Written by Larry McDonald
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In Illinois, you could get a lighter sentence for killing a cop than recording one.

Section 14-4 of the Illinois criminal code reads : "The eavesdropping of an oral conversation ... between any law-enforcement officer ... while in the performance of his or her official duties ... is a Class 1 felony." Under Illinois law, a person is "eavesdropping" when he or she "knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation" without the consent of all parties to the conversation.

A Class 1 felony is punishable by up to 15 years' imprisonment. My irreverent sense of the humor often gets me in trouble, but I just can't contain it here: You could get a lighter sentence for killing a cop than recording one. When Jonathan Posey was convicted of reckless homicide in the 2001 dragging death of Illinois State Police Master Sergeant Stanley Talbot in Rock Island, he only got a five-year sentence for that crime. Good for Mr. Posey, he wasn't videotaping.

It's important to note that the potential 15-year penalty in Illinois for audio- or video-recording the activities of police has been in place since 2000. What has changed in the past decade-plus is our technology. Audio- and video-recording are now standard-issue on smart phones, and stand-alone recording devices are cheaper and far more portable. The result is that there are now millions of citizen videographers on the street.

The Illinois eavesdropping statute is not some old legal chestnut similar to laws against leaving your horse on Main Street after dark. The police are actively using it, and three recent examples involve violators in their early 20s.

• In July of last year, Tiawanda Moore of Chicago went to police headquarters to file a sexual-harassment complaint against a police officer. Finding officers uncooperative, she pulled out her Blackberry to record their reactions. She was promptly arrested and charged with

eavesdropping . A preliminary court date was scheduled for this week.

• In May in Galesburg, city police entered a private residence without a warrant, suspecting that there was underage drinking. Concerned that the police might have been violating search-and-seizure laws, Eric Kraus and Andrew Cree began recording the police activities. Both were arrested and charged with felony eavesdropping but not any other offense.

• In DeKalb in November 2009, brothers Fanon Parteet and Adrian Parteet were on a late-night run with a friend to the local McDonald's when the car they were in was stopped by police on suspicion of DUI. While a DeKalb police officer was talking to the driver of the car, a second officer advised him that Fanon Parteet appeared to be recording him using a camera-equipped cell phone. While Fanon Parteet was being arrested and placed in a squad car, Adrian Parteet used another camera-equipped cell phone to record his brother's arrest. Both were charged with eavesdropping
, but they pleaded guilty in April 2010 to attempted eavesdropping – a misdemeanor.

As the American Civil Liberties Union (ACLU) notes in its current appeal of the *ACLU V. Alvarez* case dismissed last year
: "In recent years, at least nine prosecutors have charged at least 13 civilians with violating the [eavesdropping] act [in Illinois] by audio-recording on-duty police. Five prosecutions were initiated in 2010 alone. The increasing frequency of prosecutions parallels the increasingly common ownership of mobile phones that record sound."

A Fishbowl Made of One-Way Glass

The Illinois eavesdropping statute is troublesome for a number of reasons:

• The law is unusually restrictive. Only two other states – Massachusetts and Oregon – forbid the nonconsensual recording of plainly audible public conversations, such as an arrest on a public street. And Illinois allows for an enhanced penalty for recording law-enforcement officers. (See sidebar .)

• The law puts citizens at a disadvantage when it comes to collecting evidence for their defense. Police activity is often exempt from eavesdropping consent requirements in Illinois, and they can use the video and audio evidence they record in court proceedings. They are not obligated to share those recordings with people charged with crimes – even when the evidence might bolster a person's defense. As media organizations wrote in an amicus brief in the ACLU case : "The act vests in law enforcement near-limitless discretion to decide which recordings should be concealed from public view and which may be conveyed to the public." If citizens were allowed to record public police activity, it could assist defendants in protecting their rights.

• The law makes it impossible to monitor public police activity through video- and audio-recording. "This case seeks nothing more than a determination that the First Amendment protects this important expressive activity as a means of securing transparency and accountability in the operation of government," the ACLU wrote in its appeal. The media organizations added: "The U.S. Constitution protects people who gather and disseminate information about matters of public interest. Yet the arrest and prosecution under the Illinois Eavesdropping Act violate this constitutional protection and run counter to the text, history, and longstanding interpretation of the First Amendment."

In the broader view, though, this isn't merely an Illinois problem. There appear to be many examples of police – *sans* a restrictive, Illinois-style eavesdropping law –who empower themselves to stop citizens from documenting their activities with recording equipment.

• Last September, as New Haven, Connecticut, police were breaking up a street fight, Luis Luna whipped out his iPhone and began recording from a distance. When police ordered him to stop recording and leave the scene, Luna refused. He was arrested, was charged with "interfering with police," and spent the night in jail. Police confiscated his iPhone and returned it to him, without the video, after he pleaded guilty to a lesser charge of "public disturbance." Questioned by reporters after the event, New Haven Police Chief Frank Limon conceded: "It's not our policy to arrest people for filming. As a general principle, it is not illegal [in Connecticut] to video." An internal-affairs report on the incident concluded: "The mere act of an individual video-recording the police officers while performing their duties is not prohibited by federal or state statute. ... The New Haven Police Department has adopted a 'Video-Recording of Police Activity by the Public' policy ."

• Last year in New Jersey, high-school honor student Khaliah Fitchette was handcuffed and had her camera taken away when she attempted to record officers attending to somebody who had collapsed on a city bus. She was not charged. According to the Newark *Star-Ledger*: "Fitchette's case marks the third time in as many years when Newark police have been accused of mistreating residents who were attempting to film them."

• In April 2010, Atlanta police twisted the arm of Marlon Kautz behind his back and took his camera after he tried to record them making an arrest. He sued and earlier this year settled for $40,000. His attorney told an Atlanta television station: "If you stand back away from the officers and you're in a public place, you have an absolute right under 11th Circuit [Court of Appeals] law to photograph or video those officers."

This is not just a case of a bad Illinois law. The problem is larger and more systemic. Illinois' eavesdropping statute is terribly out-of-whack with the times, but so are practices outside of Illinois that use threats, arrests, and intimidation to block perfectly legal recording of public police activity.

Meanwhile, in the real world, the use of surveillance cameras has proliferated. Security cameras skirt eavesdropping laws by not recording sound, and cameras in stores and public places are so commonplace as to go unnoticed. Traffic cameras are used to ticket drivers. Google Earth allows anyone to peer into our backyards. Airport full-body scanners get all the headlines, while concourse eye-in-the-sky video cameras – their sly brethren – are so high-definition as to allow airport personnel to read the paperback you brought with you. Welcome to the fishbowl.

We have all relinquished privacy in the past decade. None of us decided on this, and we didn't vote on it; it's just the way it is. I hate this loss of privacy, especially when it is applied unfairly. When the privileged are increasingly empowered at the expense of the disadvantaged, it really cheeses me off.

And Illinois' eavesdropping law is grossly tilted toward the powerful.

While recording a law-enforcement official is a Class 1 felony and carries a penalty of up to 15

years in prison, making a recording of a private individual is only a Class 4 felony with a maximum penalty of three years in prison.

And, of course, uniformed police are exempt from many provisions of the eavesdropping law, yet they only use those recordings when they assist in prosecution. Suppose, for example, that you are charged with a DUI, and the arresting officer's dash-mounted camcorder shows you effortlessly jumping up and down on one foot, with your eyes closed, while reciting the alphabet backward during your field-sobriety test. The police don't have to show that in court; in fact, they aren't even obligated to keep that recording around.

The fishbowl, it would seem, is made of one-way glass.

Inhibiting an Already Dangerous Job?

Unsurprisingly, the police are neither neutral nor silent on the matter. The president of the Chicago Fraternal Order of Police, Mark Donahue, told the *Chicago Tribune* that citizen recording of arrests "could potentially inhibit an officer from proactively doing his job."

In a story on KWQC about the Galesburg eavesdropping arrests, Captain Rodney Riggs was quoted as saying that recording was "a hindrance. Following the police officers around, it's two in the morning, we have officers trying to do their jobs, and at times, we have to take action to get our job done."

In an article in *USA Today*, Fraternal Order of Police Executive Director Jim Pasco said the recording of police has created a "chilling effect" on officers: "The proliferation of cheap video equipment is presenting a whole new dynamic for law enforcement. It has had a chilling effect on some officers who are now afraid to act for fear of retribution by video. This has become a serious safety issue. I'm afraid something terrible will happen."

And in a commentary in *USA Today*, Dennis J. Slocumb and Rich Robert (of the International

Union of Police Associations) said recording of police activity puts additional burdens on a job that's already dangerous: "Policing is a job full of extraordinary risks. Officers have no choice but to make decisions based upon split-second determinations coupled with their training and experience. Out of approximately 400,000 men and women who regularly patrol the streets and highways (we are not counting an additional 400,000 who have purely administrative assignments), an average of 160 will be killed, 60,000 will be physically assaulted, and 20,000 will receive serious injuries in the line of duty every year."

For those such as Donahue who say citizen recording can "inhibit" officers: That's a small price to pay. Important jobs need to be monitored. Airline pilots live with flight-data- and voice-recorder black boxes, ensuring that every little mistake they make will live on, regardless of whether they or their passengers do. Today's vehicles constantly monitor the behavior of commercial truckers. Surgeons have jobs in which they make life-and-death decisions, and mistakes could cost them millions. Guess what: They're being recorded. I don't see representatives of any of those groups attempting an argument that video-recording inhibits their ability to do their jobs well.

As for the argument that law enforcement is a dangerous job: It is, but perhaps not as much as most people think. Danger-wise, police are in the queue behind farmers, ranchers, and sheepherders, and are far below fishermen.

As *Forbes* said in a 2011 article on "America's Most Dangerous Jobs" : "Miners and police officers face many dangers. In 2009, the most recent year for which we have statistics, 101 miners and 97 police officers and security guards died on the job, making for a roughly similar fatality rate of around 13 deaths per 100,000 workers.

"But neither cracks the top 10 on our list of America's Most Dangerous Jobs. Going by fatality rates, workers have more to worry about in such seemingly mundane professions as roofing, farming, and sanitation."

Firefighting is more dangerous than police work, but I don't believe I have ever seen a firefighter come out from a burning building and demand the news crew turn off the cameras.

Statistically, being an airline pilot is much more dangerous than being a police officer. Being a

trucker is more dangerous than being a cop. Again, those last two jobs face constant monitoring.

And nobody is claiming that recording normal police work makes cops' jobs *more* dangerous.

Other police defenses of the eavesdropping law are contradictory. In the same story in which Riggs said citizen recording was a "hindrance," he added: "I always tell my officers: If you're doing the right thing, there is no problem with being recorded."

And some are just bizarre. In an article in the Peoria *Journal Star*, Captain Dave Briggs of the Peoria County sheriff's department defended the law as protecting the privacy of people being questioned by police: "Sometimes even suspects have things they want to say to an officer – and it shouldn't be out on YouTube." But in the situation at hand, it was the suspect himself who was recording: Rodney Anderson Jr. recorded his arrest on his phone following a March 27 domestic disturbance.

Quad Cities law-enforcement officials defended the eavesdropping law by saying that police are subject to many of the same requirements as the public. However, their responses glossed over the law-enforcement exemptions.

East Moline Police Chief Victor M. Moreno wrote: "Police are also restricted from using eavesdropping without a court order during undercover operations."

Rock Island Police Chief Scott D. Harris at least acknowledged the exemptions in his e-mail response, although he, too, noted that undercover operations are restricted: "An undercover officer would have to get a court order for an eavesdrop, although there are some exceptions, such as in the case of a traffic stop in which the stop is recorded."

Rock Island County Sheriff Jeff Boyd initially said police are forbidden from eavesdropping without a court order, but when asked about exemptions for law enforcement, he said that police recordings – such as from traffic stops – are available to the public through the Freedom of Information Act. "All of that is available publicly" he said. "The accessibility is there."

Boyd said that Illinois' eavesdropping law makes undercover drug operations more difficult. Because a legal recording in Iowa requires the consent of only one party to a conversation, he said, it's easier for undercover officers to make drug buys in Iowa. For that reason, he said, he would support changing Illinois' law to single-party consent – which would give citizens the right to record their own interactions with police. Boyd said he would have no problem with legalized citizen recording "as long as that person was not interfering. ... If that's the law, I'm good with it."

However, all three law-enforcement leaders who responded to our questions said that recording of operations could cause problems for officers.

Harris wrote: "Depending on the type and length of the police operation and with today's technology, it could severely hamper an operation or officer's safety. With our current cell-phone technology, video can be sent and posted immediately showing a situation as it evolves, which would include location and number of officers, type of equipment being used or brought in, the tactics being used or contemplated by the officer, etc."

"Recording police tactics or operations can give the public insight and access to the way police approach or plan," Moreno wrote. "Having that info can allow criminals to prepare to respond, therefore creating danger for the officers."

Harris cited one example: "While I am not aware of a citizen's video endangering or hampering an officer, there was a situation in which a hostage situation was developing and some television cameras were inadvertently showing the location of perimeter officers and other personnel who were approaching the location towards a blind spot from the suspect for concealment. Once the camera crew was made aware of the hazard they were potentially creating for the officers, they changed the camera's field of view, filming other areas which allowed the officers to continue on with their task. In addition, the camera crews were initially in danger as well and relocated to a safer area."

While it's undoubtedly true that the recording of a hostage situation or major law-enforcement operation could be problematic, those rare instances could be handled – gently and tactfully – on a case-by-case basis. However, most of the time, and especially in the Illinois cases where citizens are facing a Class 1 felony sentence, people are recording commonplace police work, with no effect on officers' job performance.

Trooper. Officer. Deputy. Can We Talk?

I respect and appreciate what you do. In my experience, law-enforcement officers have behaved with the utmost civility and professionalism. As I reflect on the times that I've clearly been outside the law, I am reminded of the officers who cut me some slack. (One hundred ten miles per hour in a 55 zone comes to mind.) Admittedly, that slack probably wouldn't have occurred if the officer thought he was being recorded, and it definitely wouldn't have occurred if I jammed a camera in his face.

So let me attempt to return the favor. Remember when reality-TV shows such as *Cops* and *America's Most Wanted* were introduced? Law enforcement won a tremendous public-relations chit then. You are in danger of losing that chit in the next few years. Not because of anything I think or say, but because the numbers and the technology are against you.

Every year we will see an increase in the number of smart-phone users, and the younger they are, the more likely they are to exercise their God-given right to video-record your activities – especially because they themselves were raised being video-recorded.

Every year, the cameras within the smart phones will become more technologically advanced. Features such as telephoto lenses will allow recordings to be made from greater distances. Cameras will shrink in size. Often, you will never know the recording was made. Social-networking sites and a younger generation's increasing use of them will mean the video of you will go viral instantly. The eavesdropping act will no longer be any kind of shield, because once people are aware of it, they will cease to claim ownership of recordings. Then you are really in the censorship business, and we all know how well that works.

And the more you aggressively pursue enforcement of the law, the more people will find the law absurd and anachronistic, and push to repeal the ban on recording police activities.

But while the law is still in effect, what should you do?

Let people record. People are not motivated to photograph or record mundane, everyday events. They pull out cameras when unusual, exciting events occur. But while three squads converging on the perp look great in the editable world of *Cops*, it won't look nearly as good when the perp is just a drunk at the convenience store and the cameraman is some kid with an Android. If just one unit shows up and the drunk is quietly given a ride home, the footage is almost certain to make it to the cutting-room floor, as they used to say.

At an organizational level, you'll need to address this emerging and continuing departmental problem. Your leaders must craft a policy on recording police activities in public, and they'll need to make some sound decisions. Will you enforce the law? Under what circumstances? What will your procedures be regarding the arrest of videographers, confiscation of their equipment, and deletion of recordings? Train your officers, and make sure the public is made aware of your policy.

That cop who caught me doing 110 in a 55 mercifully gave me an expensive ticket for 29 miles per hour over the speed limit, which I gratefully accepted. Thirty or over in Illinois means you landed on the Go to Jail space. Then he showed me an interesting little piece of technology. Namely, that the company that made my radar detector and the one that made his speed gun were one and the same. He went on to explain that every year or so, the company would come out with a new speed gun that existing detectors couldn't pick up, and then it would introduce a new line of detectors that could. In other words, he wasn't the trap; the trap was a clever snare of marketing, and by thinking I had some bit of technological advantage, I was speeding right into it.

Trooper. Officer. Deputy. Because you believe you presently have a legal advantage, please don't go speeding into a public-relations trap.

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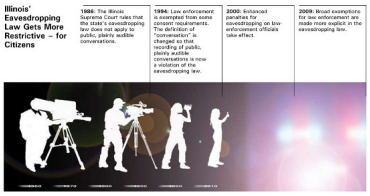
Sidebar: A Brief History of Illinois' Eavesdropping Law



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Illinois' eavesdropping statute dates back to at least 1961, but in the past two decades legislators have made significant changes.

At core, the law requires that all parties to a conversation consent to its recording. (Some states allow one-party consent – that is, only one participant needs to agree to let a conversation be recorded.)

In 1986, the Illinois Supreme Court ruled in *People V. Beardsley* that the eavesdropping law only applied to situations in which parties "believe that the conversation is private and cannot be heard by others."

In 1994, the Illinois General Assembly made two key changes. First, it exempted law-enforcement officers from some consent requirements. It also expanded the definition of a "conversation" to eliminate the expectation-of-privacy requirement; the eavesdropping law now applies "regardless of whether one or more of the parties intended their communication to be of a private nature." In other words, an audible conversation on a public street between a police officer and a citizen can no longer be legally recorded by a citizen without the consent of both parties under Illinois' statute.

This makes Illinois' eavesdropping law unusual. As the American Civil Liberties Union says in its current case: "The federal government, 39 states, and the District of Columbia each have a

statute criminalizing the audio recording of certain in-person conversations – unlike Illinois – only if there is a reasonable expectation of privacy. [Only] two states other than Illinois [Massachusetts and Oregon] extend their prohibitions to audio recording of conversations whether or not there is a reasonable expectation of privacy, but they do so in a manner substantially narrower than in Illinois."

In 2000, a provision enhancing penalties for recording law-enforcement officials was added. While a violation of the statue is a Class 4 felony (punishable by up to three years in prison), recording a law-enforcement official is a Class 1 felony (punishable by up to 15 years in prison).

Furthermore, in 2009 the Illinois legislature made more explicit some broad exemptions to the eavesdropping law for law enforcement. As the ACLU summarizes: "Uniformed police may record practically all of their conversations with civilians [without consent], while civilians are precluded from recording those same conversations."

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