narrative Report, *supra* note 68, at 1; *see also* Yates, *supra* note 67, at 1.

71. *See* Indictment, People v. Thompson, No. 04-CF-1609 (6th Jud. Cir. Ct. Ill. Sep. 2, 2004); *see also* Yates, *supra* note 67, at 1.

72. The City Manager claimed that he wrote a formal letter to the State's Attorney requesting that the charges be dismissed because the sought after effect of notifying the public of acceptable and unacceptable electronic police documentation had already been accomplished. *See* State's Motion to Dismiss, at Illinois v. Thompson, No. 04-CF-1609 (6th Jud. Cir. Ct. Ill. Sep. 24, 2004); *see also* Yates, *supra* note 67, at 1.

73. *See* Schlikerman & Mack, *supra* note 4, at 1. Thompson was dealing with the possibility of other more serious felony convictions at the same time that the eavesdropping charges were brought forth. *See* Yates, *supra* note 67, at 1. Consequently, the State's Attorney was reluctant in letting Thompson off on the lesser charge of eavesdropping while the more serious charges were still pending. *Id.*

74. *See* Schlikerman & Mack, *supra* note 4, at 1.

75. *See id.*

76. *See* Complaint at 1, Illinois v. Parteet, No. 10-CF-48 (16th Jud. Cir. Ct. Ill. Jan. 2, 2010).

77. *See* Schlikerman & Mack, *supra* note 4, at 1.

78. *See* Defendant's Motion to Quash Unlawful Stop, Detention, Search and Arrest/Miranda Warning Violation at 1, Illinois v. Parteet, No. 10-CF-48 (16th Jud. Cir. Ct. Ill. Jan. 15, 2010).

The defendant's motion to quash suggested that after the driver had proven he was not under the influence, the officers "detain[ed] the Defendant[s] unlawfully without articulable suspicion or probable cause . . . asking questions without Miranda Warnings."[79] In the eyes of the defendants, this unlawful detainment, which coincided with unsettling past experiences with officers, was compelling enough reason for the brothers to document the encounter with their cellular telephones.[80] After a preliminary examination, however, probable cause was found and the brothers were forced to plead guilty to the misdemeanor of "attempted eavesdropping" in order to avoid the full extent of the law,[81] which could have led to felony convictions,[82] heavy fines,[83] and substantial prison time.[84] The court ordered them to apologize to the officers and to delete their recordings.[85]

3. The Artist

Just over a week after the Parteet brothers were arrested for violating the Act, on December 2, 2009, Christopher Drew of Chicago, Illinois was arrested for breaching the Act with respect to police officers as well.[86] On that late autumn day, Mr. Drew was on the public sidewalk of State Street in front of Macy's department store.[87] Mr. Drew is a professional artist and was attempting to sell his work for $1 along State Street in order to challenge a Chicago City Ordinance which prohibited peddling art on public sidewalks.[88] Shortly thereafter, Mr. Drew was approached by a police officer and told to immediately cease his conduct or face arrest pursuant to the prohibitive city ordinance.[89] Mr. Drew refused to stop selling his art be-

79. *Id.*

80. *See id.*; *see also* Schlikerman & Mack, *supra* note 4, at 1.

81. *See* Guilty Plea and Jury Waiver, Illinois v. Parteet, No. 10-CF-48 (16th Jud. Cir. Ct. Ill. April 29, 2010); *see also* Schlikerman & Mack, *supra* note 4, at 1.

82. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2010) (violating the Act against a public official is a Class 1 felony).

83. *See* 730 ILL. COMP. STAT. 5/5-4.5-30(a) (2010) (violating the Act against a public official is punishable by up to fifteen years incarceration).

84. *See* 730 ILL. COMP. STAT. 5/5-4.5-50(b) (2010) (noting that fines for violating the Act against a public official could amount to $25,000).

85. Order of Court Supervision, Illinois v. Parteet, No. 10-CF-48 (16th Jud. Cir. Ct. Ill. April 29, 2010); *see also* Schlikerman, *supra* note 4, at 1.

86. Memorandum of Law in Support of Defendants Motion to Dismiss at 4, People v. Drew, No. 10-CR-4601 (Cook Cnty. Cir. Ct. Ill. 2010), *available at* http://www.c-drew.com/blog/free-speech-artists-movement/motion-to-dismiss-drew-final.pdf.

87. *Id.*

88. *Id.* at 4-5.

89. *Id.*

cause he believed the ordinance violated his constitutional rights, and was consequently arrested.[90]

Once Mr. Drew arrived at the police station, officers searched his possessions and found a running tape recorder and further charged him with violating the Act for secretly recording the conversation he had with the arresting officer.[91] As of October 2010, Mr. Drew was still going through the criminal process and all signs suggest that his intentions are to challenge the law by whatever means necessary, up to and including, appealing any adverse decision to which he may be subjected,[92] since, as he states, "[p]eople 'have the right to defend themselves and bring evidence of what the police said to them in public and bring it into public court.'"[93]

All of the preceding cases have one fundamental fact in common—in every single situation, the officers implicated had no "reasonable expectation of privacy" as defined and understood in all but one of the other dual-consent jurisdictions[94] and also previously in Illinois under the *Beardsley* precedent.[95] The officers involved were indeed acting in their official public duties; they were on public streets and sidewalks, and they were all engaged in conversations at volumes that were easily overheard by the unaided human ear, and thus, shared no "reasonable expectation of privacy."[96]

4. The Union

In response to these situations and others similar across the state,[97] the American Civil Liberties Union (ACLU) of Illinois filed a suit on August 18, 2010 in federal court in Chicago against Cook County State's Attorney Anita Alvarez that challenged the validity of the Act as violative of the First Amendment of the United States Constitution.[98] In its mission to fight for

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90. *Id.*

91. Memorandum of Law in Support of Defendants Motion to Dismiss, *supra* note 86, at 5.

92. *See* Christopher Drew, *Birthday to Birthday – One Year of Resistance*, C-DREW.COM (Oct. 9, 2010, 11:07 PM), http://www.c-drew.com/blog/2010/10/09/birthday-to-birthday-%E2%80%93-one-year-of-resistance/ (stating on his website that "[a]s soon as we defeat this felony charge we will be initiating law suits of our own. We will sue the City for artists [sic] rights and the State to create case law on the eavesdropping law that forces them to change these unconstitutional laws.").

93. Schlikerman & Mack, *supra* note 4, at 1.

94. *See supra*, Part II.C.

95. *See* People v. Beardsley, 503 N.E.2d 346, 352 (Ill. 1986) (holding that in order to convict a defendant of eavesdropping, the aggrieved party had to have a reasonable expectation of privacy).

96. *See supra* Part II.E.1-3.

97. For a compilation of cases, see ACLU Amended Complaint, *supra* note 5, at ¶ 40.

98. Schlikerman & Mack, *supra* note 4, at 1.

the civil rights and liberties of individual citizens, the ACLU asserts that it is standard practice for the organization to assemble information about government events that occur in public places with electronic documentation.[99] The ACLU further states that it is standard practice for them to release information about open government conduct that is gathered via electronic means to the general public,[100] and that it must present this gathered information to government bodies in order to petition the government for redress of grievances.[101]

While the ACLU observes public events and the practices of government officials, one of its main focuses is to monitor on-duty police conduct and it intended to engage in a formal program that accomplished that goal.[102] In order to perform this task with the utmost effectiveness, the ACLU claimed that it was imperative for it to electronically record those events.[103] The ACLU conceded that most police officers lawfully conduct their official duties; however, it did point out that some officers have a tendency to abuse their authority.[104] These efforts, the ACLU claimed, were intended "not only to observe and record the manner in which government employees perform their duties, but also to improve police practices, and to deter and detect any unlawful police interference with constitutional liberties."[105]

In light of defendant Cook County State's Attorney Anita Alvarez's official duties, to prosecute all activity considered criminal under the laws of the State of Illinois, including public official eavesdropping,[106] the ACLU emphasized reasonable fears that if it undertook the aforesaid efforts to electronically document public police conduct, it would be prosecuted by the defendant.[107] Due to this chilling effect on First Amendment activity, the ACLU sought injunctive relief against defendant's prosecutorial duties with respect to the Act and its prohibition on recording public police con-

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99. ACLU Complaint, *supra* note 11, at ¶ 11.

100. *Id.* at ¶ 12.

101. *Id.*

102. *Id.* at ¶ 14.

103. *See* ACLU Complaint, *supra* note 11, at ¶ 35 (maintaining that if relief is not granted, the ACLU will suffer "irreparable harm").

104. *Id.* at ¶ 17; *see also* Hickman, *supra* note 2; Futterman, *supra* note 2.

105. ACLU Complaint, *supra* note 11, at ¶ 14.

106. *Id.* at ¶ 8.

107. *See id.* at ¶¶ 32-33. In the ACLU's amended complaint filed on November 18, 2010, the ACLU points out that its fears of facing prosecution from defendant stem not only from her capacity as the State's Attorney, but also from the fact that she is currently prosecuting two cases under the Act. ACLU Amended Complaint, *supra* note 5, at ¶¶ 25(c), 40. The ACLU also states that over the past six years, at least seven other Illinois State's Attorneys have prosecuted roughly nine defendants under the Act. *Id.* at ¶ 25(e).

duct.[108] Furthermore, the ACLU asked for a declaration that such conduct be deemed constitutionally protected under the First Amendment of the U.S. Constitution.[109] More specifically, the ACLU asserted that:

> [T]he Illinois Eavesdropping Act . . . as applied to the audio recording of police officers, without the consent of the officers, when (a) the officers are performing their public duties, (b) the officers are in public places, (c) the officers are speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful . . . . [V]iolates the First Amendment to the U.S. Constitution.[110]

Unfortunately, without even discussing intermediate scrutiny, let alone a strict scrutiny analysis, the court ardently declared that "[t]he ACLU has not alleged a constitutional right or injury under the First Amendment. Rather, the ACLU proposes an unprecedented expansion of the First Amendment."[111] This proclamation by the court is interesting considering the fact that forty-eight other jurisdictions, including federal, regard this kind of activity as perfectly legal under the First Amendment.[112] Further-

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108. *Id.* at ¶ 4.

109. *Id.*

110. ACLU Complaint, *supra* note 11, at ¶ 1.

111. ACLU v. Alvarez, No. 10-CV-05235, 2011 U.S. Dist. LEXIS 2088, at *13 (N.D. Ill. Jan. 10, 2011). Prior to the court's decision on the validity of a First Amendment challenge, defendant Alvarez's motion to dismiss was granted by the court citing a lack of standing on behalf of the ACLU, since "[n]o imminent threat of injury to the ACLU [was] alleged." *Id.* at *8 (N.D. Ill. Oct. 28, 2010). The ACLU subsequently filed an amended complaint which cured the standing issue and forced the court to address the First Amendment challenge. *See id.* at *10.

112. *See supra* Part II.C; *see also infra* Part III.A.2. Thus, the phrase "unprecedented expansion" that the court employs, resides in the realm of hyperbole. *See* ACLU v. Alvarez, No. 10-CV-05235, 2011 U.S. Dist. LEXIS 2088, at *13. Interestingly enough, as discussed in the background section above, the Act protects judges to the same degree as police officers, in that violating the Act against any judge will result in a Class 1 felony as well. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2010). In this case however, the court justified its position by claiming that the ACLU failed to cite to any Supreme Court or Seventh Circuit cases which explicitly guaranteed the right to audio record under the First Amendment. ACLU v. Alvarez, No. 10-CV-05235, 2011 U.S. Dist. LEXIS 2088, at *10. The court also cites a Seventh Circuit case which held that "the right to record a public event" is not absolute. *Id.* at *10 (citing Potts v. City of Lafayette, 121 F.3d 1106, 1111 (7th Cir. 1997)). At the very least however, under a constitutional challenge, any law which regulates recording of public events or conversations is subject to an intermediate scrutiny analysis. *See infra* Part III.A.4.ii. In September of 2011, the Seventh Circuit Court of Appeals heard oral arguments in *ACLU v. Alvarez*. Natasha Korecki, *Judge Casts Doubt on ACLU Challenge to Law Forbidding Audio Recording of Cops*, CHI. SUN-TIMES (Sept. 13, 2011 5:26PM), http://www.suntimes.com/news/crime /7639298-418/judge-casts-doubt-on-aclu-challenge-

more, not only did the court fail to subject the Act to an intermediate or strict scrutiny analysis, but it also completely overlooked other arguments that the ACLU raised related to privacy and public policy.[113] The ACLU claimed that unless it was awarded sought after injunctive and declaratory relief, it would suffer "irreparable harm."[114] As it turns out though, masses of others will also continue to be irreparably harmed by the current Act—the law-abiding citizens of the State of Illinois. "*Quis custodiet ipsos custodes*?"[115]

III. ARGUMENTS IN FAVOR OF CHANGING THE LAW

A. THE FIRST AMENDMENT

"Congress shall make no law . . . 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."[116]

Amendment I of the U.S. Constitution

1. Incorporation of the First Amendment under the Due Process Clause of the Fourteenth Amendment

The people of the State of Illinois are prepared to immediately monitor police through peaceful engagement of audio recording on-duty officers in public places, as many are unaware that there is even such a law which pro-

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to-law-forbidding-audio-recording-of-cops.html. Highly esteemed Chief Justice Posner had little issue expressing his concerns about the prospect of overturning the Act, stating: "'If you permit the audio recordings, they'll be a lot more eavesdropping . . . . There's going to be a lot of this snooping around by reporters and bloggers' . . . . 'Yes, it's a bad thing. There is such a thing as privacy.'" *Id.* Evidently Justice Posner believes his privacy interests, as a public official, will always outweigh the First Amendment interests of the citizenry, even in public places. Justice Posner's disposition towards a potential declaration of the Act's unconstitutionality is not only unwarranted, but simply erroneous given current First Amendment precedent and public policy concerns that necessitate an overthrow of the Act. *See infra* Part III.

113. *See* ACLU v. Alvarez, No. 10-CV-05235, 2011 U.S. Dist. LEXIS 2088. "Completely overlooked" denotes that the court did not address these issues *at all*.

114. ACLU Complaint, *supra* note 11, at ¶ 35; *see also* Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) ("The presumption of irreparable harm is manifest . . . where it is alleged that first amendment rights have been chilled as a result of both government action and inaction.").

115. This is a Latin phrase that translates to, "[w]ho will guard the guards themselves?" David Isenberg, *Quis custodiet ipsos custodies?*, HUFFINGTON POST, (May 31, 2010 12:25 PM), http://www.huffingtonpost.com/david-isenberg/quis-custodiet-ipsos-cust_b_595304.html. It has also been translated as "[w]ho watches the watchmen?" *Id.*

116. U.S. CONST. amend. I (emphasis added).

hibits doing so.[117] Consequently, the question remains, is this activity constitutionally protected by the First Amendment against state legislative infringements?

In the recent Supreme Court decision *McDonald v. City of Chicago*, the Court laid out the contemporary test to resolve the question of whether or not a fundamental right is safeguarded by the Due Process Clause of the Fourteenth Amendment against state regulation.[118] In order to determine whether or not a right granted to United States citizens in the Bill of Rights of the United States Constitution is granted to citizens of the several states as well, the Court must decide whether the right is fundamental to our "scheme of ordered liberty"[119] or whether this right is "'deeply rooted in this Nation's history and tradition.'"[120]

The Court confirmed how, as of 2010, by piecemeal, nearly every provision of the Bill of Rights has been incorporated in accordance with the Fourteenth Amendment's Due Process Clause for application to the individual states.[121] As far as the First Amendment is concerned, however, the Court pointed to the fact that *every* provision found within its gambit, including; the "establishment clause,"[122] the "free exercise clause,"[123] the "freedom of assembly clause,"[124] the "free speech clause,"[125] and finally the "freedom of press clause"[126] have all been incorporated under the Fourteenth Amendment's Due Process Clause.[127]

Once rights are held to be fundamental to our "scheme of ordered liberty"[128] and "'deeply rooted in [our] Nation's history and tradition,'"[129] the protected rights at issue "are all to be enforced against the States under the

117. *See, e.g.*, *supra* note 107 (discussing a small sample of Illinois citizens who, in recent years, were openly oblivious to the Act's existence and were subjected to prosecution pursuant to the Act).

118. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010).

119. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

120. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

121. *See McDonald*, 130 S. Ct. at 3034-35. The Court listed the provisions which have yet to be fully incorporated prior to the Court's decision in *McDonald*: (1) the Second Amendment's right to keep and bear arms, (2) the Sixth Amendment's right to a unanimous jury verdict, (3) the Third Amendment's guard against forced quartering of soldiers, (4) the Fifth Amendment's requirement of grand jury indictments, (5) the Seventh Amendment right to a jury trial in civil cases, and (6) the Eighth Amendment's ban on extreme fines. *Id.*

122. *See* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947).

123. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

124. *See* De Jonge v. Oregon, 299 U.S. 353 (1937).

125. *See* Gitlow v. New York, 268 U.S. 652 (1925).

126. *See* Near v. Minnesota *ex rel*. Olson, 283 U.S. 697 (1931).

127. McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010).

128. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

129. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[130] In other words, states are barred from subjectively applying their own interpretations of the protected rights granted to citizens of the United States by the Bill of Rights, which in many instances have been inconsistent dilutions of the federal version.[131] Clearly, the breadth and magnitude of First Amendment protections are part of our fundamental "scheme of ordered liberty,"[132] and thus must be safeguarded under state regulations to the same degree as the federal level. Nevertheless, the issue persists—do those guaranteed protections, granted under the First Amendment, which may not be infringed upon without the due process of law, encompass monitoring public police conduct via electronic audio recordings?

2. *The First Amendment Protects Citizens' Rights to Gather, Receive and Record Information*

The free speech and free press clauses of the First Amendment protect citizens' rights to gather, receive, and record information for the purposes of publicizing that information and to petition the government for a redress of grievances.[133] The Supreme Court has never specifically dealt with the issue of whether or not audio recording on-duty police officers and other public officials in public places is a protected First Amendment activity. Nevertheless, the First, Seventh, and Eleventh Circuit Court of Appeals have all explicitly held in a number of decisions that individual citizens are permitted under the First Amendment to electronically document or photograph the activity of law enforcement officers and other public officials in public forums.[134]

Implicit in each citizen's First Amendment right to gather, receive, and record public governmental conduct is the right to photograph those events. In *Schnell v. City of Chicago*, the Seventh Circuit upheld a claim against the City of Chicago, which alleged that through intimidation and force, police "interfer[ed] with the plaintiffs' constitutional right to gather and report news, and to photograph news events."[135] In addition, in *Williamson v.*

130. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

131. *See id.* at 10.

132. *See supra* notes 122-27 and accompanying text.

133. *See infra* Part III.A.2.

134. *See* Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); *see also* Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999); Williamson v. Mills, 65 F.3d 155 (11th Cir. 1995); Blackston v. Alabama, 30 F.3d 117 (11th Cir. 1994); Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969).

135. *Schnell*, 407 F.2d at 1085. This was a class action suit filed by media personnel against the City for interfering with their attempts to photograph public officials/officers and other news events during the 1968 Democratic National Convention. *Id.*

Mills, the Eleventh Circuit expressly held that "[t]aking photographs [of an undercover police officer] at a public event is a facially innocent act" and that arresting a patron for doing so is violative of the Fourth Amendment since not even "arguable probable cause" could be discerned from such an act.[136]

Not only is photographing public events and officials a protected First Amendment activity, video and audio recording of public government conduct is also protected under the umbrella of First Amendment jurisprudence. In *Smith v. City of Cumming*, an aggrieved couple filed suit against the City of Cumming for preventing them from videotaping police conduct as violative of their First Amendment right to gather, receive, and record information.[137] The Eleventh Circuit held that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."[138] The court further emphasized how with regards to First Amendment rights, the rights of the individual citizen and that of the media are the same.[139]

Beyond the *Smith* precedent, the Eleventh Circuit protected the right of citizens to electronically document public officials in public forums a previous time in *Blackston v. Alabama*.[140] In *Blackston*, the court banned a restriction on the complainants from audio recording the deliberation meetings of an Alabama child support guideline committee.[141] The court stated that the committee judge violated the plaintiff's freedom of expression rights granted to each citizen under the Free Speech Clause of the First Amendment.[142]

Furthermore, and as mentioned previously, the First and Seventh Circuit Courts of Appeals have also both protected the right of individual citizens to record public official conduct in public places.[143] In *Dorfman v. Meiszner*, the Seventh Circuit struck down a ban on radio broadcasting in a federal building that contained both federal district courthouses and federal

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136. *Williamson*, 65 F.3d at 158.

137. *See Smith*, 212 F.3d at 1332.

138. *Id.* at 1333. The court did indeed recognize a First Amendment right to photograph or videotape police conduct, but stated that this right would be subject to "reasonable time, manner and place restrictions." *Id.*

139. *Id*; *See also Iacobucci*, 193 F.3d at 25 (recognizing that an independent journalist has a First Amendment protected right to electronically document public government meetings); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 609 (1978) (stating that with regards to public information, the general public and the media are on equal footing).

140. *See* Blackston v. Alabama, 30 F.3d 117 (11th Cir. 1994).

141. *Id.* at 121.

142. *See id.* at 120. For an explanation on how audio/video recording of events is considered freedom of expression and protected under the Free Speech Clause of the First Amendment, see *infra* Part III.A.3.

143. *See infra* notes 144-48 and accompanying text.

offices;[144] the ban was intended "to promote the integrity of the court's proceedings."[145] The court determined that extending the ban beyond the floors of the building that included the courts to the floors where there were no courtrooms, to the main lobby, and to the plaza and surrounding outside areas "is broader than is necessary to accomplish the stated purpose."[146]

Lastly, in *Iacobucci v. Boulter*, the First Circuit upheld a claim against a police officer who was sued for falsely arresting a citizen for using a recording device to document public officials during an open public meeting.[147] The court declared that "because [plaintiff's] activities were peaceful . . . and done in the exercise of his First Amendment rights, [the officer] lacked the authority to stop [him]."[148] It is evident that a number of circuit courts of appeals, including the Seventh Circuit, have recognized citizens' First Amendment right to gather, receive, and record open public official conduct. These holdings directly implicate what the people seek to accomplish and each one of these holdings protects their right to carry onward in their efforts.

3. Freedom of Expression

In addition to holding that citizens have the right to record public governmental meetings, the *Blackston* court also noted that the lower court judge's "attempt to prohibit [plaintiffs] from recording the proceedings did have some impact on how they were able to obtain access to and present information about the Committee and its proceedings," consequently, inhibiting plaintiffs' protected First Amendment rights to expressive conduct.[149] In *Texas v. Johnson*, the Supreme Court discussed just what exactly "ex-

144. *See* Dorfman v. Meiszner, 430 F.2d 558, 563 (7th Cir. 1970).

145. *Id.* at 562.

146. *Id.*

147. *See* Iacobucci v. Boulter, 193 F.3d 14, 24-25 (1st Cir. 1999).

148. *Id.* at 25. In fact, since this Comment was initially authored, in August of 2011, the First Circuit had the opportunity to deal with the exact issue of whether or not a private citizen has a constitutionally protected First Amendment right to audio record a police officer in public. *See* Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011). In *Glik*, the plaintiff sued police officers for violating his First Amendment right to gather and record information, and his Fourth Amendment right against arrest without probable cause. *Id.* at 79. In their FED. R. CIV. P. 12(b)(6) motion to dismiss, the defendant officers argued that the doctrine of "qualified immunity" barred any civil suit related to the plaintiff's arrest because the rights that plaintiff averred were violated by the officers were not "well-established." *Id.* at 81-82. The court, citing many of the same cases cited here-in, held with respect to the First Amendment claim, "[b]asic First Amendment principles, along with case law from this and other circuits, answer" the question of whether or not there is a constitutionally protected right to record police carrying out their duties in public "unambiguously in the affirmative." *Id.* at 82.

149. Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994).

pressive conduct," also called "freedom of expression," entails.[150] In *Johnson*, a young man faced criminal prosecution for burning an American flag pursuant to a Texas statute which forbade such conduct;[151] the issue was whether or not doing so was expressive conduct protected under the free speech clause of the First Amendment.[152] The test that the Court used to decide the aforementioned issue was this: "whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'"[153]

Once again, the Supreme Court has never specifically dealt with the issue of whether or not audio recording public officials is protected First Amendment expressive activity. Yet, beyond the Eleventh Circuit's holding in *Blackston* that recording public officials is protected expressive conduct,[154] in *Thompson v. City of Clio*, an Alabama district court helped clarify the issue by holding that if a restriction on a complainant's desire to record a government body "has some impact, however small or incidental, on how he is able to obtain access to and present such information [such a restriction] regulates conduct protected by the [F]irst [A]mendment."[155]

Thus, if a regulation restricts not only a patron's accessibility to desired information that will be subsequently "expressed" to an audience, but also the means of accessibility to that information, such a regulation restricts freedom of expression that is protected by the First Amendment. In the present situation, the people seek to use electronic recording devices for the purpose of documenting open audible conversations that police officers have with citizens in public ways, while the officers are performing their public duties, and in an otherwise lawful manner for the purposes of disseminating that information to the public and to petition the government for a redress of grievances. The Act, as it currently stands, impedes upon the people's means of accessibility to that desired information by making it illegal for them to use any electronic device to record those conversations, consequently restricting their right to freedom of expression granted under the free speech clause of the First Amendment.

It is very easy to underplay the significance of audio recording devices in this situation granted that taking photographs, creating muted videotapes, or documenting events with a pen implicating public police conduct do not violate the Act.[156] Still, the importance of audio recording devices to be

150. *See* Texas v. Johnson, 491 U.S. 397 (1989).

151. *See id.* at 399.

152. *See id.*

153. *Id.* at 404. This test was first utilized in the 1974 Supreme Court decision *Spence v. Washington*, 518 U.S. 405, 410-11 (1974).

154. *See Blackston*, 30 F.3d at 120.

155. Thompson v. City of Clio, 765 F. Supp. 1066, 1070 (M.D. Ala. 1991).

156. *See supra* Part III.A.2.

respected as a valid medium of expression is not only necessary for the people to accomplish their goals, as the ACLU has stated, it is absolutely imperative in view of the fact that "the initial action of making the audio recording is integral to the process of creating expression."[157] The ultimate goal of overturning the Act is to provide unmodified ample documentation of public police conduct, including spoken words, to most effectively curtail police abuses on citizens,[158] which in many instances have included verbal threats and assaults.[159]

Citizens of Illinois, of other states, and of foreign nations all use permeating technologies such as cell phone video cameras to document events and spoken words that occur on a daily basis.[160] Not only do individuals document these witnessed public events, but they willingly share these findings with others via the internet, media, or otherwise.[161] As Justice Kennedy recently avowed:

> The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citi-

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157. Plaintiff's Combined Reply in Support of Motion for Preliminary Injunction and Response in Opposition to Defendant's. Motion to Dismiss at 3, ACLU v. Alvarez, No. 10-CV-05235 (N.D. Ill. Oct. 6, 2010), *available at* http://www.aclu-il.org/wp-content/uploads/2011/02/ACLU-v-Alvarez-PI-reply-MTD-response-10-6-10.pdf.

158. *See id.* at 4 (stating that it is essential to paint a full picture of the events in question by including audio recordings in order to authenticate and "enhance . . . efforts in educating the general public, reforming government policies, and even resolving testimonial disputes").

159. *See* Letter from Robert F. Rosenwald, ACLU Found. of Fla., to Matti H. Bower, Mayor, City of Miami Beach, at 2 (Feb. 3, 2010), http://www.aclufl.org/STRICKLAND_Letter_to_Bower.pdf (quoting an officer's verbal assaults on a homosexual man saying such things as, "[w]e know what you're doing here. We're sick of all the fucking fags in the neighborhood" and that he was going to "get it good in jail"). *See also* Annie Sweeney, *Officer Investigated After Traffic Stop Recorded*, CHI. TRIB. (Mar. 19, 2010), http://articles.chicagotribune.com/2010-03-19/news/ct-met-police-racial-comments-20100319_1_chicago-police-officer-driver-threatened (noting that when a driver asked a police officer why he was stopped, the police officer said that he usually stops people "'because they are black.'"); *Caught on Cell Phone: Chicago Police Officer Making Racist Remark When Pulling Over Driver,* YOUTUBE, http://www.youtube.com/watch?v=Fdv4xeaSSTQ; *Authoritarian/Totalitarianism – Police Threats And Verbal Abuse*, YOUTUBE, http://www.youtube.com/watch?v=vyFXNcKjqdg (last visited Jan. 2, 2011) (capturing an officer verbally threatening and assaulting a citizen shouting "[d]o you want to try me tonight? . . . I will ruin your fucking night . . . . Do you want to go to jail for some fucking reason I can come up with? . . . ever get smart mouth with a cop again, I'll show you what a cop does . . . we will ruin your career and life").

160. *See* David Bauder, *Cell-Phone Videos Transforming TV News*, WASH. POST (Jan. 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/07/AR2007010700473.html.

161. *See id.* (pointing to events such as the Saddam Hussein execution, which was captured via a cell phone video camera).

> zens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.[162]

Accordingly, in this situation, flatly denying citizens the right to utilize recording devices as a medium of expression, which is a conduit to political discussion, goes against everything the First Amendment stands for.[163] If that right is infringed upon by an ordinance or state regulation of any kind, how rigorously must a court scrutinize the validity of such a law?

4. Determining the Appropriate Level of Scrutiny

The scrutiny level that a court chooses to apply in a case goes a long way in ultimately determining the outcome of the issue at hand. If the court applies strict scrutiny, as Gerald Gunther famously once said about this standard of review: "strict in theory and fatal in fact,"[164] the regulation will almost always be struck down. With respect to determining the appropriate level of scrutiny in a situation where a citizen or citizens seeks to audio record a public official in a public forum, the *Blackston* court gives guidance yet again.[165]

i. The Case for Strict Scrutiny

In *Blackston*, the court held that in a free speech claim, a regulation or restriction on freedom of expression which imposes viewpoint or speaker discrimination is subject to strict scrutiny.[166] Once again the Supreme Court

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162. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 917 (2010) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 341 (2003), *partially overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010)).

163. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (stating that the "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.") *See also e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

164. Gerald Gunther, *The Supreme Court 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

165. *See* Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994).

166. *See id.*

has a case on point in *Young v. American Mini Theaters, Inc.*[167] In *Young*, the Supreme Court was faced with the issue of whether or not the First Amendment was violated by a City of Detroit zoning ordinance that regulated the location of adult entertainment businesses.[168] The Court stated that the government regulation on freedom of expression must be neutral and that "its regulation of communication may not be affected by sympathy or hostility for the *point of view* being expressed by the communicator."[169] If the regulation is viewpoint or speaker discriminatory, then it would be subject to a strict scrutiny analysis and would be struck down unless it was "narrowly tailored to serve a compelling state interest."[170]

Moreover, the nature in which the Act is constructed also calls into question whether or not the regulation against audio recording on-duty public officials is content neutral. In *Turner v. FCC*, the Supreme Court stated that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task . . . . As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[171] In another case, *Ward v. Rock Against Racism*, the Court stated how it must look to the purpose behind the regulation and that in general, "[g]overnment regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'"[172] Additionally, "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment"[173] and are thus subject to strict scrutiny.[174]

The Act, as it is currently constructed blatantly engenders viewpoint and speaker discrimination, which consequently makes the Act content based in nature. As discussed previously, the Act makes it illegal for anyone to audio record any conversation without the prior consent of all of the

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167. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 50 (1976).

168. *See id.*

169. *Id.* at 67 (emphasis added); *see also* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."); United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that a regulation on conduct must be "unrelated to the suppression of free expression").

170. *See Blackston*, 30 F.3d at 120; *see also* Thompson v. City of Clio, 765 F. Supp. 1066, 1072 (M.D. Ala. 1991) (holding specifically that strict scrutiny is triggered when there is either a viewpoint or content-based regulation on audio recording public officials).

171. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1994).

172. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

173. Renton v. Playtime Theatres, 475 U.S. 41, 46-47 (1986).

174. *See Blackston*, 30 F.3d at 120.

parties involved.[175] This principle known as dual consent, albeit frustrating in its capacity to indirectly inhibit First Amendment activity,[176] does not deliberately create viewpoint or speaker discrimination so long as it does not distinguish groups of citizens, i.e., applies equally to citizens and public officials alike.

Yet, the exemption that the Illinois Legislature subsequently incorporated into the Act of allowing police officers to record virtually every conversation they have with citizens, and not the other way around,[177] is tantamount to explicit viewpoint and speaker discrimination, thusly content-based. The police exemption allows officers to express information gathered, received, and recorded of interactions they have with citizens, but silences and even punishes[178] citizens who wish to exercise that very same First Amendment right. As the Supreme Court stated in *City of Ladue v. Gilleo*, "[e]xemptions from an otherwise legitimate regulation of a medium of speech . . . diminish the credibility of the government's rationale for restricting speech in the first place."[179]

Accordingly, in order for the Act to be upheld in a court of law, it must be strictly scrutinized and "narrowly tailored to serve a compelling state interest."[180] As applied to this situation, the Act cannot satisfy a strict scrutiny analysis for two primary reasons. First, the Act is not adequately "narrowly tailored" in that it completely bans all single consent recordings of conversations without taking into consideration the private or non-private nature of the conversation at issue. If the Illinois Legislature's intent was to protect the privacy interests of on-duty police officers, then the least over-

175. *See* 720 ILL. COMP. STAT. 5/14-2(a) (2006) (requiring consent of all parties involved); *see also* 720 ILL. COMP. STAT. 5/14-1(d) (2008). According to the Act, a "conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." *Id.*

176. Dual consent inhibits First Amendment activity simply because of the fact that individuals seeking to electronically document daily interactions must first receive permission from all those involved, contrary to the principle of single consent which is utilized in the majority of jurisdictions. *See supra* Part II.C.

177. *See supra* Part II.D.

178. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2000) ("[E]avesdropping of . . . conversation[s] . . . between any law enforcement officer, State's Attorney . . . or a judge, while in the performance of his or her official duties . . . is a Class 1 felony.").

179. City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994). In this capacity, the vastnesses of the exemptions section in the Act is truly remarkable, and exemplifies the Act's poor construction; the exemptions go on for pages. *See generally* 720 ILL. COMP. STAT. 5/14-3 (2011).

180. *See* Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994); *see also* Thompson v. City of Clio, 765 F. Supp. 1066, 1072 (M.D. Ala. 1991) (holding specifically that strict scrutiny is triggered when there is either a viewpoint or content-based regulation on audio recording public officials).

broad way of accomplishing that goal would be to only ban audio recordings of individuals, including officers, when those persons had a reasonable expectation of privacy "under circumstances justifying that expectation."[181]

Second, there is no "compelling state interest" in regulating the audio recordings of on-duty public police conversations that are spoken at audible volumes and are gathered in an otherwise lawful manner. The only valid interest that the State may assert is that of privacy for the officers. Be that as it may, in *Bartnicki v. Vopper*, the Supreme Court noted that "[p]rivacy of communication is an *important* interest . . . ."[182] "Important" is not "compelling," and under the scrutiny of the most rigorous of constitutional tests, is not sufficient to trump the First Amendment right to gather, record, and publish "matter[s] which [are] of public or general interest."[183]

ii. Intermediate Scrutiny as a Second Option

As highlighted previously, the Act is not a law that simply incidentally burdens speech[184] that is intended for general application to all because it creates viewpoint and speaker discrimination, and categorically bans the very type of speech the people seek to exercise.[185] If for some reason, however, the application of strict scrutiny is denied under a constitutional challenge,[186] then at the very least intermediate scrutiny would be the appropriate standard of review by reason of the fact that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."[187]

If intermediate scrutiny is indeed deemed appropriate, then in order for the Act to withstand a constitutional challenge, it must be "justified without reference to the content of the regulated speech . . . narrowly tailored to serve a significant government interest, and . . . leave open ample alterna-

181. *See* 720 ILL. COMP. STAT. 5/14-1(d) (2008) (using the very same language the Illinois Legislature utilized to repudiate the significance of distinguishing between private and non-private conversations).

182. Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) (emphasis added).

183. *See id.* at 534 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

184. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (paraphrasing central language of the *O'Brien* test).

185. Thus, the "type of speech" at issue is not simply speech that is incidentally burdened by regulated conduct, it is speech expressed of content, which is gathered, received, and recorded by citizens, from citizen-officer encounters. *See supra* Part III.A.3.

186. This would probably only happen if a reviewing court chose to not recognize recording open on-duty police conversations as expressive activity, which as discussed previously, would contradict numerous precedent setting cases which hold otherwise. *See supra* Part III.A.2-3.

187. *O'Brien*, 391 U.S. at 376.

tive channels for communication of the information."[188] As discussed under the strict scrutiny analysis, the Act is content-based,[189] not narrowly tailored,[190] and would probably only withstand a rational basis standard of review in light of the fact that privacy interests of government officials is only considered an "important" governmental interest,[191] which is not "substantial," and certainly not "compelling." If under a constitutional challenge of the Act, the state is somehow able to bypass the first two elements of the test by convincing a court that the Act is not content-based and that it is "narrowly tailored to serve a significant government interest,"[192] the Act would undoubtedly falter on the "alternative channels" element of the test.

Simply put, there are no adequate alternative mediums for gathering information to circumvent the significance of audio recordings when individuals seek to document open conversations police officers have with citizens. It is true that the Act does not prohibit photographing, muted video recording, or note taking of on-duty police officers.[193] Nevertheless, audio recordings present unique, yet essential evidentiary opportunities, which are purely unattainable through these alternative mediums because they do not capture unadulterated oral threats, insults, or other general verbal abuses.[194] Moreover, the Act, as applied, flatly bans a type of speech[195] and "prohibitions foreclosing entire media" may pose a danger to freedom of speech because "by eliminating a common means of speaking, such measures can suppress *too* much speech."[196] Consequently, such extensive flat-banning regulations on mediums of expression have generally been invalidated[197]—as should be the Illinois Eavesdropping Act.

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188. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). The Court also asserted that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Id.*

189. *See supra* Part III.A.4.i.

190. *See supra* Part III.A.4.i.

191. *See* Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) ("Privacy of communication is an *important* interest.") (emphasis added).

192. *Clark*, 468 U.S. at 293.

193. *See generally* 720 ILL. COMP. STAT. 5/14 (2008); *see also* 720 ILL. COMP. STAT. 5/14-4(b) (2000).

194. *See supra* note 159.

195. *See supra* note 185.

196. City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) (emphasis added).

197. *See id.* (striking down a ban on yard signs); *see also* Jamison v. Texas, 318 U.S. 413, 416 (1943) (invalidating a prohibition on handing out leaflets in public ways); Martin v. City of Struthers, 319 U.S. 141, 145-49 (1943) (striking down a ban on the distribution of literature door to door); Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938) (holding a municipality ban on the distribution of leaflets as unconstitutional on its face).

B. ALTERNATIVE ARGUMENTS

Besides implicating the First Amendment, this issue resonates in areas such as personal privacy in public forums and general public policy as well.

1. Privacy Interests in the Public Way

To be clear, what the people seek to accomplish is to overturn the moratorium on monitoring on-duty, public police activity via audio recording. The people do not wish for a declaration to be made that police officers should be subject to constant surreptitious civilian surveillance. After all, police officers and other public officials are citizens as well and are entitled a reasonable expectation of privacy under circumstances justifying that expectation. However, when faced with an issue such as the one in this situation; it is critical for the courts to objectively analyze what "reasonable," under the circumstances, truly entails.[198]

For instance, in *United States v. Speights*, the First Circuit held that a police officer had a reasonable expectation of privacy in his own personal space, especially when the department "acquiesced in [defendant's] attempt to secure his privacy."[199] As discussed previously, in much the same fashion, but on the other end of the spectrum, prior to the Illinois Legislature's abolishment of the "reasonable expectation of privacy" factor from the eavesdropping analyses in 1994,[200] the Illinois Supreme Court held in *Beardsley* that an officer's expectation of privacy is unreasonable when he is openly speaking to a partner in a squad car while a detainee occupies the backseat.[201]

Consequently, the question that must be answered is whether or not officers can claim subjective, "'justifiable,' . . . 'reasonable,' or . . . 'legitimate expectation[s] of privacy . . . '"[202] when "(a) the officers are performing their public duties, (b) the officers

198. *See* United States v. Knotts, 460 U.S. 276, 280-81 (1983) (asserting that Fourth Amendment protections are only triggered when the aggrieved party "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy'" which is established by the individual's subjective expectation of privacy and also more importantly, by asking whether or not "the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable . . .'"") (quoting Katz v. United States, 389 U.S. 347, 351-53, 361 (1967)).

199. United States v. Speights, 557 F.2d 362, 363 (3d Cir. 1977) (dealing with an officer's expectation of privacy in his department locker).

200. *See* 720 ILL. COMP. STAT. 5/14-1(d) (2008) (adding this definition of "conversation;" which took "reasonable expectation of privacy" out of the equation in determining if an eavesdropping violation had in fact taken place).

201. *See* People v. Beardsley, 503 N.E.2d 346, 352 (Ill. 1986).

202. *See Knotts*, 460 U.S. at 280-81.

are speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful."[203] Unfortunately for police officers and for the Illinois Legislature's Eavesdropping Act, officers *do not* have reasonable, legitimate, or justifiable expectations of privacy when they are in public ways, on-duty, and speaking at volumes easily overheard by the unaided human ear since, as the Supreme Court held in *United States v. Knotts*, "person[s] . . . on public thoroughfares ha[ve] no reasonable expectation of privacy, . . ."[204] and thus, cannot seek sanctuary under a Fourth Amendment privacy claim.

Furthermore, courts that have dealt specifically with the issue of whether or not any individual, including police officers, has a reasonable expectation of privacy in a public way have habitually held that there is no such expectation, and recording of conversations in those circumstances does not violate eavesdropping laws.[205] Yet, at a more rudimentary level, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[206]

Thus, the exposure of the person, in a public way, speaking at volumes easily overheard by passerbyers is not granted Fourth Amendment privacy protections because there simply is no "reasonable expectation of privacy" in such a situation.[207] Moreover, "enforcement of [a privacy] provision . . . [which] implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information . . . give[s] way when balanced against the interest in publishing matters of public importance."[208] When balanced against the public interest of exposing police mis-

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203. ACLU Complaint, *supra* note 11, at 1.

204. *Knotts*, 460 U.S. at 281.

205. *See* State v. Flora, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) (holding that, under the same basic facts, an arrestee could legally tape record an officer because in that situation, the officer had no reasonable expectation of privacy); *accord* Commonwealth v. Henlen, 564 A.2d 905, 906 (Pa. 1989) (holding that a prison guard, under similar circumstances, "would not have been justified in expecting that his conversation would not be subject to interception."); Gibson v. State of Md., 771 A.2d 536, 544 (Md. Ct. Spec. App. 2001) (holding that there is no "expectation of privacy" while traveling on a public right of way); *see also, e.g.*, Dep't. of Agric. & Consumer Servs. v. Edwards, 654 So. 2d 628, 632 (Fla. Dist. Ct. App. 1995) (holding that "[f]or an oral conversation to be protected . . . the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable.") (quoting State v. Smith, 641 So. 2d 849, 852 (Fla. 1994)); State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, *13-14 (Md. Cir. Ct. Sept. 27, 2010) (holding that an officer has no reasonable expectation of privacy during a traffic stop on the side of a public street).

206. Katz v. United States, 389 U.S. 347, 351 (1967).

207. *See* United States v. Knotts, 460 U.S. 276, 280-81 (1983); *see also* People v. Beardsley, 503 N.E.2d 346, 352 (Ill. 1986).

208. Bartnicki v. Vopper, 532 U.S. 514, 533-34 (2001).

conduct, which includes verbal threats and assaults,[209] the privacy interests of officers in public ways granted under the Act must give deference to the people because after all, "[g]overnments are instituted among Men, deriving their just powers from the consent of the governed . . . ."[210]

2. Public Policy Considerations

Beyond the basic constitutional arguments, which illustrate a necessity for reform, there are also compelling public policy arguments that suggest that modifying the Act is not only necessary, but would serve the best interest of society in general as well. In particular, such reform would allow citizens to protect their own interests against questionable police conduct. Police misconduct has been an ongoing problem for decades[211] and to circumvent one of the only means of protection against such abuses by statutorily criminalizing electronic audio documentation of police interactions with citizens for the sake of protecting on-duty police officers privacy interests[212] is exceedingly unjust. When one considers, as touched upon previously, the fact that a conviction under the Act against a public official is equivalent to a criminal sexual assault conviction,[213] the "unjust" level of the Act hurdles from "exceedingly," to "outlandishly." One of our fundamental American creeds is "all men are created equal";[214] as it stands right now, however, citizens are deterred from challenging the law given the serious penalties at stake for violating the Act against public officials.[215] Is this how a true "free society" should operate? Evidently, some, namely public officials, are more equal than others.

Holding police officers and other public officials to a higher standard of accountability is a practice that is central to the furtherance of the democratic process.[216] In *Lewis v. City of New Orleans*, the Supreme Court

209. *See supra* note 159.

210. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

211. *See* Hickman, *supra* note 2; *see also* Futterman, *supra* note 2; 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 nn.39-40 (2009) (pointing to a series of cases and articles, which illustrate the ever prevalent and rising problem of police abuses on citizens throughout the country).

212. *See generally* 720 ILL. COMP. STAT. 5/14 (2008).

213. 720 ILL. COMP. STAT. 5/12-13(b)(1) (2010).

214. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

215. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2000).

216. *See* Mills v. Alabama, 384 U.S. 214, 218-19 (1966). The Court stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is op-

noted how, as a practical matter, with regards to "fighting words,"[217] when "such words are addressed to a police officer[, officers are] trained to exercise a higher degree of restraint than the average citizen."[218] Likewise, in *Gooding v. Wilson*, in a similar situation where police officers were insulted subsequently causing a fight to ensue, the Court held that the Georgia statute which made it a misdemeanor to use "opprobrious words or abusive language, tending to cause a breach of the peace"[219] was on its face unconstitutional.[220] The Court reasoned that the statute was overbroad and did not adequately establish the "standard of responsibility" expected from individuals, such as officers, from being provoked into fighting situations.[221]

Accordingly, police officers and other public officials of the State of Illinois should also be held to an elevated standard of accountability, and for good cause given the pervasiveness of general misconduct across the nation.[222] Not only is there misconduct in the field, but as one scholar noted, "[w]hether it is conjecture by individual observers, a survey of criminal attorneys, or a more sophisticated study, the existing literature demonstrates a widespread belief that 'testilying' is a frequent occurrence."[223] "Testilying" refers to public officials, more specifically police officers, lying under oath in order to convict defendants.[224]

Although it is often argued that officers will be "chilled" from performing their official duties in an effective and efficient manner if they are subjected to constant civilian surveillance via audio documentation when they are in public ways,[225] the fact of the matter remains, officers are al-

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> erated or should be operated, and all such matters relating to political processes.

Id.

217. "[F]ighting words" are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

218. Lewis v. New Orleans, 408 U.S. 913, 913 (1972).

219. Gooding v. Wilson, 405 U.S. 518, 518 (1972) (quoting *Chaplinsky*, 315 U.S. at 572 (1972)).

220. *Id.* at 528.

221. *Id.*

222. *See, e.g.*, *supra* note 211 and accompanying text.

223. Christopher Slobogin, *Testilying: Police Perjury and What to do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996).

224. *See id.* at 1040.

225. *See* Plaintiff's Combined Reply in Support of Motion for Preliminary Injunction and Response in Opposition to Defendant's. Motion to Dismiss at 12, ACLU v. Alvarez, No. 10-CV-05235 (N.D. Ill. Oct. 6, 2010), *available at* http://www.aclu-il.org/wp-content/uploads/2011/02/ACLU-v-Alvarez-PI-reply-MTD-response-10-6-10.pdf. (referring to Defendant Alvarez's claim that the ACLU program would "chill and undermine the efforts of the police.").

ready under continuous observation from their very own equipment.[226] It is guilelessly myopic to aver that civilians exercising *their* constitutionally protected First Amendment rights induce inefficient and ineffective police efforts, especially given the fact that officers are fully aware that their actions are being monitored via in-house video/audio surveillance equipment during most, if not all citizen-officer encounters.[227] Audio documentation helps clarify police interactions with citizens by painting a complete picture of each encounter, can help prove or disprove accusations of misconduct, and, in effect, may help reduce the likelihood of "testilying."[228] There simply is no justifiable reason in law or otherwise suggesting that granting the right to audio record public citizen-officer verbal exchanges exclusively to officers and officers alone is good policy.[229] Not to mention, we, as taxpaying citizens, pay their salaries.

IV. CONCLUSION

The Illinois Eavesdropping Act's flat ban on audio recording of police officers and other public officials is in direct violation of the First Amendment; the Amendment that fundamentally serves as the catalyst from which all of the other personal liberties of the Bill of Rights are derived.[230] In its current capacity, the Act engenders open viewpoint speaker discrimination through its police exemptions, fails to properly balance the privacy rights of officers against the people's superior First Amendment interests, and lastly, disregards the necessity for public awareness of police transgressions. Without reforming the law through legislative action or through judicial

226. *See, e.g.*, 720 ILL. COMP. STAT. 5/14-3(h) (2010) (demonstrating by example the statutory language in the police exemptions referencing law enforcement recording equipment).

227. In forty-eight other jurisdictions, where it is legal to record officers and other public officials when there is no reasonable expectation of privacy, officers are able to perform their official duties without being subjected to this so called "chilling effect." *See supra* Part II.C.

228. *See* Slobogin, *supra* note 223, at 1051-54.

229. *See* Futterman, *supra* note 2, at 266. Futterman points to how out of 10,149 total misconduct complaints filed against the Chicago Police Department between 2002 and 2004, there were only nineteen sustained meaningful disciplinary actions taken against the accused officers, which resulted in suspensions of one week or longer. *Id.* Futterman argues that there would have been more complaints, but due to a lack of faith in the justice system's ability to discipline the culprits and fears of future reprisal from officers, citizens have been reluctant to come forward. *Id.* Citizen free use of cameras with respect to citizen-officer encounters would certainly go a long way to alleviate such fears in order to bring police misconduct to justice. *See* Slobogin, *supra* note 223, at 1051-54.

230. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 145 (1967) (holding that freedom of thought, speech, and press "is the 'matrix, the indispensable condition, of nearly every other form of freedom'") (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

precedent, poor public policy and unconstitutional impediments on Illinois citizens' constitutionally protected rights will remain unchecked and the people will continue to be irreparably harmed.[231]

As President John F. Kennedy once said:

> We decided long ago that the dangers of excessive and unwarranted concealment . . . far outweighed the dangers which are cited to justify it . . . . [T]here is little value in insuring the survival of our nation if our traditions do not survive with it . . . . And no official . . . whether his rank is high or low, civilian or military, should interpret my words . . . as an excuse to censor the news, to stifle dissent, to cover up . . . mistakes or to withhold from the press and the public the facts they deserve to know.[232]

President Kennedy clearly knew the fundamental significance of fostering government transparency in a free and open society. He etched into our brains that time-honored Presidential challenge, "ask not what your country can do for you—ask what you can do for your country."[233] It is time to fulfill our democratic obligations as citizens and rise up to our thirty-fifth President's noble challenge. Watching the watchmen is not the responsibility of other watchmen; if we want to ensure the survival of our nation, watching the watchmen is the collective responsibility of we the people, and we the people alone.

ROBERT J. TOMEI JR.*

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231. *See* Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) ("[T]he presumption of irreparable harm is manifest . . . where it is alleged that first amendment rights have been chilled as a result of both government action and inaction.").

232. President John F. Kennedy, Address before the American Newspaper Publishers Association (Apr. 27, 1961), *available at* http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/The-President-and-the-Press-Address-before-the-American-Newspaper-Publishers-Association.aspx.

233. Inaugural Address of President John F. Kennedy (Jan. 20, 1961), *available at* http://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntFl7SVAjA.aspx.

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