Comment

Just Because It's Legal Doesn't Mean You Can Do It: The Legality of Employee Eavesdropping and Illinois Workplace Recording Policies

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In March 2014, in People v. Clark *and* People v. Melongo *the Illinois Supreme Court held unconstitutional a large portion of the Illinois Eavesdropping Act ("IEA"), one of the nation's strictest criminal eavesdropping statutes. However, on December 30, 2014, outgoing Governor Pat Quinn signed into law a new eavesdropping statute remedying what* Clark *and* Melongo *deemed unconstitutional.*

Prior to 2014, under the IEA, if employers caught employees recording conversations at work, the employer hardly needed a justification for employee discipline or discharge: the employee was violating the law. Thus, Clark, Melongo, *and the December changes to the IEA raise questions for not only criminal jurisprudence, but also employment law; specifically workplace recording policies. Currently, although eavesdropping in Illinois is only illegal if an individual surreptitiously records a private conversation, employers may still discipline their employees for violating a company recording policy.*

The following Comment addresses the legality of workplace recording policies and what effect, if any, Clark, Melongo, *and the December changes to the IEA will have on such policies. The Comment draws from existing case law as well as examines other state eavesdropping statutes and concludes that, notwithstanding the recent Illinois Supreme Court decisions and the December changes to the IEA, an Illinois employer may still implement a workplace recording policy and discipline employees for violations of that policy. Furthermore, when Seventh Circuit federal courts and Illinois state courts review such recording policies and discipline for violations, the courts should view such actions as legitimate and favorably uphold employer actions.*

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INTRODUCTION

The key to good eavesdropping is not getting caught.[1]

Until 2014, the Illinois Eavesdropping Act ("IEA") made it illegal for an individual to knowingly or intentionally audio record any conversation or interaction between two or more people without the consent of every party to the conversation.[2] In March 2014, the Illinois Supreme Court held unconstitutional parts of the IEA in two separate decisions.[3] In *People v. Clark*[4] and *People v. Melongo*,[5] two unanimous decisions determined that the portion of the IEA that required two-party consent[6] to record a conversation was unconstitutional.[7] *Clark* and *Melongo* had their intended effect, however, and on December 30, 2014, changes were made to the IEA and a new eavesdropping act was signed into law remedying the constitutional flaws raised by the two cases.[8] While *Clark* and *Melongo* involved criminal charges—indeed

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1. LEMONY SNICKET, THE BLANK BOOK (A SERIES OF UNFORTUNATE EVENTS) (2004).

2. Illinois Eavesdropping Act, 720 ILL. COMP. STAT. 5/14-2 (2012), *held unconstitutional in* People v. Clark, 2014 IL 115776, 6 N.E.3d 154 (Ill. 2014), *and* People v. Melongo, 2014 IL 114852, 6 N.E.3d 120 (Ill. 2014).

3. *See* Eric M. Johnson, *Illinois Supreme Court Strikes Down Eavesdropping Law as Too Broad*, REUTERS (Mar. 21, 2014), http://www.reuters.com/article/2014/03/21/us-usa-court-eavesdropping-idUSBREA2K08D20140321 (reporting that the Illinois Supreme Court struck down a part of the IEA as unconstitutional because it criminalized recording some innocent behavior); Steve Schmadeke, *State Supreme Court Strikes Down Eavesdropping Law*, CHI. TRIB. (Mar. 20, 2014), http://articles.chicagotribune.com/2014-03-20/news/chi-supreme-court-eavesdropping-law-20140320_1_illinois-supreme-court-illinois-eavesdropping-act-cook-county-jail (reporting Annabel Melongo's reflections on the time she spent in jail for a violation of the IEA).

4. People v. Clark, 2014 IL 115776, 6 N.E.3d 154 (Ill. 2014).

5. People v. Melongo, 2014 IL 114852, 6 N.E.3d 120 (Ill. 2014).

6. When a jurisdiction has an eavesdropping law that requires the consent of every party to the conversation, it is typically referred to as a "two-party consent law" regardless of whether two or more people are party to the conversation. Thus, "two-party" and "all-party" are terms used interchangeably to describe a jurisdiction that has an eavesdropping law that requires every party to the conversation to consent in order for lawful recording to occur. Throughout this Comment, "two-party consent" is the terminology used for a statute that requires each party to the conversation to consent for legally permissible recording to occur. *See infra* Part I.A (discussing the different jurisdictions' eavesdropping laws); *see also* Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 532–45 (2011) (touching upon state wiretapping and eavesdropping laws in both one-party and two-party contexts). *See generally* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837 (1998) (using the term "wiretapping" broadly to encompass an extensive discussion and fifty-state analysis of the different types of eavesdropping laws).

7. *Clark*, 2014 IL 115776, ¶¶ 25–26; *Melongo*, 2014 IL 114852, ¶¶ 26, 36.

8. S.B. 1342, 98th Gen. Assemb., Reg. Sess., 2014 Ill. Laws, P.A. 98-1142, § 5; *see infra* Part IV (addressing the changes made to the IEA by Illinois General Assembly and its implications).

the IEA is a criminal statute—the effects have indirect civil ramifications. This Comment addresses a civil ramification in the employment law context: workplace recording policies.

Prior to *Clark* and *Melongo*, the IEA required two-party consent to record a conversation. Two-party consent requires that each party to a conversation be aware of and consent to recording in order for an individual to lawfully record the conversation.[9] Thus, an Illinois employer could quite easily prohibit employees from recording—whether surreptitiously or openly—conversations in the workplace, and justify subsequently disciplining an employee for the recording.[10] Recording at work constituted criminal behavior, and employers did not need to justify prohibiting employees from engaging in such conduct.[11] *Clark* and *Melongo* beg the question of whether this is still sound practice.[12] If openly recording a conversation is no longer illegal, does that mean an employee can record anything she desires while at work?[13] This Comment examines this question and attempts to navigate through the application of workplace recording policies following *Clark*, *Melongo*, and the December 2014 changes to the IEA.

Part I of this Comment discusses the different types of eavesdropping laws, provides a history of eavesdropping law in Illinois, and explains

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9. *See* text accompanying *supra* note 6 (describing two-party consent).

10. *See, e.g.*, De La Cruz v. Ill. Civil Serv. Comm'n, 2012 IL App 111888-U, ¶¶ 1, 15 (approving the Commission's decision to discharge an employee for a violation of a workplace policy); Williams v. Ill. Civil Serv. Comm'n, 968 N.E.2d 1238, 1241 (Ill. App. Ct. 2012) (holding that the Commission's decision to discharge an employee for a violation of a zero tolerance of violence in the workplace policy was not arbitrary, unreasonable, or unrelated to the employee's actions); Younge v. Bd. of Educ. of City of Chi., 788 N.E.2d 1153 (Ill. App. Ct. 2003) (upholding the Board's decision to terminate employees without written warning for violating a drug-free school policy).

11. If the offending employee was at-will, the individual may be fired for any reason. *See, e.g.*, Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491, 492 (Ill. 1998) ("Generally, an employer may fire an employee-at-will for any reason or no reason at all."); Fellhauer v. City of Geneva, 568 N.E.2d 870, 875 (Ill. 1991) (stating that the court generally adheres to the proposition that at-will employees may be fired for any reason or no reason except for the limited and narrow cause of action for the tort of retaliatory discharge); Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (Ill. 1985) ("The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still the law in Illinois . . . .").

12. One major Chicago employment law firm has raised questions about potential ramifications, posting an article about the issue shortly after the *Clark* and *Melongo* decisions. *See* Jacqueline Gharapour Wernz & Lisa McGarrity, *Impact on Employers and Schools of Illinois Supreme Court's Rejection of Eavesdropping Law*, FRANCZEK RADELET (Mar. 26, 2014), http://www.franczek.com/frontcenter-Eavesdropping_Law_Schools_Employers.html.

13. *See infra* Part III.A (concluding that an employee may not violate an employer's workplace recording policy notwithstanding the open recording's legality). *But see infra* Part IV.A (discussing that, pursuant to the December changes, the surreptitious recording of a private conversation is still unlawful under the IEA).

employer workplace recording policies.[14] The first portion of Part II discusses how workplace recording policies have been interpreted, including Title VII implications for such policies.[15] The second portion of Part II examines the facts, holdings, and reasoning by the Illinois Supreme Court in *Clark* and *Melongo*.[16] Part III analyzes the expected impact that *Clark* and *Melongo* will have on employer recording policies in Illinois.[17] Part IV.A explains the December changes to the IEA and the current status of the law of eavesdropping.[18] Then, Part IV.B discusses how federal and Illinois courts should react to the December changes to the IEA.[19] Finally, Part IV.C proposes how the IEA interacts with and affects employee recording and employer workplace recording policies.[20] Ultimately, this Comment concludes that although open recording is no longer illegal in Illinois,[21] an employer may still prohibit its employees from recording conversations that occur in the workplace.

I. BACKGROUND

A. The Laws of Eavesdropping

Nearly every United States jurisdiction prohibits eavesdropping.[22]

14. *See infra* Part I.
15. *See infra* Part II.A–C.
16. *See infra* Part II.D.
17. *See infra* Part III.A–B.
18. *See infra* Part IV.A.
19. *See infra* Part IV.B.
20. *See infra* Part IV.C.
21. *See infra* Part IV.A.
22. Vermont is the only jurisdiction that does not have an explicit wiretapping or eavesdropping statute. Bast, *supra* note 6, at 851; *see* Carol M. Bast, *Conflict of Law and Surreptitious Taping of Telephone Conversations*, 54 N.Y.L. SCH. L. REV. 147, 150 (2010). North Carolina does not have an eavesdropping law; however, the state does have a criminal wiretapping law. *See* N.C. GEN. STAT. § 14-155 (2013). Thirty-five states and the District of Columbia have one-party consent eavesdropping laws. *See* Alderman, *supra* note 6, at app.1 (addressing state eavesdropping and wiretapping statutes current to 2011); Bast, *supra* note 6, at app. A & B (collecting state eavesdropping and wiretapping statutes current to 1999). Thirteen states have two-party consent eavesdropping laws, including the IEA. *See* CAL. PENAL CODE § 632 (2010) (including § 632(d), which states that "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding," and which was abrogated by People v. Algire, 165 Cal. Rptr. 650 (Cal. Ct. App. 2013), *reh'g denied and ordered not officially published*, People v. Algire, 165 Cal. Rptr. 650 at n.2 (Cal. Ct. App. 2014); eavesdropping, however, is still illegal and requires two-party consent); CONN. GEN. STAT. §§ 52-570d, 53a-187–189 (2012); DEL. CODE ANN. tit. 11, § 1335 (2007); FLA. STAT. §§ 934.01–09 (2001); 720 ILL. COMP. STAT. ANN. 5/14-1 to 5/14-2 (West 2014); MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401–08 (2013); MASS. GEN. LAWS ch. 272, § 99(B)(2) (2010); MICH. COMP. LAWS §§ 750.539a–39h (2004);

The laws that proscribe eavesdropping derive in part from the desire to safeguard an individual's privacy.[23] While the Fourth Amendment and comparable state constitutional provisions are primarily concerned with governmental intrusion, the laws also proscribe eavesdropping predicated on privacy concerns.[24] Moreover, an explicit right to privacy, separate from search-and-seizure provisions, is provided for in several state constitutions.[25]

MONT. CODE ANN. § 45-8-213 (2013) (a portion of Montana's privacy law was recently held unconstitutional in State v. Dugan, 303 P.3d 755 (Mont. 2013), *reh'g denied*, (Mar. 29, 2013); however, this did not affect the eavesdropping portion of the law); N.H. REV. STAT. ANN. § 570-A:1–11 (2003); OR. REV. STAT. §§ 133.721, 165.535–49 (2013); 18 PA. CONS. STAT. §§ 5703–04 (2000); WASH. REV. CODE § 9.73.030 (2010).

23. Bast, *supra* note 6, at 839. Additionally, several state eavesdropping statutes have explicit sections on the legislative findings and intent, which gave rise to statutes, citing the right to privacy. *See, e.g.*, CAL. PENAL CODE § 630 (2010) (recognizing concerns about devices and invasion of privacy "[t]he Legislature by this chapter intends to protect the right of privacy of the people of this state."); FLA. STAT. § 934.01 (2001) ("To safeguard the privacy of innocent persons . . . .").

24. U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For chronological development of privacy and the Fourth Amendment in Supreme Court cases, see Silverman v. United States, 365 U.S. 505, 509–12 (1960) (establishing the standard that eavesdropping into conversations intended to be private may implicate the Fourth Amendment); Katz v. United States, 389 U.S. 347, 350 (1967) (stating that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion . . . ."); Cardwell v. Lewis, 417 U.S. 583, 589 (1974) (plurality decision) ("The primary object of the Fourth Amendment was determined to be the protection of privacy.").

25. *See* ALASKA CONST. art. I, § 22 (Right of Privacy: "The right of people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art 2, § 8 (Right to privacy: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); CAL. CONST. art. 1, § 1 (Inalienable rights: "All people are by nature free and independent and have alienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 (Right to privacy: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."); HAW. CONST. art I, § 6 (Right of Privacy: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."); ILL. CONST. art. 1, § 12 (Right to Remedy and Justice: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."); LA. CONST. art. 1, § 5 (Right to Privacy: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); MONT. CONST. art. II, § 10 (Right of privacy: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); S.C. CONST. art. I, § 10 (Search and seizures; invasions of privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated . . . ." (emphasis added)); WASH. CONST. art. 1, § 7 (Invasion of Private Affairs or Home Prohibited: "No person shall be disturbed in his private

Eavesdropping laws largely break down into two different types: one-party consent and two-party—or all-party—consent.[26] By way of example, in a one-party consent jurisdiction, if *A* and *B* are involved in a conversation, either *A* or *B* must consent to such a recording in order for that conversation to be lawfully recorded.[27] Thus, if *A* consents to be recorded, recording the conversation falls outside the proscribed scope of the one-party consent eavesdropping law and no criminal act has occurred.[28] For clarity, this essentially means that if *A* and *B* are talking, *B* does not have to be aware that she is being recorded.

If, however, the same conversation were to occur in a two-party consent jurisdiction and *B* outright refused to consent to such a recording, or if the conversation was recorded without *B*'s knowledge, *A* would have committed criminal eavesdropping.[29] In many jurisdictions, including Illinois, eavesdropping constitutes a felony offense.[30] A conviction for eavesdropping generally carries not only a

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affairs, or his home invaded, without authority of law.").

26. *See* text accompanying *supra* note 22 (collecting state eavesdropping statutes).

27. Bast, *supra* note 22, at 149–50 (explaining the Federal Wiretapping Statute, which requires one-party consent, and how it is analogous to comparable state eavesdropping laws that similarly require one-party consent); *see, e.g.*, ALA. CODE § 13A-11-30 (2005) (defining "eavesdrop" as "[t]o overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication, except as otherwise provided by law").

28. Typically, in one-party consent jurisdictions, consent by a party to the conversation is an affirmative defense or exception to a violation of the eavesdropping statute. *See, e.g.*, ME. REV. STAT. tit. 15, §§ 709(4) (2003) (precluding the sender or receiver, or consent given by either, as "to intercept" within the meaning of the statute); N.J. STAT. ANN. §§ 2A:156A-4 (d) (2011) (providing an exception to the eavesdropping law when the person recording is a party to the conversation or has consented to the conversation).

29. *See, e.g.*, MICH. COMP. LAWS § 750.539c (2004) ("Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto . . . is guilty of a felony . . . ."); 18 PA. CONS. STAT. § 5704(4) (2010) (stating that an exception to the prohibition of interception and disclosure of communications (eavesdropping) includes "where *all parties* to the communication have given prior *consent* to such interception." (emphasis added)); *see also* Bast, *supra* note 6 at 868–70. For a complete list of two-party consent jurisdictions, see text accompanying *supra* note 22.

30. *See, e.g.*, FLA. STAT. § 934.03(2)(a)(3)(d) (2001) (carrying a penalty of a felony of the third degree); 720 ILL. COMP. STAT. 5/14-2 (2012) (providing a class 4 felony for first offense); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2013) (providing for a felony conviction and not more than five years' imprisonment); MASS. GEN. LAWS ch. 272, § 99(B)(2) (2010) (providing for imprisonment not more than five years); MICH. COMP. LAWS § 750.539c (2004) (providing for a felony punishable by imprisonment not to exceed two years); NEB. REV. STAT. § 86-290(1)(e) (2008) ("[A]ny person who violates [the eavesdropping law] is guilty of a Class IV felony . . . ."); N.H. REV. STAT. ANN. § 570-A:2 (2003) (person who commits eavesdropping is guilty of a class B felony); 18 PA. CONS. STAT. § 5704(4) (2010) (carrying a penalty of a felony of the third degree); *see also* Bast, *supra* note 6, at 928–30 (providing a table of the criminal penalties for eavesdropping in each state).

hefty fine,[31] but also a potentially substantial period of incarceration.[32]

Prior to *Clark* and *Melongo*, thirteen states required two-party consent for a conversation to be recorded.[33] *Clark* and *Melongo*'s invalidation of the IEA notwithstanding,[34] the December changes made by the Illinois General Assembly brought the IEA back within constitutional compliance, and again thirteen states require such consent.[35] Most two-party consent states, however, only protect private conversations that the parties thereto do not intend for others to hear, as opposed to public conversations, which anyone could overhear.[36] Put

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31. Fines for an eavesdropping conviction may amount up to $10,000 in some jurisdictions. *See, e.g.*, LA. REV. STAT. ANN. § 1303(B) (2005) ("Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars . . . ."); WIS. STAT. § 939.50 (2005) (eavesdropping conviction constitutes a Class H felony which carries a fine of up to $10,000).

32. *See* text accompanying *supra* note 30 (providing states statutes that designate eavesdropping as a felony); *see also* R.I. GEN. LAWS § 11-35-21(a) (2002) (any person found guilty of eavesdropping "shall be imprisoned for not more than five (5) years"). In some jurisdictions, eavesdropping is only a misdemeanor. *See, e.g.*, ALA. CODE § 13A-11-31 (2005) (eavesdropping constitutes a Class A misdemeanor which carries not more than one year imprisonment); ALASKA STAT. ANN. § 42.20.330 (2012) (providing for a Class A misdemeanor); KAN. STAT. ANN. § 21-6101(b)(1–3) (2014) ("Breach of privacy as defined in: (1) Subsection (a)(1) through (a)(5) is a class A nonperson misdemeanor.").

33. This list includes: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, and Washington. *See* text accompanying *supra* note 22 (collecting two-party consent eavesdropping statutes).

34. *See infra* Part II.D (analyzing *Clark* and *Melongo*, which held the IEA unconstitutional).

35. *See infra* Part IV.A (explaining the December changes made to the IEA).

36. *See* CAL. PENAL CODE § 632(c) (2010) (construing a conversation as a "confidential communication," which is defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto" and all conversations in public or in which the parties had no reasonable expectation of privacy); CONN. GEN. STAT. § 52-570d(a) (2002) (precluding a violation of recording when it "is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party"); DEL. CODE ANN. tit. 11, § 1335(a)(3) (2007) ("Installs or uses outside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there . . . ."); FLA. STAT. § 934.02(2) (2001) ("'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception . . . ."); MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (2013) ("'Oral communication' means any conversation or words spoken to or by any person in private conversation."); MICH. COMP. LAWS § 750.539c (2004) (specifically referring to a private conversation as the basis for statutory violation); MONT. CODE ANN. § 45-8-213(1)(c) (2013) (protecting conversations where recording occurs without the knowledge or consent of the parties unless a person gives prior warning of the recording); N.H. REV. STAT. ANN. § 570-A:1.II (2003) ("'Oral communication' means any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation."); OR. REV. STAT. § 133.721(7)(a) (2013) (defining oral communication as any communication "uttered by a person exhibiting an expectation that such communication is not subject to interception"); 18 PA. CONS. STAT. § 5702 (2000) (defining oral communication as "oral communication uttered by a person possessing an expectation that such communication is not subject to interception"); WASH. REV.

another way, aside from Massachusetts,[37] and until recently Illinois, the other eleven two-party consent states do not criminalize the recording of a conversation in which the parties have no reasonable expectation of privacy.[38] Massachusetts prohibits the recording of any conversation, even those that do not implicate any element of privacy.[39] The other twelve two-party consent states—including Illinois, as of December 30, 2014—would not criminalize the recording of such a conversation in this example, and neither would they prohibit the recording of public conversations where it is likely that another person may overhear its

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CODE § 9.73.030 (2010) (protecting private conversations alone); *see also* Robert J. Tomei Jr., Comment, *Watching the Watchmen: The People's Attempt to Hold On-Duty Law Enforcement Officers Accountable for Misconduct and the Illinois Law that Stands in Their Way*, 32 N. ILL. U. L. REV. 385, 392 n.45–47 (2012).

37. Massachusetts and Illinois had similar eavesdropping laws. *See* MASS. GEN. LAWS ch. 272, § 99(B)(2) (2010). Massachusetts does not distinguish between the types of oral conversations that are prohibited from recording. *But see* Jean v. Mass. State Police, 492 F.3d 24, 31–33 (1st Cir. 2007) (holding that plaintiff Jean may succeed on the merits of a First Amendment claim because the Massachusetts State Police Department did not have an interest in protecting a conversation). *Jean* called into question the validity of the Massachusetts law and begs the question whether or not the state will continue to adhere to a statute that does not demarcate between private and public conversations. Although addressing the state's wiretapping statute, in *Massachusetts v. Glik*, a Boston Municipal Court Judge found that the defendant could not have contravened Massachusetts' wiretapping statute because by using his cell phone, the defendant recorded a police officer performing the officer's public duties and that the statute only prohibits the "secret" interception of a conversation without consent of all of the parties. Mass. v. Glik, No. 0701 CR 6687, slip op. at 2–3 (Boston Mun. Ct., Jan. 31, 2008), *available at* http://www.volokh.com/files/glik.pdf; *see* Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 489–90 (2013) (discussing the *Glik* case in detail). Additionally, the state court decision served as the basis for the decision of the First Circuit in a separate § 1983 action brought by Glik. "We thus conclude, on the facts of the complaint, that Glik's recording was not "secret" within the meaning of Massachusetts's wiretap statute, and therefore the officers lacked probable cause to arrest him." Glik v. Cunniffe, 655 F.3d 78, 88 (1st Cir. 2011).

38. *Compare* MASS. GEN. LAWS ch. 272, § 99 (2010) (defining an oral communication as "speech" without any mention to whether it protects private conversations alone), *and* 720 ILL. COMP. STAT. 5/14-1 (2012) (defining a conversation as "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"), *with* text accompanying *supra* note 36 (collecting two-party consent jurisdictions' definitions of a conversation).

39. Tomei, *supra* note 36, at 393; *see* text accompanying *supra* note 38 (noting high criminal fines for eavesdropping). Under Massachusetts', and until recently Illinois', statutory schemes, if one was to record a loud argument on a public street, that individual would have committed a crime. *See, e.g.*, People v. Melongo, 2014 IL 114852, ¶ 29 (noting that the IEA criminalized the recording of conversations that did not implicate any privacy interests, yet constituted a felony to record each one). "A loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others." *Id.* Recall that most two-party consent jurisdictions require that the parties had a reasonable expectation of privacy, thus, these examples smack in the face of nearly every state eavesdropping law. *See* text accompanying *supra* note 36 (collecting two-party consent jurisdictions' definitions of a conversation).

content.[40] Typically, in these jurisdictions, an oral conversation is defined as that which the parties intended to be, or had a reasonable expectation would be, private.[41]

Notwithstanding the thirteen two-party consent jurisdictions, every other state that has an eavesdropping law requires only one party to the conversation to consent for it to be recorded.[42] With some context about the law of eavesdropping and what constitutes a criminal violation in other states, we are now ready to examine Illinois' eavesdropping law—arguably one of the strictest in the country.[43]

B. Illinois Eavesdropping Law—Past to Present

1. Origin and Evolution of the Illinois Eavesdropping Act

The original law protecting conversational privacy and prohibiting eavesdropping in Illinois was enacted in 1895.[44] When the more modern version was codified in 1961, it was vague in its proscription.[45]

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40. *See* text accompanying *supra* note 36 (collecting two-party consent jurisdictions' definitions of a conversation).

41. *See, e.g.*, N.H. REV. STAT. ANN. § 570-A:1 (2012) (defining an oral communication as "any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation"); WASH. REV. CODE § 9.73.030 (2014) (explicitly prohibiting the recording or interception of *private* conversations alone); *see also* text accompanying *supra* note 29 (collecting two-party consent jurisdictions' definitions of a conversation).

42. *See* text accompanying *supra* note 22 (collecting state eavesdropping statutes).

43. In fact, when deciding *ACLU. v. Alvarez*, the Seventh Circuit conceded that "[a]s best we can tell, the [IEA] is the broadest of its kind . . . ." 679 F.3d 583, 595 n.4 (7th Cir. 2012) (citation omitted); *see* Stephanie Claiborne, *Is it Justice or a Crime to Record the Police?: A Look at the Illinois Eavesdropping Statute and its Application*, 45 J. MARSHALL L. REV. 485, 489 (2012) ("The [IEA] is particularly strict in that the statute specifically includes a provision making eavesdropping illegal regardless of whether the parties intended their communication to be private."); Johnson, *supra* note 3 (stating that the IEA is one of the strictest eavesdropping laws in the nation); Schmadeke, *supra* note 3 (referring to the IEA as one of the strictest in the nation, which criminalizes conversations made in public without the consent of all of the parties thereto).

44. It is debated between scholars whether the Illinois law started as an eavesdropping law or a wiretapping law. *Compare* JOHN F. DECKER & CHRISTOPHER KOPACZ, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES § 10.08 (5th ed. 2013) (describing the 1895 law as an eavesdropping provision grounded in privacy concerns for the conversations of private persons and government officials), *with* JOYCELYN M. POLLOCK, CRIMINAL LAW 433 (10th ed. 2013) (stating that Illinois outlawed wiretapping by law in 1895). Sources agree, however, that a law was enacted in 1895, created as a byproduct of privacy concerns. DECKER, *supra* at 10.08; POLLOCK, *supra* at 433. The law was later codified in 1961. *See* Claiborne, *supra* note 43, at 491–93 (discussing the history of the IEA); Celia Guzaldo Gamrath, *A Lawyer's Guide to Eavesdropping in Illinois*, 87 ILL. B.J. 362, 363–64 nn.7–14 (1999) (discussing the history of the law of eavesdropping in Illinois). *See generally* People v. Beardsley, 503 N.E.2d 346, 348 (Ill. 1986), *superseded by statute as stated in* People v. Clark, 2014 IL 115776, ¶ 17, 6 N.E.3d 154, 159 (Ill. 2014) (noting that eavesdropping was codified in the criminal code of 1961).

45. ILL. REV. STAT. 1961, ch. 38 §§ 206.1, 206.4; *see* Claiborne, *supra* note 43, at 491

The 1961 IEA defined a violation of eavesdropping as the "[use of] an eavesdropping device to hear or record all or any part of any oral conversation *without the consent of any party thereto*."[46] As of result of the ambiguity, in *People v. Kurth*, the Illinois Supreme Court decided whether the consent of "any party" meant one party to the conversation or every party to the conversation.[47] *Kurth* involved several defendants who were charged with conspiracy to obtain money and property from an Illinois township.[48] In an attempt to expose the alleged corruption, a State's witness surreptitiously recorded conversations between the defendants, which according to the court, if properly admitted, served as evidence prejudicial to the matter of guilt.[49] It was undisputed that the State's witness was a party to conversation, and thus, the issue of the case turned on whether that alone was sufficient consent to record the conversations.[50] The Illinois Supreme Court answered in the negative, holding that, in essence, the 1961 construction of the IEA required consent from each party to the conversation in order to be admissible against the defendants.[51]

The court's ruling in *Kurth* established a relationship between the Illinois General Assembly and the Illinois Supreme Court that has been tenuous at best in regard to the IEA.[52] Over the following ten years, the

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(discussing early litigation surrounding the 1961 codification of the law); Gamrath, *supra* note 44, at 363 (discussing the 1961 version of the eavesdropping statute).

46. ILL. REV. STAT. 1961, ch. 38 §§ 206.1, 206.4 (emphasis added); People v. Kurth, 216 N.E.2d 154, 157 (Ill. 1966), *overruled by* People v. Beardsley, 503 N.E.2d 346, 352 (Ill. 1986); Claiborne, *supra* note 43, at 491; Gamrath, *supra* note 44, at 363.

47. *Kurth*, 216 N.E.2d at 157–58.

48. *Id.* at 154.

49. *Id.* at 157.

50. *Id.*

51. *Id.* at 158. In reaching this conclusion, the court relied heavily on its interpretation of the legislative intent at the time of drafting the IEA.

> Having in mind this expression of legislative intent, we believe that it is unreasonable to suppose that the legislature intended that the consent of the party who is surreptitiously recording the conversation of others can make the recorded conversations admissible against the other parties, who were unaware that their conversations were being recorded.

Id. In his concurrence, Justice Schaefer protested that the court relied on an absolutely erroneous construction of the IEA, one that was contrary to the recognized definition of eavesdropping. *Id.* at 159 (Schaefer, J., concurring). To support his contention, Justice Schaefer gave this example:

> If the statute requires consent of all parties to a conversation, a businessman who, in the interest of preserving an accurate record, has his secretary listen in on an extension phone and take down the exact words used, commits a crime unless all other parties to the conversation consented to its recording in this fashion.

Id.

52. Until *Clark* and *Melongo*, the Illinois Supreme Court and the Illinois General Assembly went back and forth defining what was the true meaning and intent of the IEA. Ultimately, the

IEA went through several amendments, culminating when substantial changes were made in 1976.[53] In that set of amendments, section 14-2(a)—the criminal portion of the IEA—was amended to explicitly require "consent of all of the parties."[54] While the language may appear clear, ambiguity ensued as to the proper meaning and application of the phrase "all of the parties."[55]

2. *People v. Beardsley* and *People v. Herrington*: Eavesdropping Law Protects Privacy

In 1986, the Illinois Supreme Court interpreted the linguistic change to the IEA in *People v. Beardsley*.[56] In *Beardsley*, the defendant was convicted under the IEA for unlawfully recording a conversation between two police officers while he was under arrest in the back of a police car.[57] On appeal to the Illinois Supreme Court, the defendant

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court finally determined that the General Assembly had legislated too broadly and held the IEA unconstitutionally overbroad in March of 2014. *See infra* Part II.D (discussing the decisions in *Clark* and *Melongo*). *But see* Part IV.A (explaining the December changes to the IEA).

53. The 1961 version of the IEA was first amended in 1969 to redefine eavesdropping as to hear or record a conversation "unless he [did] so with the consent of *any one party* to such conversation and at the request of a State's Attorney." 1976 Ill. Laws, P.A. 76-1110, § 1 (emphasis added); *see* Gamrath, *supra* note 44, at 364 (citing the 1969 amendment). The IEA was then substantially amended in 1976. *See* 1976 Ill. Laws, P.A. 79-1159, § 1. Illinois courts also interpreted the IEA prior to the 1976 amendment; however, the decisions largely related to law enforcement procedures. *See, e.g.*, People v. Richardson, 328 N.E.2d 260 (Ill. 1975) (holding that the IEA permits eavesdropping with consent of one party to the conversation at the request of a State's Attorney); People v. Klingenberg, 339 N.E.2d 456 (Ill. App. Ct. 1975) (holding that a law-enforcement officer's use of audiovisual recording of driving-while-under-the-influence traffic stops satisfied the requirements of the IEA, and that the defendant did not have a reasonable expectation of privacy with respect to coordination requests during the stop); People v. Giannopoulos, 314 N.E.2d 237 (Ill. App. Ct. 1974) (holding that where an officer is able to overhear the telephone conversation unaided by an eavesdropping device, there is no violation of the IEA by admitting such intercepted conversations into evidence).

54. 1976 Ill. Laws, P.A. 79-1159, § 1; *see* Bast, *supra* note 6, at 876 ("The [IEA] had been amended in 1975 to require all-party consent."); Gamrath, *supra* note 44, at 364 (discussing the amended statutory language which replaced the phrase "the consent of any one party" with the phrase "the consent of all the parties").

55. When confronted with *People v. Beardsley* in 1986, Illinois argued that the language of the IEA was clear in that each party's consent must be acquired to record a conversation, making no mention of whether the conversation was intended to be private or secret. People v. Beardsley, 503 N.E.2d 346, 348 (Ill. 1986). However, the defendant in *Beardsley* made the argument that a violation could only occur if the conversation was intended to be private; an argument that the court ultimately accepted. *Id.* at 349, 352.

56. *Id.*

57. *Id.* at 347–48. Beardsley had been pulled over for speeding and refused to give the attending officer his name or license, simply stating that he wanted to speak with a lawyer. *Id.* at 347. The officer observed Beardsley attempting to record their interaction and subsequently radioed his supervising sergeant who responded to the scene in an attempt to persuade Beardsley to cooperate. *Id.* The officers were unsuccessful and placed Beardsley under arrest. *Id.* at 348. While waiting for the tow truck, with Beardsley under arrest in the back seat of the police car, he

successfully argued, that because he was present during the conversation between the officers, he could not be found guilty of eavesdropping.[58] More specifically, Beardsley contended that the IEA merely protected private and secret conversations.[59] The court agreed, reasoning that because Beardsley was present during the conversation, and because the officers could have left the vehicle, the officers could not have had a reasonable expectation of privacy.[60] In 1986, when *Beardsley* was decided, the court determined that the IEA prohibited only the surreptitious recording of a conversation in which the participants had a reasonable expectation of privacy.[61] The court did not determine that the phrase "consent of all of the parties" meant that each party to a conversation must consent in order for a recording to happen.[62] But rather, the court determined that lawful recording hinged on the conversants' expectation of privacy.[63]

In 1994, only a few years after the decision in *Beardsley*, the Illinois Supreme Court reaffirmed its *Beardsley* holding in *People v. Herrington*.[64] This case involved a conversation between a victim of sexual abuse and the defendant, which was recorded by the victim with assistance from the police.[65] While the trial court suppressed the recording as evidence, the Illinois Supreme Court reversed, stating, "there can be no reasonable expectation of privacy [to the victim] where the individual recording the conversation is a party to that conversation."[66] In this case, the victim of sexual abuse consented to

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again recorded the officers' conversation. *Id.* This last recording was the substantive issue on appeal to the Illinois Supreme Court. *Id.*

58. *Id.* at 348–49.

59. *Id.* at 348. Beardsley made the argument that the court should adopt the common-law definition of eavesdropping and adhere to the common meaning: "that eavesdropping can occur only when parties intend their conversations to be secret or private." *Id.*

60. *Id.* at 350–52.

61. *Id.* at 349. The court stated that it is not "whether all of the parties consented to the recording of the conversation[,] [r]ather, it is whether the officers/declarants intended their conversation to be of a private nature . . . ." *Id.* at 350. It seems here that the majority opinion considered the wording of the IEA "with the consent of all of the parties to such conversation," *id.* at 348, to implicate reasonable expectations of privacy rather than all party consent for the recording to be lawful.

62. *See generally id.* at 351–52 (illustrating that the analysis turned on expectations of privacy as opposed to consent from all parties).

63. *Id.* Justice Simon, concurring, articulated that "[t]he majority's construction ignores the amendatory language [of the IEA] which replaced the word '*any*' with the word '*all*.'" *Id.* at 352 (Simon, J., concurring); *cf.* Gamarth, *supra* note 44, at 364 ("*Beardsley* has been criticized for not being supported by the statutory language [of the IEA] requiring the consent of all of the parties to the conversation.").

64. People v. Herrington, 645 N.E.2d 957, 959 (Ill. 1994).

65. *Id.* at 957.

66. *Id.* at 958 (citing *Beardsley*, 503 N.E.2d at 351).

the recording, and therefore, the victim's recording of the conversation between himself and the defendant could not constitute a violation of the IEA.[67] Thus, the defendant's argument that the tape could not be admitted because it was recorded illegally was rejected.[68]

3. The General Assembly Strikes Back

In response to the Illinois Supreme Court's ruling in *Beardsley* and its progeny, the General Assembly amended the IEA in 1994 to explicitly legislate away the court's interpretation of a conversation.[69] While the portion of the IEA at issue in *Beardsley* and *Herrington* was not amended,[70] a new definition of "conversation" was added to include protection for conversations in which individuals had no reasonable expectation of privacy.[71] After the 1994 amendment, the IEA defined a conversation as "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."[72] Thus, after the amendment, it became clear that the General Assembly intended to require all parties to any conversation to

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67. *Id.* at 959.

68. *Id.* at 958. The defendant attempted to persuade the court to accept the argument that the conversation, which served as the evidentiary basis for the charges, was illegally recorded. *Id.* If the court accepted this assertion, then the evidence would have to be excluded under 720 ILL. COMP. STAT. 5/14-5, which provides:

> Evidence Inadmissible. Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings; provided, however, that so much of the contents of an alleged unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this Article.

720 ILL. COMP. STAT. 5/14-5 (2012).

69. H.B. 356, 88th Gen. Assemb., Reg. Sess., 1994 Ill. Laws, P.A. 88–677, § 14-1. While passed under the guise of officer safety, it is clear from the Illinois Senate transcripts that the legislative intent was to overrule *Beardsley*. *See* Senate Transcripts, H.B. 356, 88th Gen. Assemb., Reg. Sess., at 42 (May 20, 1994), *available at* http://www.ilga.gov/senate/transcripts/strans88/ST052094.pdf ("[The bill adds language] to reverse the Beardsley eavesdropping case [in order to allow] consensual overhears by law enforcement in certain cases when necessary for officer safety . . . .").

70. The portion of the IEA at issue was 720 ILL. COMP. STAT. 5/14-2(a), which sets out the substantive crime of eavesdropping and delineates the elements of the offense.

71. H.B. 356, 88th Gen. Assemb., Reg. Sess., 1994 Ill. Laws, P.A. 88–677, § 14-1; *see* Claiborne, *supra* note 43, at 493 & nn.53–54 (arguing that the General Assembly explicitly amended the IEA to overrule *Beardsley*); Gamrath, *supra* note 44, at 365 ("This new definition of conversation potentially reverses *Beardsley* and *Herrington* interpretations and restores the legal requirement of all-party consent to the [IEA].").

72. 720 ILL. COMP. STAT. 5/14-1(d) (2012) (emphasis added).

consent in order for any lawful recording to take place.[73]

A few technical changes were made in subsequent years, including adding a culpable *mens rea* requirement to the IEA in 2000.[74] However, when the Illinois Supreme Court confronted the IEA yet again in *Clark* and *Melongo* in 2014, section 14-2(a)(1)(A) read:

> (a) A person commits eavesdropping when he: (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication . . . .[75]

With the present definition of conversation added to the IEA, and the explicit overruling of *Beardsley* and its progeny, the IEA did not distinguish between private and non-private conversations, or rather, conversations in which no discernible expectation of privacy is present.[76] A recording of either type of conversation, private or public, constituted a felony.[77] While there are a plethora of exceptions to the IEA, they mainly relate to law-enforcement procedures.[78]

4. *American Civil Liberties Union of Illinois v. Alvarez*

In 2012, the Seventh Circuit decided *American Civil Liberties Union*

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73. People v. Clark, 2014 IL 115776, ¶ 17, 6 N.E.3d 154 (Ill. 2014); *see* Claiborne, *supra* note 43, at 493 & nn.53–54 (discussing the Illinois legislature's definition of "communication"); Gamrath, *supra* note 44, at 365 ("Significantly, this [amendment] seems to incorporate the privacy requirement back into the statute.").

74. H.B. 526, 91st Gen. Assemb., Reg. Sess., 1999 Ill. Laws, P.A. 91–567, § 14-2.

75. 720 ILL. COMP. STAT. 5/14-2(a)(1)(A) (2012); *Clark*, 2014 IL 115776, ¶ 14, 6 N.E.3d at 158–59.

76. *Clark*, 2014 IL 115776, ¶¶ 17–18, 6 N.E.3d at 159–60; People v. Melongo, 2014 IL 114852, ¶ 28, 6 N.E.3d 120, 126 (Ill. 2014).

77. If the recording occurred between two private parties, then a first offense of the IEA constituted a Class 4 felony carrying a minimum sentence of one year but not more than three years' incarceration. 720 ILL. COMP. STAT. 5/14-4(a) (2012); 730 ILL. COMP. STAT. 5/5-4.5-45 (2012). A second, or subsequent, violation of the IEA constituted a Class 3 felony carrying a term of not less than two years but not more than five years' incarceration. 720 ILL. COMP. STAT. 5/14-4(a); 730 ILL. COMP. STAT. 5/5-4.5-40. If, however, the defendant recorded a conversation of a law-enforcement official, State's Attorney, Attorney General, or judge while performing their official duties, a conviction resulted in a Class 1 felony carrying a minimum term of imprisonment of four years but not more than fifteen years. 720 ILL. COMP. STAT. 5/14-4(b); 730 ILL. COMP. STAT. 5/5-4.5-30; *see* Alderman, *supra* note 37, at 497 ("Somewhat remarkably, the [IEA] elevates the offense to a class 1 felony . . . if any of the recorded parties is performing duties as a law enforcement officer.").

78. The exemptions under the IEA range from television and radio broadcasts, to consumer hotlines, to law-enforcement purposes in conjunction with the State's Attorney, to law-enforcement stops, to collecting evidence under reasonable suspicion that a crime has been or is being committed against the recorder. 720 ILL. COMP. STAT. 5/14-3(a)–(q) (2012).

of Illinois v. Alvarez, in which the court questioned the constitutionality of the IEA.[79] The American Civil Liberties Union of Illinois ("ACLU") planned to implement a "police accountability program" that would record police officers performing their duties in public places.[80] Before implementing its program, the ACLU filed a pre-enforcement action against the Cook County State's Attorney seeking declaratory and injunctive relief barring enforcement of the IEA.[81] The court called into question the validity of the IEA, stating that it legislated too broadly, "restrict[ing] a medium of expression commonly used for the preservation and communication of information and ideas . . . ."[82] The court reasoned that the IEA was overbroad because the statute made it "a crime to audio record *any* conversation, even those that are *not* in fact private," and therefore have no reasonable expectation of privacy.[83]

The decision, however, was not without challenge, inviting a fiery dissent from Judge Richard A. Posner.[84] The learned judge stated that the majority conceded the IEA's objective of conversational privacy, "but [the majority] thinks there can be no conversational privacy when the conversation takes place in a public place . . . ."[85] Thus, Posner posited that the court's ruling cast a shadow of doubt on other states' eavesdropping statutes because nearly all conversations, no matter how private, may be susceptible to sophisticated interception.[86] Judge Posner's critique notwithstanding, the invalidity of the IEA was confirmed by the Illinois Supreme Court's decisions in *Clark* and *Melongo*.[87] These decisions are addressed and examined in Part II.D. A particular type of eavesdropping, however—the secret recording of a private conversation without the consent of every party thereto—is again illegal in Illinois after the General Assembly acted in December 2014; a mere nine months after *Clark* and *Melongo*.[88]

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79. ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012).
80. *Id.* at 586.
81. *Id.* at 586, 588.
82. *Id.* at 586, 595, 606.
83. *Id.* at 606.
84. *Id.* at 608–14 (Posner, J., dissenting).
85. *Id.* at 613.
86. *Id.* at 609–10.
87. *See generally* Janan Hanna, *What Next for Eavesdropping Law in Illinois?*, 102 ILL. B.J. 214 (2014) (discussing how Illinois is without an eavesdropping statute after the two decisions). While *ACLU v. Alvarez* was a pre-enforcement suit, the trial court in *Melongo* relied heavily on its reasoning, and the case was critical in the sequence of events which led to the Illinois Supreme Court's ruling. *See infra* Part II.D.2 (describing the reliance on the reasoning from *ACLU v. Alvarez* in the *Melongo* decision).
88. *See infra* Part IV.A (explaining the December changes to the IEA).

C. What, Exactly, is a Workplace Recording Policy?

At its most basic level, a workplace recording policy prohibits employees from recording any conversations or meetings that occur with other employees or supervisors.[89] Consider, for example, Whole Foods Market Group's recording policy, which prohibits "record[ing] conversations with a tape recorder or other recording device (including a cell phone or any electronic device) [without prior leadership approval]."[90] Or, for comparison, J.P. Morgan Chase's policy on workplace recording: "No photo or video or audio recording taken on Company premises or at work-related events may be circulated, posted or distributed (on the Internet or otherwise) without prior approval."[91] While the latter policy does not explicitly proscribe the recording of any conversations, but rather any sort of content dissemination, both are quite broad in the types of behavior that they prohibit.[92]

Whole Foods goes so far as to spell out the purpose of its policy, which is "to eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded."[93] Fostering an open and collaborative workplace environment, without the fear that an individual's words and actions are being recorded while at work, is certainly a noble goal, and one that should be advanced.[94] There are, however, many other important elements that give rise to such recording policies—policies that arguably also curtail free expression in the workplace.[95] For one, a workplace recording policy protects the proprietary information of all employees as well as the company itself.[96]

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89. *See generally* Whole Foods Market, Inc., 1518 N.L.R.B. No. 01-CA-096965, 2013 WL 5838721 (Div. of Judges Oct. 30, 2013) (illustrating a workplace recording policy).

90. *Id.*

91. *Code of Conduct*, J.P. MORGAN CHASE & CO. 1, 32 (Nov. 2013), http://www.jpmorganchase.com/corporate/About-JPMC/document/Code_-of-Conduct_Nov2013.pdf.

92. *Compare* Whole Foods Market, Inc., 1518 N.L.R.B. No. 01-CA-096965, *with Code of Conduct*, *supra* note 91 (prohibiting the dissemination of any conversations without prior approval).

93. Whole Foods Market, Inc., 1518 N.L.R.B. No. 01-CA-096965.

94. *See id.* (stating that Whole Foods articulates that its policy is set forth "to encourage open communication [and the] free exchange of ideas . . . .").

95. *Cf.* Whole Foods Market, Inc., 1518 N.L.R.B. No. 01-CA-096965 (noting that while Whole Foods prohibits employee recording to encourage open communication, it also subjects employees and patrons, to security and surveillance camera monitoring); Bast, *supra* note 6, at 849 (discussing the rise of employee taping in an effort to gain more workplace rights as well as to gather crucial evidence of potential employment discrimination and sexual harassment allegations).

96. *See infra* notes 97–98 and accompanying text (discussing the various reasons that technology companies proffer for restricting recording in pursuit of protection of proprietary information).

Certain industries and companies rely on being the first to create or market a product.[97] This competitive edge is best protected when the employer has taken steps to ensure that information is not leaked to outsiders.[98] Google Glass, for example, recently sparked a great deal of concern over the potential for workplace espionage and the need to protect confidential information of both personal and professional natures.[99] Thus, presented here are at least some reasons for why an employer would institute a recording policy.

II. DISCUSSION

Clearly, workplace recording policies have some legitimate justifications.[100] Moreover, these policies are not new phenomena, and courts have favorably addressed the validity of such policies in a variety of jurisdictions.[101] The recording policies that are addressed in this Part

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97. *See, e.g.*, *Business Conduct: The Way We Do Business Worldwide*, APPLE, INC. (Oct. 2014), http://files.shareholder.com/downloads/AAPL/1635337056x0x443008/5f38b1e6-2f9c-4518-b691-13a29ac90501/business_conduct_policy.pdf (stating that a core business principle of Apple is the confidentiality of Apple's information); *see also* Adriana Lee, *Apple Handbook Shushes Employees from Talking about the Company*, TECHNOBUFFALO (Dec. 2, 2011), http://www.technobuffalo.com/2011/12/02/apple-handbook-shushes-employees-from-talking-about-the-company/ (describing an extensive policy promulgated by Apple regarding an employee's interaction with co-workers, the publication, or lack thereof, of information, and the paramount need for confidentiality of Apple's proprietary information).

98. *See* Lee, *supra* note 97 (using Apple's confidentiality policies as an example); *see also Code of Conduct*, GOOGLE, INC., http://investor.google.com/corporate/code-of-conduct.html#toc-confidentiality (last visited Apr. 26, 2015) ("Google's 'confidential information' includes financial, product and user information. Make sure that confidential company material stays that way; don't disclose it outside of Google without authorization.").

99. Khurram Nasir Gore et al., *Controlling Legal Risk of Google Glass and Wearable Tech*, CORP. COUNSEL (May 27, 2014) (arguing that Google Glass has sparked concerns about security and safety in the workplace because those other than the user do not know when the device is recording); *see* Anisha Mehta, Comment, *"Bring Your Own Glass": The Privacy Implications of Google Glass in the Workplace*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 607, 609 (2014) (emphasizing the privacy implications of wearable technology like Google Glass and stating that "[t]he discreet nature of wearable technology is combined with the aspect of instantaneous dissemination of information to create this surreptitious and privacy-intrusive device"). Google Glass is an optical-head mounted smart device, essentially like a smartphone computer worn on the head. Mehta, *supra* at 609. Glass is part of a new category of emerging digital products called "wearable tech," which, collectively, refers to watches, health monitors, passive cameras, etc. Nasir Gore et al., *supra*; *see* Mehta, *supra*, at 608–09 (discussing different types of wearable technology). The common feature of these products is that they are always on—at least always in the open—and become integrated into the daily routine of the user. *See* Nasir Gore et al., *supra* (stating that wearable devises are always on and do not require "the user to break away from a real-life interaction to use them").

100. *See* text accompanying *supra* notes 93–99 (discussing some of the reasons for workplace recording policies).

101. *See, e.g.*, Capeless v. Dep't of Veteran Affairs, 78 M.S.P.R. 619 (June 24, 1998) (upholding employee discipline for a violation of a workplace recording policy); Sternberg v.

have arisen in both one-party consent and two-party consent jurisdictions.[102] First, this Part addresses how federal courts have interpreted different workplace recording policies. Second, this Part discusses the recent Illinois Supreme Court decisions in *Clark* and *Melongo*.

A. Seventh Circuit Upholds Discipline for Workplace Recording

The IEA had been examined in the context of workplace recording prior to *Clark* and *Melongo*.[103] In 2008, the Seventh Circuit addressed the IEA in *Argyropoulos v. City of Alton*.[104] The case involved the termination of Christina Argyropoulos, who worked as a jailor for the City of Alton, Illinois Police Department.[105] Argyropoulos worked for the city for a mere ten months before she was discharged.[106] During her employment, Argyropoulos' job performance was the subject of considerable criticism.[107] Job performance, however, was not the only issue.[108] Seven weeks prior to her discharge, Argyropoulos complained to supervisors that another jailor had sexually harassed her.[109] In response, the police department began to investigate and took measures to ensure that Argyropoulos and the fellow jailor were not left unsupervised.[110] The encounters with the fellow jailor continued, however, even while not at work.[111] Argyropoulos' questionable job performance continued as well, with one supervisor indicating that "[w]ithout constant supervision, Jailer [sic] Argyropoulos fails to accomplish minimal job tasks . . . ."[112] Subsequently, Argyropoulos was called into a meeting with her supervisors, which she erroneously believed was about the status of her sexual harassment complaint.[113] It

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Dep't of Defense Dependents Schs., 41 M.S.P.R. 46, 48 (June 6, 1989) (discussing one charge of discipline which stemmed from the employee tape-recording conversations with personnel without permission); *see infra* Part II.C (federal circuits and district courts interpreting workplace recording policies).

102. *See infra* Parts II.A (Seventh Circuit interpreting Illinois' two-party consent law); Part II.C (Sixth Circuit interpreting Ohio's one-party consent law).

103. Argyropoulos v. City of Alton, 539 F.3d 724 (7th Cir. 2008).

104. *Id.*

105. *Id.* at 727.

106. *Id.*

107. *Id.* at 729–30.

108. *Id.* at 727.

109. *Id.*

110. *Id.* at 729.

111. Argyropoulos reported that while walking down a public way outside of work, a pickup truck, of which she believed contained the harassing jailor, drove past her and yelled lewd comments at her. *Id.*

112. *Id.* at 730.

113. *Id.* at 730.

was not, however, and Argyropoulos became hostile when her supervisors instead addressed the quality of her work and recent complaints concerning her job performance.[114] Feeling "terrified," Argyropoulos activated a tape recorder and surreptitiously recorded the conversation with her supervisors.[115]

Two days after the Alton Police Department discovered Argyropoulos' recording, she was fired from the department.[116] The Chief of Police gave reasons of poor job performance and the illegal and surreptitious recording as explanation for her discharge.[117] Following her termination, Argyropoulos filed suit against the city for wrongful termination and violations under Title VII of the Civil Rights Act of 1964.[118] Argyropoulos contended that her termination was a retaliatory action in response to her earlier harassment claims.[119] Moreover, she asserted that the eavesdropping and performance reasons given by the chief were merely pretextual justifications for the adverse employment action.[120]

The Seventh Circuit was unpersuaded by Argyropoulos' argument and affirmed the district court grant of summary judgment.[121] The court held that Argyropoulos failed to meet the required elements under either the direct or indirect methods of asserting a Title VII retaliation claim.[122] The court reasoned that while Title VII does protect an employee who complains of discrimination, "the statute does not grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination."[123] The court concluded that this was a legitimate

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114. *Id.*

115. *Id.*

116. *Id.* at 730–31.

117. *Id.* at 731. The chief gave a third reason for the termination decision regarding the untruthful statements, which Argyropoulos gave to officers while they investigated the eavesdropping and attempted to uncover the tape recorder. *Id.*

118. By virtue of her employment, Argyropoulos was a member of the American Federation of State, County, and Municipal Employees ("AFSCME") union. *Id.* at 728. Therefore, in lieu of a lawsuit, Argyropoulos could have challenged her termination by filing a union grievance or by requesting a hearing before the Civil Service Commission per her union contract. *Id.* at 731. As the court noted, she instead decided to pursue a lawsuit after she received notice of her right to sue from the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 731–32. For more information about the process for filing a charge with the EEOC, see generally U.S. EQUAL EMP.'T. OPPORTUNITY COMM'N., http://www.eeoc.gov/ (last visited Apr. 26, 2015).

119. *Argyropoulos*, 539 F.3d at 732.

120. *Id.* at 736–37.

121. *Id.* at 738, 741.

122. *Id.* at 741; *see infra* Part II.B and note 132 (describing how an employee must establish evidence of retaliation under either the direct or indirect methods of proof).

123. *Argyropoulos*, 539 F.3d at 734. Here, the court also drew on its 2002 decision in *Hall v.*

disciplinary decision and clearly not retaliatory.[124] In its reasoning, the court considered the fact that the termination occurred just two days after the police department learned of the recording made it unlikely that this served as pretext for retaliation from the complained of harassment that occurred seven weeks earlier.[125] As a final note, the court stated that it does not sit as a "super personnel review board" and would neither review nor second-guess otherwise facially legitimate employer discipline decisions.[126]

B. Title VII: Protected Employee Activities, and Pretext

Before addressing how other federal courts have interpreted employer discipline for employees that commit eavesdropping, some context regarding Title VII may be helpful. Title VII of the Civil Rights Act of 1964 prevents employers from discriminating against employees on the basis of sex, national origin, race, color, and other protected groups under federal law.[127] Section 2000e–3(a) specifically prohibits employers from retaliating against an employee who opposed an unlawful employment practice, e.g., discriminatory adverse employment actions based on a protected group identification.[128] This includes an employee who makes allegations, testifies, or aids in the investigation of unlawful employment practices.[129] This provision serves as an anti-retaliatory provision that shields and protects employees who might otherwise fear adverse employment action by an employer for exposing or aiding in the investigation of allegations of discrimination.[130] This anti-retaliation principle operates to protect against employer interference "by prohibiting employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, or their employers."[131]

Bodine Electric Co., which held that although an employee may complain of harassment or discrimination, that does not immunize the employee from any subsequent and unrelated discipline, including inappropriate workplace behavior. Hall v. Bodine Elec. Co., 276 F.3d 345, 359 (7th Cir. 2002).

124. *Argyropoulos*, 539 F.3d at 741.

125. *Id.* at 737–38.

126. *Id.* at 736. The court stated that it is not "a 'super personnel review board' that second-guesses an employer's facially legitimate business decisions. We would hardly be so foolish as to suggest that insubordination is not a legitimate reason for an employer to fire an employee." *Id.* (citing Culver v. Gorman & Co., 416 F.3d 540, 547 (7th Cir. 2005)).

127. 42 U.S.C. § 2000e–3(a) (2012).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Argyropoulos*, 539 F.3d at 733 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks omitted)); *see* Robinson v. Shell Oil Co., 519 U.S.

Once an employee believes that he or she has been retaliated against for engaging in a Title VII statutorily protected activity, the individual must establish and prove that retaliation under either a direct or indirect method of proof.[132] In federal court, absent direct evidence of retaliatory treatment, as is typically the case, courts must analyze the Title VII claim under the *McDonnell Douglas Corp. v. Green* burden-shifting test.[133] To satisfy this test, an employee must first establish her prima facie case of retaliation.[134] After an employee has established her prima facie case, the burden then shifts to the employer to provide a non-discriminatory, legitimate reason for the adverse employment action.[135] If the employer is able to provide a legitimate and lawful reason for the adverse employment action, the burden then shifts back to the employee.[136] In order to overcome the apparent legitimate reason, the employee must prove that such proffered reason is in fact a pretext for the retaliation.[137]

337, 346 (1997) (holding that the primary purpose of the anti-retaliatory provisions of Title VII is to maintain "unfettered access to statutory remedial mechanisms").

132. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing a burden-shifting framework to determine whether under the indirect method of proof a plaintiff has shown that the employer engaged in a Title VII violation of an employee's statutorily protected activities). To assert a Title VII claim, the employee has two methods in order to prove employer retaliation. The direct method requires a showing that: (1) the employee engaged in a statutorily protected activity; (2) the employee suffered a materially adverse action; and (3) a showing of a causal connection that exists between the two. Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 476 (6th Cir. 2012); *Argyropoulos*, 539 F.3d at 733. In the alternative, the employee may assert a Title VII retaliation violation under the indirect method of proof. *Jones*, 504 F. App'x at 476; *Argyropoulos*, 539 F.3d at 733. The first two elements of the indirect method parallel the direct method; however, the employer must additionally show that: (3) the employee met the employer's legitimate expectations—that is, performing the job satisfactorily—and (4) that the employee was treated less favorably than a similarly-situated employee who did not engage in a protected activity. *Jones*, 504 F. App'x at 476; *Argyropoulos*, 539 F.3d at 733.

133. *Jones*, 504 F. App'x at 476; *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In 2012, Judge Diane Wood for the Seventh Circuit articulated a new test, in opposition to the outdated burden-shifting test, which has gained substantial favor within the circuit. Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring). The new test provides a simple framework requiring only that the plaintiff raise evidence sufficient that a rational jury could find that the employee took adverse employment action for an unlawful reason. *Id.*; *see* Carlson v. CSX Transp., Inc., 758 F.3d 819, 830 (7th Cir. 2014).

134. *See* text accompanying *supra* note 132 (describing how an employee must establish evidence of retaliation under either the direct or indirect methods of proof).

135. *Jones*, 504 F. App'x at 476–77.

136. *See generally* text accompanying *supra* note 132 (describing how an employee must establish evidence of retaliation under either the direct or indirect methods of proof).

137. *Jones*, 504 F. App'x at 476–77; *Argyropoulos*, 539 F.3d at 735–36; *see* Grube v. Lau Indus., Inc., 257 F.3d 723, 730 (7th Cir. 2001) ("A 'pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks." (citing Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681, 684 (7th Cir. 2000) (internal quotation marks omitted))); BLACK'S LAW DICTIONARY 1307 (9th ed. 2009)

This discussion barely scratches the surface of Title VII retaliation and discrimination claims against employers.[138] However, for the purposes of this Comment it should be a sufficient background to understand the framework of such claims. The potential for employees to bring claims of pretextual retaliation against employers when the individual is discharged for violations of a workplace recording policy will be addressed later in this Comment.[139]

C. Persuasive Authority: Other Circuit Interpretations

The Sixth Circuit recently examined an employee recording case in 2012 in *Jones v. St. Jude Medical S.C., Inc.*[140] While the Sixth Circuit was examining Ohio's one-party consent law,[141] the decision parallels the *Argyropoulos* court's reasoning and provides insight for Illinois courts confronting the issue.[142] In *Jones*, the plaintiff, an African-American female, worked as medical-device salesperson for the defendant, a seller of such devices.[143] After Jones was removed from significant accounts, she began surreptitiously recording conversations with clients, other employees, and management to gather evidence of what she alleged was discriminatory treatment.[144] In light of performance issues, as well as Jones' disloyalty as evidenced by the recordings, the defendant decided to terminate Jones.[145] Jones subsequently brought action against the company alleging retaliation under Title VII, as well as several other claims.[146] One of Jones'

("Pretext. . . . A false or weak reason or motive advanced to hide the actual or strong reason or motive.").

138. *See generally* Ruth Bader Ginsburg, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964, Symposium: Introduction*, 22 HOFSTRA LAB. & EMP. L.J. 353 (2005) (discussing race and sex discrimination in Title VII cases); Eboneé N. Hamilton et al., *Title VII of the Civil Rights Act of 1964*, 2 GEO. J. GENDER & L. 521 (2001) (discussing and analyzing Title VII).

139. *See infra* Part III.B.

140. *Jones*, 504 F. App'x. at 473.

141. OHIO REV. CODE ANN. §§ 2933.51–2933.66 (2014).

142. Although Ohio's eavesdropping law is substantially different than that which the Illinois Supreme Court invalidated in *Clark* and *Melongo*, it is particularly important for analysis of employer recording policies. *See infra* Part III.B (discussing potential allegations of pretext in response to a legitimate discharge for violation of an employer's workplace recording policy).

143. *Jones*, 504 F. App'x at 474.

144. *Id.*

145. *Id.* at 475. A Senior Vice President for the company said that "[he] was unaware of any employee who had violated the recording policy and had not been fired for the violation." *Id.* at 476.

146. *Id.* The other causes of actions include claims under the Equal Pay Act and wage discrimination under the Ohio Revised Code. *Id.* For the purposes of this Comment, however, only the Title VII claim is addressed. Specifically, the argument that termination for violations of the company's recording policy was a pretext for the alleged discriminatory treatment.

allegations was that although she violated the company recording policy—which she conceded would normally be sufficient for termination—she was immune from such action because the surreptitious recording was a protected activity under Title VII.[147]

The Sixth Circuit did not agree with Jones' characterization of the law and affirmed the district court's grant of summary judgment.[148] First, the record reflected that even after discovering that such recording was a violation of a company policy, Jones continued to record conversations.[149] Second, the court found that it was unnecessary for Jones to violate the workplace recording policy in order to oppose the alleged discrimination; therefore, the recordings were unreasonable.[150] The court postulated several alternative avenues that Jones could have pursued to oppose the alleged discriminatory treatment—including writing down the substance of the conversations or simply asking for permission to record.[151] Similarly, the court rejected the argument that because the recordings were legal it was not unreasonable to breach the company policy.[152]

Not all circuits have been consistent with each other, and the Second Circuit has explicitly held the opposite of determinations made by the Sixth and Seventh Circuits.[153] *Heller v. Champion International Corp.*,[154] decided by the Second Circuit in 1989, reflects this inconsistency. *Heller* involved an employee who recorded conversations with a supervisor under the belief that the company was planning to demote him and discriminate against him due to his age.[155] Upon learning that Heller had been recording conversations, he was confronted by supervisors, and after admitting to such recordings, he was fired "for cause."[156] The Second Circuit held that Heller's act of recording was not a legitimate basis for his termination.[157] The court did not accept the premise that an employee would never be justified in

147. *Id.* at 479.
148. *Id.* at 481.
149. *Id.* at 475.
150. *Id.* at 481.
151. *Id.*
152. *Id.*
153. *See, e.g.*, Heller v. Champion Int'l Corp., 891 F.2d 432, 433, 437 (2d Cir. 1989) (holding that the plaintiff could have been gathering evidence in support of a possible age discrimination claim when he recorded conversations with a supervisor).
154. *Id.*
155. *Id.* at 433–35.
156. *Id.* at 435.
157. *Id.*

secretly recording conversations with his or her supervisors.[158] It did, however, make note that such surreptitious recording represented disloyalty to the company.[159] Nevertheless, the court went on to state that the recording was "not necessarily the kind of disloyalty that under these circumstances would warrant dismissal as a matter of law."[160]

The *Heller* court's interpretation of an employee's termination for recording is an outlier. Many other federal district courts throughout the country have held similarly to the *Argyropoulos* and *Jones* courts and paralleled the reasoning.[161] Although all federal decisions are persuasive authority to Illinois courts, their reasoning may still be useful if a case arises that involves discharge for violation of a workplace recording policy.[162]

D. Go Ahead, Record Anything

On March 20, 2014 the Illinois Supreme Court handed down two decisions, which held that the IEA was unconstitutionally overbroad,[163] and criminalized a wide range of otherwise innocent conduct.[164] While both are criminal cases that involve the invalidation of a criminal statute, the consequences indirectly affect employment law as well.

1. *People v. Clark*

The first of the Illinois Supreme Court eavesdropping decisions handed down in March 2014 was *People v. Clark*.[165] In *Clark*, the

158. *Id.* at 436.

159. *Id.*

160. *Id.*

161. *See, e.g.*, Soloman v. Phila. Newspapers, Inc., No. 05-05326, 2008 WL 2221856 (E.D. Pa. 2008), *aff'd*, 2009 WL 215340 (3d Cir. 2009) (granting an employer's motion for summary judgment because the decision to terminate the employee for surreptitiously recording co-workers was a facially legitimate employment action); Bodoy v. N. Arundel Hosp., 945 F. Supp. 890 (D. Md. 1996), *aff'd*, 112 F.3d 508 (4th Cir. 1997) (granting a motion for summary judgment because the employee was unable to establish a causal connection between his protected activity and his discharge to rebut the employer's legitimate adverse employment action for surreptitiously taping conversations with a supervisor); Deiters v. Home Depot U.S.A., Inc., 842 F. Supp. 1023 (M.D. Tenn. 1993) (holding that an employer's discharge of an employee for surreptitious recording of meeting was legitimate in an absence of a showing by the employee that the action was pretextual).

162. *See infra* Part IV.C (discussing how courts should react to workplace recording policies post *Clark*, *Melongo*, and the December changes to the IEA).

163. People v. Clark, 2014 IL 115776, ¶¶ 25–26, 6 N.E.3d 154 (Ill. 2014); People v. Melongo, 2014 IL 114852, ¶¶ 26, 36, 6 N.E.3d 120 (Ill. 2014). It is interesting to note that in both cases the judgment of the Illinois Supreme Court was unanimous, inviting no dissent. Chief Justice Garman delivered the judgment and subsequent opinions in these cases, with Justices Freeman, Thomas, Kilbride, Burke, and Theis concurring in both the judgment and opinions.

164. *Melongo*, 2014 IL 114852, ¶ 29.

165. *Clark*, 2014 IL 115776.

defendant was in court regarding a child-support matter.[166] It was alleged that Clark surreptitiously recorded various conversations between himself, an attorney representing the other party, and a circuit court judge acting in the performance of official duties.[167] Clark, however, contended that he had a good reason to record the conversations.[168] Clark alleged that because there was not a court reporter present during the conversations, he decided to record the proceedings in order to maintain an accurate record of the matters therein.[169] Clark reasoned that he was entitled to protection under the First Amendment, which would allow him to record public officials performing their public duties.[170] The circuit court agreed with Clark and granted his motion to dismiss.[171] Subsequently, because the circuit court found a criminal statute unconstitutional, the State took an immediate appeal to the Illinois Supreme Court.[172]

After a review of the history of the IEA, including *Beardsley*, *Herrington*, and the 1994 amendment to the IEA, the Illinois Supreme Court held Section 14-2(a)(1)(A) of the IEA unconstitutionally overbroad and in violation of the First Amendment to the United States Constitution.[173] Specifically, the court invalidated the requirement of two-party consent in order to effectuate a legal and legitimate recording of a conversation.[174] The court reasoned that the IEA was overbroad because of the substantial number of its unconstitutional applications weighed against the IEA's legitimate sweep—that is, prohibiting the recording of clearly private conversations.[175] By way of example, the

166. *Id.* ¶ 3.
167. *Id.* ¶ 1.
168. *Id.* ¶ 3.
169. *Id.*
170. *Id.*
171. *Id.* ¶ 7.
172. *Id.* ¶¶ 7–9. Pursuant to Illinois Supreme Court Rule 603, when a circuit court finds a criminal statute unconstitutional, appeal lies directly with the Illinois Supreme Court. ILL. SUP. CT. R. 603 (2013) ("Appeals in criminal cases in which a statute of the United States or of this State has been held invalid shall lie directly to the Supreme Court as a matter of right. All other appeals in criminal cases shall be taken to the Appellate Court.").
173. *Clark*, 2014 IL 115776, ¶ 23. At the time *Clark* was decided, section (a)(1)(A) of the IEA read:

> (a) A person commits eavesdropping when he: (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) *with the consent of all of the parties to such conversation or electronic communication* . . . .

720 ILL. COMP. STAT. 5/14-2(a)(1)(A) (2012) (emphasis added).
174. *Clark*, 2014 IL 115776, ¶ 23.
175. *Id.* ¶¶ 22–23.

court illustrated that if a person overhears a conversation, that individual may repeat the substance of the conversation, or even take notes, write it down, and publish it.[176] If, however, that same individual were to record the conversation, with some sort of audio recording device, it would then become a criminal act.[177] Thus, the court deemed that the IEA's blanket prohibition on all audio recordings without the consent of each party swept far too broadly.[178] The court noted, however, that the entire IEA was not completely erroneous, and that there are instances in which recordings of truly private conversations are within its legitimate scope.[179]

2. *People v. Melongo*

The same day that the court handed down the decision in *Clark*, the Illinois Supreme Court dealt another blow to the IEA in *People v. Melongo*.[180] Annabel Melongo was charged with several counts of surreptitiously recording a phone conversation between herself and a court reporter supervisor.[181] Melongo had been charged with computer tampering in a case unrelated to the eavesdropping charge.[182] Although Melongo was present on the date of arraignment for the tampering charge, which the official record reflected, the judge's half sheet and the court call sheet indicated that Melongo was absent and that the arraignment did not take place.[183] Subsequently, in an effort to have the court call sheet changed to accurately reflect that Melongo was present,

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176. *Id.* ¶ 23.

177. *Id.*; *see* ACLU v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012) ("By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns . . . . The same is true of a ban on audio and visual recording.").

178. *Clark*, 2014 IL 115776, ¶ 22.

179. *Id.* "The prohibition on [recording private conversations] serves the purpose of the [IEA] to protect conversational privacy. However, the [IEA's] blanket ban on audio recordings sweeps [too] broadly . . . ." *Id.*

180. People v. Melongo, 2014 IL 114852, 6 N.E.3d 120 (Ill. 2014). Melongo was also charged with three counts of divulging information obtained via use of an eavesdropping device. *Id.* ¶ 7. This second crime, a violation of 720 ILL. COMP. STAT. 5/14-2(a)(3), is a separate charge of eavesdropping. Section 5/14-2(a)(3) reads:

> (a) A person commits eavesdropping when he: . . . (3) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

720 ILL. COMP. STAT. 5/14-2(a)(3) (2012).

181. *Melongo*, 2014 IL 114852, ¶¶ 5–7.

182. *Id.* ¶ 5.

183. *Id.* ¶¶ 5–6.

she recorded a conversation with a court reporter supervisor.[184] After recording the conversation in which Melongo attempted, unsuccessfully, to persuade the supervisor to change the record, she posted the recordings and transcripts on her website.[185] The subsequent posting of the recorded conversations led to three counts of using or divulging information obtained through the use of an eavesdropping device.[186] In her defense, Melongo contended that her recording was exempt from prosecution pursuant to one of the statutory exceptions to the IEA—that is, the belief that the individual being recorded is committing or about to commit a criminal offense against the recorder and the recording will lead to evidence of such.[187]

After a lengthy trial on the IEA charges, the jury was unable to reach a unanimous verdict, and a mistrial was declared.[188] The matter was subsequently assigned to a new trial court judge.[189] Melongo filed a *pro se* motion to declare the IEA unconstitutional.[190] The new judge ruled in favor of Melongo and held the IEA unconstitutional both facially and in its application to Melongo.[191] Upon a finding of

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184. *Id.* ¶¶ 5–7.

185. *Id.* ¶ 7.

186. *Id.*

187. *Melongo*, 2014 IL 114852, ¶ 8. Specifically, Melongo contended that she was acting in a lawful manner under a reasonable suspicion of a criminal offense exemption, 720 ILL. COMP. STAT. 5/14-3(i), which reads:

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

720 ILL. COMP. STAT. 5/14-3(i) (2012) (emphasis added); *see supra* Part I.B.3 and note 78 (addressing the many exceptions to the IEA).

188. *Melongo*, 2014 IL 114852, ¶ 12.

189. *Id.* Initially, Melongo filed a motion to dismiss, predicated on her 5/14-3(i) defense, *see supra* note 187, in which she stipulated to the fact that she recorded the conversations with the court reporter supervisor. *Melongo*, 2014 IL 114852, ¶ 8. The motion was denied by the court, as was a subsequent motion by Melongo to reconsider. *Id.* ¶ 10. Melongo filed a third motion to dismiss, this time on the basis that IEA was unconstitutional "under the due process clauses of both the Illinois and United States Constitutions because there is 'no rational relation between requiring two party consent and a legitimate state interest.'" *Id.* ¶ 11. This motion was argued but also denied by the court. *Id.*

190. *Id.* ¶ 13.

191. The court's order stated, "[T]he [IEA] appears to be vague, restrictive and makes innocent conduct subject to prosecution." *Id.* ¶ 14. The trial judge's order relied heavily on the Seventh Circuit's ruling in *ACLU v. Alvarez*, which held in part that the IEA was unconstitutional on First Amendment grounds when applied to a plan to record police officers while performing their professional duties in public. *Id.*; *see* ACLU v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012); *see also supra* Part I.B.4 (addressing the ACLU's challenge to the IEA in federal court).

unconstitutionality, the State appealed and the Illinois Supreme Court reviewed the question *de novo*.[192] Ultimately, the court determined that the IEA was unconstitutionally overbroad, "burden[ing] substantially more speech than is necessary to serve a legitimate state interest in protecting conversational privacy."[193] The court noted that its holding was guided by and wholly consistent with its decision in *Clark*.[194] Additionally, however, the court provided several examples of the criminalized "innocent conduct"—including recording loud arguments in the street or at a large athletic event—which the court in *Clark* claimed the IEA criminalized.[195] After citing several examples, the court stated that none implicate privacy interests, but under the current statutory scheme all constitute felonious behavior.[196] Therefore, consistent with *Clark*, the court in *Melongo* reaffirmed the overbroad and unconstitutional nature of the IEA.[197]

III. ANALYSIS

A. Clark, Melongo*, and Workplace Recording Policies*

There are several implications of *Clark* and *Melongo*, but this Comment focuses on the indirect effects on workplace recording policies. As discussed in Part I.C, employers may put in place a policy that prohibits employees from recording in the workplace for several reasons.[198] These might include, for example, policies to protect trade secrets, foster openness and collaboration, or to protect against

192. *Melongo*, 2014 IL 114852, ¶¶ 17, 20; *see* People v. Kitch, 942 N.E.2d 1235, 1243 (Ill. 2011) ("Whether a statute is constitutional is a question of law, which we review *de novo*." (emphasis in original) (citation omitted)); *see also* ILL. SUP. CT. R. 603 (requiring direct appeal to the Illinois Supreme Court when a criminal statute is invalidated).

193. *Melongo*, 2014 IL 114852, ¶ 31.

194. "Although the cases were not consolidated, they involved similar issues . . . [and o]ur analysis in [*Melongo*] is guided by our holding in *Clark*." *Id.* ¶ 26. The court also found that the additional claim—the criminal publishing of the recordings—which was not present in *Clark* to be unconstitutionally overbroad. *Id.* ¶ 36. "We hold that [Melongo] cannot be constitutionally prosecuted for divulging the contents of the conversations she recorded." *Id.* This subsequent ruling by the court is likely predicated on the fact that the court determined that the initial recording did not constitute criminal activity.

195. *Id.* ¶ 29. "The [IEA] criminalizes the recording of conversations that cannot be deemed private: a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others." *Id.*

196. *Id.*

197. *Id.* ¶¶ 26, 31.

198. *See supra* Part I.C and accompanying notes (discussing the various reasons that employers have proffered for instituting workplace recording policies).

corporate espionage.[199] Prior to *Clark* and *Melongo*, eavesdropping—both surreptitiously and openly—was criminal and an employer hardly needed to justify discipline of an employee for committing a crime while at work.[200]

Because *Clark* and *Melongo* are criminal cases the holdings of the cases alone will not address employment concerns. Ultimately, although open recording is no longer criminal in Illinois, that change in the law does not give employees license to engage in whatever behavior they desire while they are at work.[201] Most workplaces have rules and guidelines that employees are expected to follow as a condition of their employment.[202] Typically, employees receive a handbook when they are hired and are instructed to read the rules and regulations, subsequently signing a form, which presumably confirms that the individual has read such rules.[203] Employers tend to do this to assert that the employee was on notice of such rules and on notice that violations could subject the employee to discipline.[204] When an employee breaches a workplace policy it is not at all uncommon for employers to take adverse employment action against the employee.[205]

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199. *See supra* Part I.C and accompanying notes.

200. *See* text accompanying *supra* notes 10 (collecting cases of employee discharge for violating workplace policy) & 11 (collecting cases of employee-at-will doctrine).

201. *See* text accompanying *supra* notes 10–11 (providing cases involving employee discharge for violating workplace policy).

202. *See* text accompanying *supra* note 10 (listing cases that involve employees being discharged for violating workplace policy); *see also supra* Part I.C and accompanying notes (citing several examples of a promulgated workplace recording policy).

203. *See, e.g.*, *Ethics Code of Conduct*, POTBELLY CORP. 1 (Oct. 2013), http://files.shareholder.com/downloads/AMDA-24CMIO/0x0x688242/f922e732-f723-477f-9d84-3b1c4fee9ec0/Potbelly_-_Ethics_Code_of_Conduct_-As_sent_to_Board.pdf ("All employees are required to acknowledge, upon hire and annually, that they have read, understand and are in compliance with this Ethics Code of Conduct. Abiding by this Code is a condition of continued employment with Potbelly. . . . Any employee who fails to meet the obligations set forth in this Code or the law will be subject to discipline, up to and including dismissal."); *City of Chicago Personnel Rules*, CITY OF CHI. (Nov. 18, 2010), http://www.cityofchicago.org/content/dam/city/depts/dhr/supp_info/HRpolicies/Personnel_Rules_DHR_03_2012_Choi.pdf (noting after most rules that employees found in violation may be subject to discipline, up to and including discharge).

204. *See* text accompanying *supra* note 203 (showing examples of Potbelly's Ethics Code of Conduct and the City of Chicago's Personnel Rules which provide employees with sufficient notice of the rules and the consequences of violating those rules); *see also Ethical Business Conduct Guidelines*, BOEING 9, http://www.boeing.com/assets/pdf/companyoffices/aboutus/ethics/ethics_booklet.pdf (last visited Apr. 26, 2015) ("All employees, including contract labor employees, sign a document stating they will adhere to the Boeing Code of Conduct and uphold the values set forth for the company. This action allows each of us to acknowledge our ethical expectations and reminds us of our responsibility to uphold integrity . . . .").

205. *See* text accompanying *supra* note 10 (collecting cases of employee discharge for violating workplace policy); *see also* Thorne v. Jewel Food Stores, Inc., 410 F. App'x 994, 996–

A violation of certain policies, rules, or particularly egregious behavior, can result in termination of the employee.[206] Additionally, *Clark* and *Melongo* do not alter the age-old tradition of at-will employment.[207] An at-will employee may be fired for any reason, or no reason at all, so long as the termination is non-discriminatory.[208] Whether the employee is at-will or otherwise, an employer may never justify termination on the basis of discrimination.[209] When an employee breaches workplace policy, however, termination is certainly warranted.[210] Therefore, although open recording of conversations is no longer a criminal act in Illinois, employers may still prohibit their employees from engaging in such behavior in the workplace based on their own employment policy.

B. Be Wary of Pretext: What Employers Cannot Prohibit

Although a violation of workplace policy is something that can warrant termination, employers should take great caution that they do not terminate an employee who was engaging in a statutorily protected activity.[211] Recall the discussion of Title VII and the issue of pretext.[212] Employers cannot fire employees for opposing discrimination or retaliation, which Title VII declares are protected activities.[213] This concept becomes more complicated, however, when an employee may be attempting to procure evidence of discrimination by means of recording conversations or actions of supervisors or other employees.[214]

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97 (7th Cir. 2011) (holding that an employer's decision to fire employee for violations of its workplace policies was not pretext for discrimination); Bradford v. City of Chi., 121 F. App'x 137, 140 (7th Cir. 2005) (finding legitimate the city's decision to place its bipolar employee on suspension for violating a zero-tolerance workplace-violence policy).

206. *See* text accompanying *supra* notes 10 (collecting cases of employee discharge for violating workplace policy), 101 (examples of employees discharged for recording conversations), & 205 (collecting Seventh Circuit cases of employee discharge for violating workplace policy).

207. *See* text accompanying *supra* note 11 (collecting cases of employee-at-will doctrine).

208. 42 U.S.C. § 2000e–3(a) (2012); *see* text accompanying *supra* note 11.

209. 42 U.S.C. § 2000e–3(a); *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the standard test for discriminatory employment action); Ginsburg, *supra* note 138, at 353 (stating that of all federal measures implemented to eliminate employment discrimination, Title VII has the greatest impact).

210. *See* text accompanying *supra* note 10.

211. If an employer terminates an employee for engaging in a statutorily defined protected activity, the employer is liable under Title VII. 42 U.S.C. § 2000e–3(a); *see supra* Part II.B.

212. *See supra* Part II.B.

213. 42 U.S.C. § 2000e–3(a).

214. *See, e.g.*, Stephens Media, LLC, 356 N.L.R.B. No. 63 (Feb. 14, 2011) (lending support to the proposition that an employer may ban employees from recording; however, in this case the employer promulgated the policy after it discovered employees attempting to gain evidence of discrimination—a protected activity under Title VII—and therefore found against the employer);

Pursuant to the opposition clause, an employer cannot discipline an employee for opposing discriminatory treatment[215] or attempting to collect evidence of such treatment.[216] So long as the employer specifically disciplines the employee for a violation of a workplace recording policy, however, the employer should be able to withstand any claim that the discipline was a pretextual reason for otherwise terminating the employee for opposing discrimination.[217] When addressing instances such as the one mentioned above, Illinois courts should take guidance from the Sixth and Seventh Circuits' reasoning in determining whether employee recording under the guise of "opposing discrimination" legitimately overcomes the adverse employment action.

The Seventh Circuit addressed this question in *Argyropoulos* and provided persuasive reasoning, which Illinois courts may adopt when confronting this issue.[218] Recall that Argyropoulos, a jailor for the Alton Police Department, was discharged when it was discovered that she surreptitiously tape-recorded a workplace meeting with two of her supervisors.[219] The court in *Argyropoulos* noted that when determining the legitimacy of an adverse employment action, the length of time that elapsed between the protected activity and the adverse action is critical.[220] In that case, seven weeks had elapsed since the complained-of sexual harassment and Argyropoulos' termination; as opposed to a

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Bast, *supra* note 6, at 849–51 (discussing an instance where Texaco employees taped information to prove employment discrimination claims causing a suit to go on for two and one-half years before a settlement was reached).

215. 42 U.S.C. § 2000e–3(a); Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 480 (6th Cir. 2012); Argyropoulos v. City of Alton, 539 F.3d 724, 732 (7th Cir. 2008).

216. While collecting evidence is protected under Title VII, what constitutes protected collection is a decision made by the courts. *See Jones*, 504 F. App'x at 480–81 (holding that while an employee may claim protection for activities that were opposing the alleged discrimination, a violation of the employer's recording policy was not necessary in order to do so). In determining whether an activity constitutes opposing discrimination, the Sixth Circuit has stated that the employee's action must be reasonable. *Id.* at 480; *see* Johnson v. Univ. of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000) ("In short, the only qualification that is placed upon an employee's invocation of protection from retaliation under Title VII's opposition clause is that the manner of his opposition must be reasonable.").

217. *Jones*, 504 F. App'x at 481; *Argyropoulos*, 539 F.3d at 737–38. *See generally* text accompanying note 10 (collecting cases of employee discharge for violating workplace policy).

218. *See supra* Part II.A and accompanying notes (analyzing *Argyropoulos*).

219. *Argyropoulos*, 539 F.3d at 727. 42 U.S.C. § 2000e–3(a) does not insulate an employee that engages in workplace espionage and dubious self-help tactics from discipline. *Argyropoulos*, 539 F.3d at 733–34; *cf.* Nasir Gore et al., *supra* note 99. Although developed after the Seventh Circuit's decision in *Argyropoulos*, Google Glass presents an employee with the opportunity to engage in exactly the type dubious behavior the court holds Title VII does not protect. Nasir Gore et al., *supra* note 99.

220. *Argyropoulos*, 539 F.3d at 736.

mere two days after the discovery of the recording violation.[221] Thus, the court stated that it would not second-guess an employer's "facially legitimate business decision."[222]

It is important to note that at the time that *Agyropoulos* was decided, surreptitious eavesdropping constituted a crime in Illinois.[223] Additionally, under the December changes to the IEA, surreptitious recording of a private conversation is still illegal.[224] Stringing these two propositions together, it is logical to infer that so long as there is nothing suspicious about the timing, and the employer proffers a legitimate reason for the adverse employment action, the employer will likely withstand a Title VII allegation.[225] This result does not turn alone on whether the jurisdiction has a two-party consent eavesdropping law.[226] A similar judgment was rendered on the issue by the Sixth Circuit's decision in *Jones*, which interpreted Ohio's one-party consent statute.[227]

Similar to the argument in *Argyropoulos*, Jones asserted that she was unlawfully terminated for engaging in protected activities under Title VII.[228] However, Jones went one step further and alleged that regardless of the employer's recording policy, a violation could not have provided a legitimate basis for termination because the recordings were a protected activity under Title VII—namely, opposing retaliation by collecting evidence of the conduct via the recordings.[229] The court

221. *Id.*

222. *Id.*

223. The Seventh Circuit decided *Argyropoulos* in 2008, whereas the Illinois Supreme Court decided *Clark* and *Melongo*—invalidating the open recording portion of the IEA—in March 2014.

224. *See infra* Part IV.A (explaining the December changes to the IEA).

225. *See Argyropoulos*, 539 F.3d at 736 (ruling that "even if Argyropoulos had managed to establish the prima facie case, her retaliation claim would still face an insurmountable obstacle, because she cannot show that the City's proffered justification for her arrest and termination was a pretext for retaliation"); *see also* Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 477–79 (6th Cir. 2012) ("When an employer offers more than one independent, legitimate, non-discriminatory reason for an adverse employment action, even if one is found to be pretextual but at least one other is not, the defendant employer is still entitled to summary judgment."); text accompanying *supra* note 205 (collecting Seventh Circuit cases of employee discharge for violating workplace policy).

226. *See Jones*, 504 F. App'x at 480 (describing Jones' secret recording of conversations).

227. *See supra* Part II.C (analyzing *Jones*).

228. *Jones*, 504 F. App'x at 473.

229. *Id.* at 479; *see* 42 U.S.C. § 2000e–3(a) (2012) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."). The court noted that "[o]nly the opposition clause applies in Jones's case because she made many of the recordings well before she first filed a discrimination complaint with the Equal Employment Opportunity Commission . . . ." *Jones*, 504 F. App'x at 480.

found that Jones failed to produce any evidence rebutting the reason for her termination.[230] Moreover, Jones failed to assert why a violation of company policy was not a legitimate reason for her termination.[231] Thus, she effectively conceded that the adverse action taken against her was legitimate.[232] The court took time to note that it was unaware why Jones needed to violate company policy at all to oppose the alleged improprieties.[233] The court reasoned that there are many other means to accomplish the same end that do not violate the employer's workplace recording policy.[234]

Although the court in *Jones* interpreted a one-party consent eavesdropping law, it came to the same conclusion as the Seventh Circuit in *Argyropoulos*, which interpreted a two-party consent law.[235] Clearly, the determinative issue was not whether the state in which the adverse employment action occurred was a one-party or two-party consent eavesdropping jurisdiction.[236] Rather, the legality of the employee's discharge turned on whether the employer had a legitimate reason—e.g., violation of a company workplace recording policy.[237]

IV. PROPOSAL

A. A Lasting Act

On December 30, 2014, as one of his last official acts as the Governor of Illinois, Pat Quinn signed into law Senate Bill 1342, which amended and reinstituted a criminal eavesdropping law in the state.[238] The new rules redefine eavesdropping, essentially harmonizing the IEA with *Clark* and *Melongo*. Specifically, after the passage of the amendment, in order for an individual to commit criminal

230. *Jones*, 504 F. App'x at 480.

231. *Id.*

232. *Id.*

233. *Id.* at 481.

234. *Id.*

235. *See id.* at 480 (describing Jones's secret recording of conversations); text accompanying *supra* note 142 (describing Ohio's eavesdropping law). *See generally* Argyropoulos v. City of Alton, 539 F.3d 724, 737–38 (7th Cir. 2008); *supra* Part I.B.3 (citing the version of the IEA prior to *Clark* and *Melongo*).

236. Both the *Argyropoulos* court and the *Jones* court came to the same conclusion while the former was interpreting a two-party consent law and the latter was interpreting a one-party consent law. *Jones*, 594 F. App'x at 480; *Argyropoulos*, 539 F.3d at 737–38.

237. *Jones*, 594 F. App'x at 480; *Argyropoulos*, 539 F.3d at 737–38.

238. Monique Garcia, *Quinn Signs New Illinois Eavesdropping Rules into Law*, CHI. TRIB. (Dec. 30, 2014, 5:53 PM), http://www.chicagotribune.com/news/ct-quinn-signs-illinois-eavesdropping-law-met-1231-20141230-story.html; Patricia Whitten et al., *Governor Quinn Signs New Eavesdropping Law*, FRANCZEK RADELET (Jan. 6, 2015), http://www.franczek.com/frontcenter-Quinn_Eavesdropping_Law_Signed.html.

eavesdropping, an individual must surreptitiously record a private conversation.[239] The culpable *mens rea* of the IEA, knowingly or intentionally, stayed the same, presently:

> (a) A person commits eavesdropping when he or she knowingly and intentionally: (1) Uses an eavesdropping device, *in a surreptitious manner*, for the purpose of overhearing, transmitting, or recording all or any part of any *private conversation* to which he or she is not a party unless he or she does so with the consent of all of the parties to the private conversation . . . .[240]

There are two significant changes that the Illinois General Assembly made to the IEA. First, the General Assembly added that the recorder of a conversation must do so in a surreptitious, or secretive, manner,[241] raising the inference that if done in the open it would give the recorded party (or parties) notice.[242] The second change consisted of redefining a conversation; specifically, the IEA now protects only private conversations.[243] In Section 5/14-1(d), the Ninety-Eighth General Assembly substituted "private conversation" for "conversation," including a reasonable expectation of privacy by one of the parties:

> (d) Private conversation.
>
> For the purposes of this Article, "*private conversation*" means any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, *when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation*.[244]

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239. S.B. 1342, 98th Gen. Assemb., Reg. Sess., 2014 Ill. Laws, P.A. 98-1142, § 5.

240. 720 ILL. COMP. STAT. ANN. 5/14-2(a)(1) (West 2014) (emphasis added). Compare the present version of the statute with the older version:

> (a) A person commits eavesdropping when he: (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication . . . .

720 ILL. COMP. STAT. 5/14-2(a)(1) (2012).

241. S.B. 1342, 98th Gen. Assemb., Reg. Sess., 2014 Ill. Laws, P.A. 98-1142, § 5.

242. *Cf.* People v. Clark, 2014 IL 115776, ¶ 20, 6 N.E.3d 154, 160 (Ill. 2014) ("[N]o recording could be made absent consent from all parties regardless of any lack of expectation of privacy."); People v. Beardsley, 503 N.E.2d 346, 349 (Ill. 1986) ("[I]f the parties to a conversation act under circumstances which entitle them to believe that the conversation is private and cannot be heard by others who are acting in a lawful manner, then they should be protected in their privacy.").

243. S.B. 1342, 98th Gen. Assemb., Reg. Sess., 2014 Ill. Laws, P.A. 98-1142, § 5; *see* Whitten et al., *supra* note 238.

244. 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West 2014) (emphasis added). Compare the present version of the statute with the older version:

> [T]he term 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

Both changes bring the IEA back within the permissible scope authorized by the Illinois Supreme Court in *Clark* and *Melongo*.[245] *Clark* and *Melongo*'s stated reason for the IEA's unconstitutionality was that it swept too broadly.[246] The court noted, however, that truly private conversations would be within the permissible scope of a state eavesdropping law.[247] Thus, consistent with the State's desire to protect conversational privacy, it appears that the General Assembly determined that a two-party consent law more aptly addressed those concerns.[248]

B. Court Reactions to the December Changes to the Illinois Eavesdropping Act

With the changes to the IEA now codified into law, individuals can once again be charged with criminal eavesdropping in Illinois. This raises several questions: How should courts react to the changes made, in the criminal context, generally? Should the law be upheld as constitutional? What constitutes a reasonable expectation of privacy? This Part analyzes these questions through the lenses of both the Seventh Circuit courts and Illinois state courts.

1. Federal Court Reaction

The December changes to IEA are consistent with the majority's reasoning in *American Civil Liberties Union of Illinois v. Alvarez*.[249] The primary concern of the majority was that the draconian IEA was criminalizing conversations that took place in open, public places, creating too great a restriction on speech.[250] The conversations at issue

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a private nature under circumstances justifying that expectation.

720 ILL. COMP. STAT. 5/14-1(d) (2012).

245. *See* Whitten et al., *supra* note 238.

246. *Clark*, 2014 IL 115776, ¶ 23; People v. Melongo, 2014 IL 114852, ¶ 29, 6 N.E.3d 120 (Ill. 2014).

247. *Clark*, 2014 IL 115776, ¶ 22 ("Audio recordings of truly private conversations are within the legitimate scope of the [IEA]."). *See generally Melongo*, 2014 IL 114852, ¶¶ 17, 20, 31.

248. *See* ILL. CONST. art. 1, § 12 (Right to Remedy and Justice: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."); *Clark*, 2014 IL 115776, ¶ 22 (stating that prohibiting truly private conversations would serve the IEA's statutory purpose of protecting conversational privacy); *Melongo*, 2014 IL 114852, ¶ 28 ("The State and defendant agree that the purpose of the [IEA] is to protect conversational privacy."); *Beardsley*, 503 N.E.2d at 349 ("The reason for this [eavesdropping] legislation has, of course, been to protect the privacy of the individual.").

249. *Compare* ACLU v. Alvarez, 679 F.3d 583, 595–600 (7th Cir. 2012), *with* S.B. 1342, 98th Gen. Assemb., Reg. Sess., 2014 Ill. Laws, P.A. 98-1142, § 5, *and* 720 ILL. COMP. STAT. ANN. 5/14-1–2 (West 2014).

250. *Alvarez*, 679 F.3d at 600.

in *Alvarez* implicated no elements of privacy, and thus, the majority stated criminalizing their recording did not serve the important governmental interest in protecting conversational privacy.[251] Specifically, under the IEA's broad scope, the statute's means did not meet its ends.[252]

Although the *Alvarez* decision only called into question the validity of the IEA,[253] making no final constitutional judgment, the majority would likely uphold the statute under the December changes to the IEA.[254] In fact, the majority implied that protecting personal privacy is an important goal.[255] Therefore, under the new scope of the IEA—criminalizing only the secret recording of a private conversation—Seventh Circuit federal courts addressing the issue should rule favorably on the IEA's constitutionality.

2. Illinois State Court Reaction

When Illinois courts are confronted with an individual charged with criminal eavesdropping, the constitutionality of the December changes to the IEA should go unquestioned. By striking the offending language in the definition of a conversation, "regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation,"[256] the December changes to the IEA are consistent with the Illinois Supreme Court's decisions in *Clark* and *Melongo*.[257] *Clark* and *Melongo* only held that the IEA was unconstitutionally overbroad in criminalizing what the court deemed to be "otherwise innocent conduct."[258] The court was explicit that the problem with the IEA was that it criminalized the recording of conversations in which the conversants had no reasonable expectation of privacy.[259] Moreover, the court also stated that "[a]udio recordings of truly private conversations are within the legitimate scope

251. *Id.* at 608.
252. *Id.* at 606.
253. *Id.* at 608.
254. *See generally id.*
255. *Id.* at 606.
256. 720 ILL. COMP. STAT. 5/14-1(d) (2012).
257. People v. Clark, 2014 IL 115776, ¶ 21, 6 N.E.3d 154 (Ill. 2014) ("Individuals have a valid interest in the privacy of their communications and a legitimate expectation that their private conversations will not be recorded by those not privy to the conversation."); People v. Melongo, 2014 IL 114852, ¶ 28, 6 N.E.3d 120 (Ill. 2014) ("[T]he purpose of the statute is to protect conversational privacy.").
258. *Clark*, 2014 IL 115776, ¶¶ 22, 23; *see Melongo*, 2014 IL 114852, ¶ 29 ("The [IEA] criminalizes the recording of conversation that cannot be deemed private . . . .").
259. *Clark*, 2014 IL 115776, ¶¶ 21; *Melongo*, 2014 IL 114852, ¶ 29.

of the [IEA]."[260] Thus, the constitutionality of the IEA should go unchallenged since *Clark* and *Melongo* had their intended effect: reigning in the scope of IEA.

The next logical question courts must address is what constitutes a reasonable expectation of privacy.[261] *People v. Beardsley*, the first case in which the Illinois Supreme Court mentioned that an expectation of privacy is necessary to criminalize recording, may provide guidance.[262] In *Beardsley*, the court agreed that the purpose of the IEA was to protect from recording what was said in private.[263] In that case, the court dismissed the eavesdropping charges against Beardsley because the police officers he recorded did not have a reasonable expectation of privacy.[264] Thus, at the very least, we can infer that an individual can record police officers performing their official duties without any reasonable expectation of privacy present.[265]

The support found in Illinois jurisprudence for the aforementioned conception of a reasonable expectation of privacy notwithstanding,[266] in the wake of recent police shootings of unarmed civilians, there may be a more basic public desire for the transparency that comes with recording.[267] Consider, for example the video evidence of a New York City Police Officer choking Eric Garner, a forty-three-year-old Staten

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260. *Clark*, 2014 IL 115776, ¶ 22.

261. The IEA is silent on what constitutes a reasonable expectation of privacy. *See* 720 ILL. COMP. STAT. ANN. 5/14-1 (West 2014).

262. People v. Beardsley, 503 N.E.2d 346, 349 (Ill. 1986) ("We agree with the defendant that the [IEA] was intended to protect individuals from the *surreptitious* monitoring of their conversations by the use of eavesdropping devices . . . ."); *see* Claiborne, *supra* note 43, at 492 (stating that the IEA included an element of reasonable expectation of privacy, although at the time *Beardsley* was decided, the statute did not explicitly include such a condition).

263. *Beardsley*, 503 N.E.2d at 349. The court mentions that the General Assembly Committee Comments of the IEA state that the reason for the legislation was to "protect the privacy of the individual." *Id.*

264. *Id.* at 349.

265. *Accord id.* Moreover, in *Clark*, the court explicitly invoked the rule of *Beardsley*, stating that "consent of all the parties to a conversation to the recording of that conversation [is] not required in instances where any party lack[s] an intent to keep the conversation private." *Clark*, 2014 IL 115776, ¶ 20.

266. *Cf.* ILL. CONST. art. 1, § 12; *Clark*, 2014 IL 115776, ¶ 22; People v. Melongo, 2014 IL 114852, ¶ 28, 6 N.E.3d 120 (Ill. 2014); *Beardsley*, 503 N.E.2d at 349.

267. *See, e.g.*, Peter Herman & Rachel Weiner, *Turning to Tech to Restore Trust*, WASH. POST, Dec. 3, 2014, at A1, A16 (addressing the debate over police officer body cameras after the tragic shooting of a black youth by a white police officer in the summer of 2014); Fiona Ortiz, *Police Chiefs Pledge More Transparency After Ferguson*, REUTERS (Sept. 17, 2014, 6:39 PM), http://www.reuters.com/article/2014/09/17/us-usa-police-transparency-idUSKBN0HC2IC20140917 (reporting that in wake of Ferguson police chiefs plan to implement more transparency in policing).

Island man, to death for selling cigarettes when he "resisted" arrest.[268] If the bystander who recorded this interaction did so in Illinois, under the old IEA the individual would have committed felony eavesdropping.[269] However, in the wake of the December changes to the IEA the same recording likely does not implicate any reasonable expectation of privacy and would not be criminal.[270]

C. So What? How the December Changes to the Illinois Eavesdropping Act Will Affect Employee Recording in the Workplace

1. If an Employee Records a Conversation at Work, Does it Constitute a Crime?

Under the December changes to the IEA, an individual commits criminal eavesdropping when he or she surreptitiously records a private conversation.[271] Determining whether an employee has a reasonable expectation to privacy is fact specific and would likely change dependent on the location of the employee—i.e., when in the main office juxtaposed to when the employee is in a supervisor's or coworker's office discussing a matter deemed sensitive.[272] This raises an interesting question about whether an employer has a reasonable expectation of privacy in its workplace, which merits mention, though it is outside the scope of this Comment.[273] Thus, it is unclear whether

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268. Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for Police*, N.Y. TIMES, July 18, 2014, at A1. For more information on the failure of a New York grand jury to indict the police officer who choked Garner to death, see Christopher Mathias & Lilly Workneh, *Grand Jury Declines to Indict NYPD Officer in Chokehold Death of Eric Garner*, HUFF. POST (Dec. 12, 2014, 11:59 PM), http://www.huffingtonpost.com/2014/12/03/eric-garner_n_6263656.html.

269. *See supra* Part I.B.3 (discussing the IEA prior to *Clark* and *Melongo*).

270. *See* 720 ILL. COMP. STAT. ANN. 5/14-1 (West 2014); *cf.* ACLU v. Alvarez, 679 F.3d 583, 606 (7th Cir. 2012); *Beardsley*, 503 N.E.2d at 349.

271. 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2014).

272. Scott McNealy, Sun Microsystems CEO believes that the battle for employee privacy in the workplace was over before it even started. *See* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1462 (2000) (quoting Mr. McNealy saying "You have zero privacy anyway. . . . Get over it."). McNealy, who is a member of a privacy watchdog group the Online Privacy Alliance, told reporters that consumer privacy was a "red herring." Peter D. Jacobsen, *Medical Records and HIPPA: Is it Too Late To Protect Privacy?*, 86 MINN. L. REV. 1497, 1497 (2002) (citation omitted).

273. There are many articles and discussion about employer monitoring of employees and employees' right to—or the need to ensure—privacy in the workplace. *See, e.g.*, Corey A. Ciochetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285 (2011) (advocating for a new framework for technological monitoring that balances the techniques of privacy invasiveness with enterprise protection); Ariana R. Levinson, *Carpe Diem: Privacy in Employment Act*, 43 AKRON L. REV. 331 (2010)

criminal liability would be triggered under the IEA if an employee secretly records a conversation at work. What is clear from the changes made to the IEA, however, is that if an employee *openly records* a conversation at work, it would not trigger criminal liability. Pursuant to the December changes to the IEA, open recording would negate any reasonable expectation of privacy that a party to the conversation could perceive.[274]

2. Employer Handbook Has a Specific Policy Addressing Workplace Recording

Regardless of whether an employee commits criminal eavesdropping, it should not affect whether or not an employer can prohibit its employees from recording while at work. When the Seventh Circuit decided *Argyropoulos* under the old IEA, the court never addressed expectations of privacy and barely scratched the surface of a criminality discussion.[275] It appears the court viewed both these elements as irrelevant.[276] The violation of company policy alone was an egregious act, one that the court determined sufficiently warranted the adverse employment action.[277] The *Argyropoulos* court repeatedly emphasized that inappropriate workplace activities are not legitimate and that even prior complaints of harassment or discrimination do not immunize an employee from being disciplined for subsequent inappropriate workplace behavior.[278]

Analysis of this issue brings the reader back to same proposition: just because an act is not illegal does not mean that you can do it while at work. Although it is not illegal to record a conversation that lacks an

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(proposing that legislation be enacted to protect the privacy of employees from technological monitoring by employers at work); Mehta, *supra* note 99, at 611 (specifically discussing the implications of Google Glass, "Balancing measures must be implemented to ensure the protection of an employer's business strategies and confidential information as well as an employee's reasonable expectation of privacy when using personal devices, like Google Glass, in the workplace"). The answer as to whether an employer has a reasonable expectation of privacy, however, is less clear and outside the scope of this Comment.

274. *Accord* Whitten et al., *supra* note 238.

275. Argyropoulos v. City of Alton, 539 F.3d 724, 734–37 (7th Cir. 2008); *see supra* Part I.B.3 (providing the version of the IEA held unconstitutional by *Clark* and *Melongo*).

276. The *Argyropoulos* court stated that even if Argyropoulos could have asserted a colorable defense to the eavesdropping charge, "[m]erely showing that she might have been able to raise a meritorious defense to the eavesdropping charge is hardly tantamount to showing of bad faith." *Argryopoulos*, 539 F.3d at 737.

277. *Id.* at 736; *see supra* Part I.C and accompanying notes (addressing the consequences for failure to follow workplace policy); text accompanying *supra* note 10 (collecting cases of employee discharge for violating workplace policy).

278. *Argryopoulos*, 539 F.3d at 734, 736–37, 741.

expectation of privacy,[279] an employer may still discipline its employees for a violation of workplace policy regardless of whether the employee is or is not breaking the law by recording conversations.[280] Therefore, an employer should still be able to ban and discipline for workplace recording. Employees are often disciplined and terminated for violations of company policy.[281] The prohibition of an otherwise legal act should not immunize an employee from adverse employment action.[282]

3. What if the Employer Handbook is Silent on Workplace Recordings?

One last issue to address is what happens if an employee openly records a conversation, but the employer has no workplace recording policy prohibiting such conduct. Can the employer discipline or discharge the employee? Should an Illinois court view such conduct favorably? It is the belief of this author that the employer would still be justified in its discipline or discharge of an employee even absent a specific policy forbidding such conduct. In particular, if the employee was at-will, then the employer would not need any reason for the discharge, and therefore, be warranted in such action.[283]

The questions become more complicated, however, if the employee is not at-will and the handbook is silent of any sort of workplace recording policy. Based on the information presented in this Comment, it is the belief of this author that an employer would still be merited in the discipline or discharge of an employee for recording at work. Whether prefaced on the need to ensure an open workplace,[284] protect against corporate espionage,[285] or simply disloyalty to the company,[286] an employer would likely be justified in such an action. Thus, when reviewing such adverse employment actions, Illinois courts should view the policy favorably and uphold the employer's facially legitimate

279. 720 ILL. COMP. STAT. ANN. 5/14-1 to 5/14-2 (West 2014); *see* S.B. 1342, 98th Gen. Assemb., Reg. Sess., 2014 Ill. Laws, P.A. 98-1142, § 5.

280. *See supra* Part I.C (addressing the consequences for failure to follow workplace policy).

281. *See id.*

282. *See id.*; text accompanying *supra* note 10 (collecting cases of employee discharge for violating workplace policy); *cf.* Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 481 (6th Cir. 2012).

283. *See* text accompanying *supra* note 11 (collecting cases of employee-at-will doctrine).

284. *See, e.g.*, Whole Foods Market, Inc., 1518 N.L.R.B. No. 01-CA-096965, 2013 WL 5838721 (Div. of Judges Oct. 30, 2013).

285. *See, e.g.*, Nasir Gore et al., *supra* note 99.

286. *Cf.* Heller v. Champion Int'l Corp., 891 F.2d 432, 436 (2d Cir. 1989) (noting that surreptitious recording represents disloyalty toward ones employer).

decision. In order to fully examine and answer these questions, however, further scholarship on the topic is necessary.

CONCLUSION

People v. Clark, *People v. Melongo*, and the December changes to the IEA, implicate not only criminal law, but, indirectly, implicate employment law as well. Currently, eavesdropping is illegal in Illinois only if an individual surreptitiously records a private conversation. Thus, if an employee openly records a conversation at work, one that is not private—implicating no reasonable expectation of privacy—no criminal act has occurred. This begs the question of whether an employer can implement a workplace recording policy and discipline employees for subsequent violations thereof. Just because something is legal, it does not mean that an employee has the right to engage in such conduct while at work. Employees are discharged frequently for workplace policy violations, even those policies that implicate no criminal conduct. Seventh Circuit federal courts and Illinois state courts that are confronted with such policies and subsequent discipline should view the actions favorably and uphold employer-recording policies.

Currently, *Clark*, *Melongo*, and the December changes to the IEA notwithstanding, an employer in Illinois may implement a workplace recording policy barring employees from recording while at work, and discipline an employee if he or she violates that policy.