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WHAT'S BUGGING YOU? INCONSISTENCIES AND IRRATIONALITIES OF THE LAW OF EAVESDROPPING

Carol M. Bast*

INTRODUCTION

Even though you may least expect it, someone may be taping what you say. Little did Michael LaSane, a seventeen year old murder suspect, expect that the murder victim would secretly tape record forty-six minutes of their conversation.¹ The mini-cassette was found in Kathleen Weinstein's pocket after she was murdered on March 14, 1996.² The forty-five year old teacher apparently recorded part of the conversation on the first side of the tape, turned the tape over, and recorded twenty-three more minutes on the second side.³ Initially, investigators listened to the first side of the tape which ended in an eight minute lapse.⁴ An expert later found the additional twenty-three minutes on the second side.⁵

The Weinstein tape led police to LaSane.⁶ LaSane had Weinstein's car keys and her 1995 Toyota Camry was parked outside his apartment; he allegedly murdered Weinstein and took her car to celebrate his seventeenth birthday the following day.⁷ The second side of the tape gave the police the alleged murderer's first name and age as well as other personal information which helped the prosecution's case.⁸ Weinstein legally taped the conversation; New Jersey is one of a majority of states which allows a conversation to be taped with the con-

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1. William K. Heine & Maria M. Perotin, *Additional 23 Minutes of Tape: Teacher's Courage Praised "Extraordinary" Act Before Dying*, RECORD, Mar. 28, 1996, at A01, available in LEXIS, News Library, Njrec File.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Robert Rudolph, *Slain Teacher Recorded on Tape's 2d Side; Cops Uncover 22 Minutes More of Woman's Pleas*, STAR-LEDGER, Mar. 27, 1996, at 001, available in 1996 WL 7927006; Malcolm Gladwell, *Slain Teacher Left Final Lesson in Kindness*, WASH. POST, Mar. 23, 1996, at A01. For further discussion of the incident, see *infra* note 217 and accompanying text, and note 291.

sent of only one participant.⁹ If the events had happened in any of a dozen other states, the taping would have been illegal and inadmissible.¹⁰ A dozen states require all parties to consent to tape recording an oral conversation.¹¹

The fact pattern of a murder victim recording the victim's own murder is not so unusual as it may seem. In 1982, a Florida business man, Michael Anthony Phillips, taped his conversation with his business associate, Anthony Paul Inciarrano, in Phillips's office.¹² The tape contained their conversation, the sounds of a gun firing and Phillips groaning and falling to the floor.¹³ The tape was the only evidence against Inciarrano.¹⁴ Although Inciarrano acknowledged it was his voice on the tape, he moved to suppress the tape because the taping was illegal; Florida requires all parties to consent to the recording and penalizes an unconsented-to recording as a third-degree felony.¹⁵

A surreptitiously made tape was similarly important in a California murder prosecution. In *People v. Otto*,¹⁶ a case before the California Supreme Court, the prosecution unsuccessfully attempted to use tapes made by the murder victim to prove spousal murder.¹⁷ Joe Otto recorded his younger wife, Brenda Sue's telephone conversations even before they were married.¹⁸ When Brenda Sue found the telephone answering machine that had been used to record her calls, she unplugged it.¹⁹ She did not know that Joe was continuing to tape her calls by using a voice activated tape recorder concealed underneath his daughter's bed.²⁰ The recorder taped a conversation between Brenda Sue and her lover planning Joe's murder.²¹ "Joe's concerns proved to be well founded. Within 48 hours of the recorded conversation, he was found dead—bludgeoned to death in his own home."²²

The court commented that the taped conversation "played a critical role in the state's case against the defendants . . . [and] provided the

9. See Appendix B.

10. See Appendix B.

11. See Appendix B.

12. *Inciarrano v. State*, 447 So. 2d 386, 387 (Fla. Dist. Ct. App. 1984), *rev'd*, 473 So. 2d 1272 (Fla. 1985).

13. *Id.*

14. *Id.*

15. *Id.*; see Appendix B.

16. 831 P.2d 1178 (Cal. 1992) (en banc).

17. *Id.* at 1195.

18. *Id.* at 1180.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1179.

most dramatic and compelling evidence of guilt.”²³ “The so-called whispering tape provided tangible proof of an ongoing relationship between defendants, and supported the prosecution’s theory that defendants were plotting Joe’s murder at least several days prior to the event.”²⁴ Although the “tapes, in short, were the linchpin of the state’s case against the defendants,” the court held the tapes inadmissible because neither party had consented to the taping.²⁵

Federal statutes and statutes in most states restrict eavesdropping and wiretapping to safeguard the individual’s privacy.²⁶ Although common threads run through the federal and state statutes, the crazy-quilt pattern of eavesdropping statutes is often inconsistent and irrational. Part I of this Article discusses the major features of the federal statutes. Part II describes state constitutional privacy provisions and eavesdropping and wiretapping statutes. Part III discusses privacy in relation to eavesdropping and wiretapping: What is it? Why is it important? How is it lost? Part IV describes the reasons for invading privacy: curiosity, social control, and economic or social advantage. Part V discusses the inconsistencies and irrationalities in the law of eavesdropping. Federal and state statutes and state constitutional provisions protect against private or governmental interception of oral and wire communications. Except for all-party consent, this protection against third party monitoring and taping should be preserved. A dozen states allow monitoring or taping of private conversations only with all-party consent. This all-party consent requirement should be eliminated because it provides unwarranted protection. Under federal and state statutes, a police officer or a police informant can conduct electronic surveillance without a threshold level of proof as required under the Fourth Amendment. The statutes should be changed to allow such surveillance only upon some type of prior review and authorization. Appendix A lists the citations of relevant state constitutional provisions and state statutes together with the text of state constitutional privacy provisions. Appendix B is a chart containing information on relevant federal and state constitutional provisions and statutes. Appendix C contains statutory language from those states requiring all-party consent for taping.

23. *Id.* at 1195.

24. *Id.*

25. *Id.* at 1196.

26. See Appendix A.

I. FEDERAL STATUTES

Wiretapping of telephone conversations and electronic surveillance of oral conversations were practiced prior to World War I.²⁷ Private individuals and law enforcement officers, at both the federal and the state levels, made extensive use of wiretapping and electronic surveillance during the 1920s, 1930s, 1940s, 1950s, and most of the 1960s until Congress passed legislation curtailing the practices in 1968.²⁸

Wiretapping was sanctioned early by the United States Supreme Court. In 1928, in *Olmstead v. United States*,²⁹ the Court ruled that wiretaps of telephones in the defendants' homes and offices did not violate the Fourth Amendment because the wiretaps were completed without any physical entry.³⁰ *Olmstead* and a number of other defendants were convicted under the National Prohibition Act of importing, possessing, and selling alcoholic beverages.³¹ The convictions were based in large part on information obtained by tapping the home telephones of four of the defendants and the telephone of the main office of the business.³² The taps were made by inserting small wires along the telephone lines.³³ For the home telephones, the wires were inserted in nearby streets and the business telephone was tapped in the office building basement.³⁴ Eight telephones were tapped, at least six prohibition agents listened to conversations on the tapped telephones over a five-month period and took 775 typewritten pages of notes.³⁵

United States Supreme Court cases from 1952 and 1963 also permitted police informants to use electronic eavesdropping devices without the consent of the suspects. In *On Lee v. United States*,³⁶ the 1952 decision, a police informant wore a hidden microphone which transmitted two conversations with On Lee to a Narcotics Bureau agent who monitored the conversations.³⁷ Chin Poy, the police informant, was "an old acquaintance and former employee" of On Lee.³⁸ The first of two conversations occurred in On Lee's laundry and the sec-

27. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 172 (1967).

28. *Id.* at 172-210; PRISCILLA M. REGAN, *LEGISLATING PRIVACY* 8-9, 110-23 (1995).

29. 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347, 352-53 (1967).

30. *Id.* at 464-66.

31. *Id.* at 455.

32. *Id.* at 456.

33. *Id.* at 457.

34. *Id.*

35. *Id.* at 456-57, 471.

36. 343 U.S. 747 (1952).

37. *Id.* at 749.

38. *Id.*

ond occurred on a New York City sidewalk.³⁹ The agent who had monitored the conversations testified at trial and On Lee was convicted of selling opium.⁴⁰ The Court held that the use of the police informant did not violate the Fourth Amendment.⁴¹ In *Lopez v. United States*,⁴² the 1963 decision, an Internal Revenue agent investigated German S. Lopez for possible excise tax evasion at an inn which Lopez operated.⁴³ The agent had two conversations with Lopez, during the second of which Lopez allegedly offered to bribe the agent.⁴⁴ Prior to a third conversation with Lopez, the agent was instructed to record the conversation on a hidden recorder worn by the agent.⁴⁵ The recording of the third conversation was introduced into evidence at trial and Lopez was convicted.⁴⁶ The Court held that Lopez' constitutional rights had not been violated.⁴⁷

The United States Supreme Court overruled *Olmstead* almost forty years later in *Katz v. United States*.⁴⁸ In *Katz*, FBI agents attached a listening and recording device to the outside of a glass-paneled telephone booth.⁴⁹ The agents using the device overheard Katz' conversation concerning interstate betting.⁵⁰ Katz was convicted after his end of the conversation was introduced as evidence at his trial.⁵¹ The *Katz* majority held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."⁵² The Court discarded the trespass model employed in *Olmstead*, reasoning that:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁵³

39. *Id.*

40. *Id.* at 750.

41. *Id.* at 751.

42. 373 U.S. 427 (1963).

43. *Id.* at 429.

44. *Id.* at 430.

45. *Id.*

46. *Id.* at 432.

47. *Id.* at 440.

48. 389 U.S. 347, 353 (1967).

49. *Id.* at 348.

50. *Id.*

51. *Id.*

52. *Id.* at 353.

53. *Id.* at 351-52.

Justice Harlan joined in the majority opinion and added a concurring opinion which in later cases has eclipsed the majority opinion as precedent. In his concurrence, Justice Harlan included a "twofold requirement" for constitutional protection of conversations.⁵⁴ The requirement was "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁵⁵

In passing the Omnibus Crime Control and Safe Streets Act of 1968⁵⁶ [hereinafter the "1968 Act"], Congress responded to *Katz* and attempted to prevent the interception of oral and wire conversations without the consent of at least one party to the conversation.⁵⁷ The definition of "oral communication" under the 1968 Act tracked Justice Harlan's famous two-part definition of constitutionally protected conversations from his *Katz* concurrence.⁵⁸ The 1968 Act required a court order to intercept a conversation without the consent of any of the parties to the conversation.⁵⁹ Evidence obtained from unauthorized interception was inadmissible in court.⁶⁰ The 1968 Act also provided criminal penalties for its violation and authorized civil damages.⁶¹

The 1968 Act was amended twice, by the Electronic Communications Privacy Act of 1986⁶² [hereinafter the "1986 Act"] and by the Communications Assistance for Law Enforcement Act of 1994⁶³ [hereinafter the "1994 Act"]. The 1986 Act was necessary to protect electronic communications transmitted in digital form and not audible by the human ear. The interception of cellular and cordless telephones were also of great concern. The 1986 Act changed the scienter

54. *Id.* at 361 (Harlan, J., concurring).

55. *Id.*

56. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §2510 (1994)).

57. REGAN, *supra* note 28, at 9. Regan explains that Congress first began to discuss privacy protection for communications in the 1920s, but it was not until 1968 that Congress outlawed wiretapping and bugging. *Id.* at 8-9. "This law was passed largely in response to the Supreme Court ruling in *Katz v. United States* and because of congressional interest in organized crime." *Id.* (citations omitted). "It was not until the *Katz* decision . . . ruling that wiretaps were prohibited by the Fourth Amendment, that law enforcement officials had an incentive to compromise with civil liberties groups in crafting legislation." *Id.* at 188.

58. Compare Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, with *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

59. 18 U.S.C. § 2511.

60. *Id.*

61. *Id.*

62. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1852 (1986) (codified at scattered sections of 18 U.S.C.).

63. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at scattered sections of 18 U.S.C.).

requirement from “willful” to “intentional” in recognition of the fact that someone using a radio scanner to receive public communications might inadvertently tune in to a cellular telephone conversation.⁶⁴ The 1986 Act also provided a reduced penalty for interception of a cellular telephone conversation.⁶⁵ Because of the ease of intercepting cordless telephone conversations, the radio portion of cordless telephone conversations was specifically excluded from protection as a “wire communication.”⁶⁶

With the 1994 Act, Congress recognized the wide-spread use of cordless telephones and deleted the 1986 Act exception from protection for cordless telephones.⁶⁷ The 1994 Act noted that:

The cordless phone, far from being a novelty item used only at “poolside,” has become ubiquitous. . . . More and more communications are being carried out by people [using cordless phones] in private, in their homes and offices, with an expectation that such calls are just like any other phone call.⁶⁸

The specific provisions of the 1968 Act as amended by the 1986 Act and the 1994 Act are hereinafter referred to as the “Federal Act.” The Federal Act prohibits the intentional interception or disclosure of wire and oral communications, except for those specifically identified.⁶⁹ Someone acting under color of law may intercept a communication if the “person is a party to the communication or one of the parties to the communication has given prior consent to such intercept-

64. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(f), 100 Stat. 1852.

65. *Id.* § 101 (d)(2).

66. *Id.* § 101 (a)(1)(D); H. REP. NO. 99-647, at 2 (1986); S. REP. NO. 99-541, at 12 (1986).

67. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a)(1), 100 Stat. 4290.

68. H.R. REP. NO. 103-827, at 17 (1994).

69. 18 U.S.C. § 2511(1) (1994). The first section of the Federal Act contains the following definitions for “wire communication,” “oral communication,” and “intercept:”

“[W]ire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

“[O]ral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

“[I]ntercept” means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

tion.”⁷⁰ In the alternative, a law enforcement officer may obtain a court order authorizing an interception concerning evidence of certain enumerated offenses.⁷¹ Another exception material to this Article is that for a private individual. Someone not acting under color of law may intercept a communication if:

[T]he person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.⁷²

The penalty for a garden-variety wiretapping or eavesdropping is a fine or not more than five years imprisonment, or both.⁷³ The fine range is from \$1,000 to \$10,000.⁷⁴ One who intercepts a cellular or cordless telephone conversation may be fined up to \$5,000.⁷⁵ Any communication intercepted in violation of the Federal Act is inadmissible.⁷⁶ The Federal Act also authorizes civil relief for a garden-variety wiretapping or eavesdropping,⁷⁷ including equitable or injunctive relief,⁷⁸ either actual damages or statutory damages of the greater of

70. *Id.* § 2511(2)(c).

71. *Id.* § 2510. The offenses for which a court order may be obtained are listed in 18 U.S.C. § 2516. Although the listed offenses are quite numerous, authorization is restricted to those enumerated. The procedure for obtaining the court order is specified in great detail in 18 U.S.C. § 2518.

72. *Id.* § 2511(2)(d).

73. *Id.* § 2511(4)(a).

74. Section 2511(4)(a) specifies that the penalty is a fine or five years imprisonment or both and the United States Sentencing Guidelines set the amount of the fine. *Id.* U.S. SENTENCING GUIDELINES MANUAL section 2H3.1(a) designates “Interception of Communications or Eavesdropping” as a level nine base offense. U.S. SENTENCING GUIDELINES MANUAL § 2H3.1(a) (1998). U.S. SENTENCING GUIDELINES MANUAL section 5E1.2(c)(3) lists the minimum and maximum fine for each offense level. *Id.* § 5E1.2(c)(3). The fine is mandatory unless the defendant is unable to pay. *Id.* § 5E1.2(a). The offense level is increased to 12, with a \$3,000 to \$30,000 fine, if “the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain.” *Id.* §§ 2H3.1(b)(1), 5E1.2(c)(3).

75. 18 U.S.C. § 2511(4)(b). Section 2511(4)(b) specifies that the penalty for the first offense of intercepting the radio portion of a cellular or cordless telephone conversation is a fine so long as the interception “is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain” and the radio communication is not “scrambled” or “encrypted.” *Id.* Because the only penalty authorized is a fine, the interception is an “infraction.” *Id.* § 3559(a)(9). The fine for an infraction is a maximum of \$5,000. *Id.* § 3571(b)(7). However, U.S. SENTENCING GUIDELINES MANUAL section 1B1.9 states that the sentencing guidelines do not apply to an infraction. U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (1998); see *infra* notes 48-52 and accompanying text.

76. 18 U.S.C. § 2515.

77. *Id.* § 2520(a).

78. *Id.* § 2520(b)(1).

\$100 per day or \$10,000,⁷⁹ punitive damages,⁸⁰ attorneys fees,⁸¹ and costs.⁸²

The Federal Act preempts state wiretapping and eavesdropping statutes. Thus, state statutes must protect the individual's privacy at least as much as the Federal Act, but the states may provide more protection.⁸³ The Federal Act governs admissibility of intercepted communications in a federal prosecution. Thus, tapes of intercepted conversations are admissible in federal court if in compliance with the Federal Act even if the tapes would have been inadmissible under state wiretapping and eavesdropping statutes.⁸⁴

A recurring question has been whether a government informant can participate in a conversation while wearing a bug and either tape or transmit the conversation. The United States Supreme Court has consistently said that use of an informant does not violate the non-consenting participant's constitutional right against unreasonable search and seizure.⁸⁵ As described above, the Court reached that decision in 1952 and 1963.⁸⁶ The Court again sanctioned the use of police informants in *United States v. White*,⁸⁷ a plurality opinion from 1971.

In *White*, a police informant wore a hidden radio transmitter which allowed government agents to monitor the informant's conversations with James White.⁸⁸ Four conversations occurred in the informant's home and three others occurred in various locations—one in White's

79. *Id.* § 2520(c)(1)(B).

80. *Id.* § 2520(b)(2).

81. *Id.* § 2520(b)(3).

82. *Id.*

83. *United States v. Feiste*, 792 F. Supp. 1153, 1154 (D. Neb. 1991), *aff'd*, 961 F.2d 1349 (8th Cir. 1992); *People v. Otto*, 831 P.2d 1178 (Cal. 1992); *People v. Stevens*, 40 Cal. Rptr. 2d 92, 93, 95 (Ct. App. 1995); *State v. Rivers*, 660 So. 2d 1360, 1362 (Fla. 1995), *cert. denied*, 116 S. Ct. 1019 (1996); *State v. Neisler*, 666 So. 2d 1064, 1066-67 (La. 1996); *Mustafa v. State*, 591 A.2d 481, 483 (Md. 1991); *Commonwealth v. Birdseye*, 670 A.2d 1124, 1126 (Pa. 1996), *cert. denied*, 116 S. Ct. 2552 (1996). For example, in *Rivers*, the Florida Supreme Court held that a court order for wiretapping to investigate prostitution, at least where no violence was involved, should not have been granted; the Federal Act does not list prostitution as one of the enumerated offenses for which a court order may be obtained. 660 So. 2d at 1363.

84. *United States v. Pratt*, 913 F.2d 982, 986-87 (1st Cir. 1990); *United States v. Adams*, 694 F.2d 200, 201-02 (9th Cir. 1982); *Roberts v. Americable Int'l Inc.*, 883 F. Supp. 499, 503-04 (E.D. Cal. 1995); *United States v. DiFelice*, 837 F. Supp. 81, 82 (S.D.N.Y. 1993). In *DiFelice*, the defendant argued that the tape of his telephone conversation was inadmissible because it was taped without his consent, and the applicable Massachusetts statute requires all party consent. *Id.* at 81. Nevertheless, the court found the tape to be admissible. *Id.* at 82; *see also Pratt*, 913 F.2d at 987 (arguing for the same application of Massachusetts law).

85. *Lopez v. United States*, 373 U.S. 427, 440 (1963); *On Lee v. United States*, 343 U.S. 747, 751 (1952).

86. *Lopez*, 373 U.S. at 440; *On Lee*, 343 U.S. at 751.

87. 401 U.S. 745, 754 (1971) (White, J., plurality).

88. *Id.* at 747.

home, one in a restaurant, and one in the informant's car.⁸⁹ During the conversations in the informant's home, one agent monitored the conversations while hidden in a kitchen closet and another agent simultaneously monitored the conversations from outside the informant's home.⁹⁰ The agents testified concerning the monitored conversations at White's trial and White was convicted for illegal drug transactions.⁹¹ The plurality opinion held that the electronic surveillance used to monitor White's conversations did not violate his Fourth Amendment right against unreasonable search and seizure.⁹² The opinion pointed out that a police informant may take notes of his conversations with a suspect and testify concerning the conversations.⁹³ The opinion reasoned that there is no constitutional difference between these activities and an informant either surreptitiously recording the conversations or transmitting the conversations for agents to monitor or record.⁹⁴ Thus, the "person acting under color of law" in the Federal Act may be a government informant. Private party informants also qualify and were used in the first two examples in the following section.

In his dissent, Justice Douglas opined that the White investigation would have been hampered very little by requiring the agents to obtain warrants authorizing the electronic surveillance because all of the conversations were pre-arranged.⁹⁵ In a separate dissent, Justice Brennan stated: "The threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society."⁹⁶

A. *Determining When the Federal Act Comes into Play*

The frequency with which surreptitious taping occurs highlights the importance of the Federal Act. The balance of Part I gives examples of surreptitious taping. Some common reasons for taping include gathering information for use in criminal prosecution, politics, and employment law disputes.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 754.

93. *Id.* at 751.

94. *Id.*

95. *Id.* at 758 (Douglas, J., dissenting).

96. *Id.* at 761-62 (Brennan, J., dissenting).

1. Criminal Prosecution

A company's profits may rely heavily on illegal agreements. An FBI investigation of a company's illegal actions may use an employee to intercept information.⁹⁷ The FBI investigation of Archer Daniels Midland Co. ("ADM") is an example of one such investigation. In October 1996, ADM, which advertises itself as "supermarket to the world," pleaded guilty to fixing prices, to dividing up lysine and citric acid markets, and agreed to pay a \$100 million fine.⁹⁸ The FBI gathered information against ADM from secret tapes made by former ADM executive, Mark Whitacre.⁹⁹

The FBI may also choose a local business person as an FBI informer to investigate bribery charges against government officials. In 1996, information gathered by Howard Gary, a Florida investment banker, led to prosecution of a number of Miami and Dade County government officials for bribery and corruption in Operation Greenpalm.¹⁰⁰ Gary agreed to become an FBI informant after he was named as a suspect in a bribery scheme.¹⁰¹ As an informant, Gary surreptitiously taped a Miami Commissioner receiving \$100,000 as a kickback.¹⁰²

2. Politics

Politics is rife with taping; politicians are either taping or being taped. The taping occurs either with or without the consent of one party to the conversation. Because of the possibility for blackmail or embarrassment, the non-consenting party would probably not have spoken freely knowing that he or she was being taped.

97. *Lawyer: FBI Monitored Agent Pitts 6,000 Times*, ORLANDO SENTINEL, Dec. 31, 1996, at A-8. Similarly, an FBI agent may sell state secrets and the FBI may use secret taping to gather information regarding the agent's treason. *Id.* An FBI agent, Earl Edwin Pitts, was arrested on December 18, 1996 on charges that he sold United States's secret information to the former Soviet Union for more than \$224,000. *Id.* The FBI gathered information on Pitts by surreptitiously taping or observing him almost 6,000 times. *Id.*

98. *Suing FBI Mole Could Be Legal Blunder for ADM*, ORLANDO SENTINEL, Dec. 18, 1996, at C-1, C-9.

99. *Id.* at C-1. Whitacre claims he was fired for being a mole for the FBI. *Id.* ADM has filed suit against Whitacre claiming he embezzled approximately \$9,000,000 and violated a confidentiality agreement. *Id.*

100. Roger Roy, *FBI Informant Work Casts Pall over Banker's Business*, ORLANDO SENTINEL, Apr. 20, 1997, at B-1.

101. *Id.*

102. *Id.* Gary was never charged but has apparently lost some investment banking municipal bond business. One official admitted hesitancy in working with Gary for fear that Gary was continuing his work as an FBI informant. *Id.* at B-6. "In December, Gary was excluded from a \$450 million sewer and water bond issue after Metro-Dade commissioners said the 'shadow of scandal' might frighten bond buyers away." *Id.*

On December 21, 1996, United States House of Representatives Speaker Newt Gingrich confessed to ethics violations.¹⁰³ That same day Gingrich's cellular telephone conversation with his lawyers and Republican leaders was taped by the Martins, a Florida couple, who intercepted it on their police scanner.¹⁰⁴ In the conversation, Gingrich discussed a Republican counterattack to the ethics charges.¹⁰⁵ The parties to the conference call conversation were "scattered across the country."¹⁰⁶ The Martins delivered the tape to a Democratic congressman, possibly Jim McDermott, a member of the House Ethics Committee.¹⁰⁷ The congressman delivered the tape to *The New York Times*, which published a transcript of the conversation on January 10, 1997.¹⁰⁸ John Boehner, Republican Conference Chairman, who was a party to the cellular telephone call claimed, "Democrats appear to have committed a felony in order to perpetrate their attack on Newt Gingrich."¹⁰⁹ As a consequence, Gingrich barely won re-election as House Speaker that week. Taping the cellular telephone conversation violates federal law, as does disclosing information from an illegally intercepted cellular telephone conversation.¹¹⁰ On April 25, 1997, the Martins pleaded guilty and each was fined \$500.¹¹¹ A Justice Depart-

103. *GOP Urges Investigation After Gingrich Call Taped*, ORLANDO SENTINEL, Jan. 11, 1997, at A-11.

104. *Florida Couple Fined for Taping Gingrich*, ORLANDO SENTINEL, Apr. 26, 1997, at A-13.

105. *GOP Urges Investigation*, *supra* note 103, at A-11.

106. *Cellular Phones Are Handy but Vulnerable*, PORTLAND OREGONIAN, Jan. 12, 1997, at A01, available in 1997 WL 4132674.

107. *Gingrich Hearings to Take Place Inauguration Weekend*, ORLANDO SENTINEL, Jan. 13, 1997, at A-7.

108. *GOP Urges Investigation*, *supra* note 103, at A-11.

109. *Gingrich Hearings*, *supra* note 107, at A-7.

Another representative in Congress was earlier taped while conversing on a cellular telephone. Blaine Hardin, *Texas Legislator Was Burned by Cellular Phone Talk Before Gingrich*, WASH. POST, Jan. 15, 1997, at A04. In 1990 in Amarillo, former Texas representative Bill Sarpalius made a cellular telephone call while golfing. *Id.* Sarpalius called a "cute" 20 year old to make a date, suggesting a trip together to Cancun, Mexico and offering assistance in her job search. *Id.* "Let me help you. I've got all kinds of contacts in the job I have." *Id.* The 75 year old ham radio operator who intercepted the call received a \$255 fine and 36 year-old Linus Lane Baker who disclosed the tape to the media received a \$250 fine. *Id.* Baker, now an attorney and then a journalism student, did not suspect he was committing a crime. *Id.* "I thought, man, this is great. I thought I would get a Pulitzer Prize off this stuff. . . . I figured that if somebody recorded this, it was legal, right?" *Id.*

In the early 1990s, three aids to Virginia Senator Chuck Robb disclosed a tape of a 1988 cellular telephone call made by Virginia Governor Doug Wilder. *Cellular Phones Are Handy*, *supra* note 106, at A01. At the time of the disclosure, Robb and Wilder were fierce political rivals. *Id.* On the tape, Wilder discussed "published reports alleging Robb attended cocaine parties." *Id.* The aids reached plea agreements. *Id.*

110. *GOP Urges Investigation*, *supra* note 103, at A-11.

111. *Florida Couple Fined*, *supra* note 104, at A-13.

ment investigation concerning publication of the conversation in the newspapers is continuing.¹¹²

Everyone knows that President Nixon taped conversations in the oval office. In 1996, Nixon's estate ended the twenty-two year attempt to keep the tapes in the National Archives a secret.¹¹³ The newly released tapes reveal information previously unknown to the public. Over a year before his resignation, Nixon discussed resigning but was dissuaded by Alexander Haig, his chief-of-staff.¹¹⁴ In September 1971, faced with re-election, Nixon requested that the Internal Revenue Service audit tax returns of wealthy Jewish contributors to Democratic candidates.¹¹⁵ In June 1971, Nixon ordered a break-in at the Brookings Institute to discover what information the Institute had obtained on the Vietnam War.¹¹⁶

3. *Employment Law Disputes*

Employees are demanding more rights in the workplace; a number are suing to enforce their rights. Employee taping seems to be on the rise and can be significant in employment discrimination and sexual harassment cases where the crucial evidence is conversations between an employee and a manager.¹¹⁷ Surreptitious taping may be on the rise because lessening job security may also lessen employee trust, and because new technology makes secret taping easier.¹¹⁸

Some Texaco employees successfully used taped information to prove federal employment discrimination claims.¹¹⁹ In 1994, six African Americans sued Texaco Inc. alleging racial discrimination.¹²⁰ The discrimination lawsuit had languished for two and one-half years until Richard Lundwall, former senior coordinator for personnel services in the finance department, turned over tapes he had made of 1994 executive meetings to an attorney for the plaintiffs.¹²¹ The taping was not

112. *Florida Couple Plead Guilty to Intercepting Gingrich Call*, ORLANDO SENTINEL, Apr. 24, 1997, at A-6.

113. *New Tapes Shed Light on Nixon*, ORLANDO SENTINEL, Nov. 19, 1996, at A-9.

114. *Id.*

115. *Tapes Reveal President Nixon Pushed for Tax Audits of Wealthy Jews Who Contributed to Rivals*, ORLANDO SENTINEL, Dec. 8, 1996, at A-18.

116. *Nixon Ordered Break-In at Think Tank, Tapes Show*, ORLANDO SENTINEL, Nov. 22, 1996, at A-16.

117. *More Workers Turn to Taping/As Job Cuts Rise and Workplace Loyalty Falls, More Employees are Secretly Tape-Recording Meetings—and Using the Tapes in Court*, ORLANDO SENTINEL, Apr. 19, 1997, at C-9.

118. *Id.*

119. *Suit Alleges Racist Actions by Texaco*, ORLANDO SENTINEL, Nov. 5, 1996, at B-2.

120. *Id.*

121. *Texaco Settles Race-Bias Suit*, ORLANDO SENTINEL, Nov. 17, 1996, at A-1.

illegal because the meetings were taped in Harrison, New York,¹²² and New York allows taping with one-party consent. On the tapes, Texaco executives discussed destroying evidence and referred to African American workers as "black jelly beans."¹²³ One of the executives joked that "all of the black jelly beans seem to be glued to the bottom of the bag."¹²⁴ On November 15, 1996, soon after the tapes appeared, Texaco settled the race discrimination lawsuit for \$115 million in damages, pay raises of at least ten per cent to 1,400 African American Texaco employees, and formation of an "equality and tolerance task force" comprised of three Texaco Employees, three members chosen by the plaintiffs, and a chair agreed to by Texaco and the plaintiffs.¹²⁵ The task force is to evaluate employment practices. William Raspberry, an African American columnist commented, "How much of a fuss would the top people be making if the embarrassing behavior could have been kept secret?"¹²⁶

An unanswered question is whether federal wiretapping statutes cover e-mail and voice mail messages. Michael Huffcut was the regional supervisor of a McDonald's in Elmira, New York.¹²⁷ Rose Hasset worked in a McDonald's 60 miles away in Binghamton, New York.¹²⁸ In the fall of 1993, Huffcut and Hasset allegedly left "amorous" messages for each other on their voice mails at work.¹²⁹ Another area supervisor allegedly transmitted the voice mail messages to his employer, the operator of a number of McDonald's franchises.¹³⁰ The supervisor, allegedly at the employer's direction, played a tape of the voice mail messages for Huffcut's wife.¹³¹ McDonald's later fired Michael Huffcut because the Huffcuts had filed a one million dollar federal lawsuit against McDonald's Corp., the area supervisor, and the employer claiming the taping of the voice mail violated their privacy rights.¹³² McDonald's and the employer claimed that business purposes justified the monitoring.¹³³ The parties settled, but if the case

122. *Id.*; *Suit Alleges Racist Actions*, *supra* note 119, at B-2.

123. *Suit Alleges Racist Actions*, *supra* note 119, at B-2.

124. *Texaco Settles*, *supra* note 121, at A-4.

125. *Id.* at A-1.

126. William Raspberry, *Texaco's Lesson: Executives—Not Policies—Set Tone*, ORLANDO SENTINEL, Nov. 17, 1996, G-3.

127. Ben Dobbin, *Federal Suit Questions Worker Privacy Rights*, L.A. TIMES, Jan. 25, 1995, at D7.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*; *Voice Mail Settlement Avoids Issue*, ORLANDO SENTINEL, Mar. 9, 1996, at C-10.

133. *Is Voice Mail a Secure Line?*, CHI. TRIB., Mar. 8, 1995, at 14N; *Voice Mail Settlement*, *supra* note 132, at C-10.

had gone to trial, the central issue would have been whether e-mail is protected under federal wiretapping statutes.¹³⁴

The Federal Act does not provide the only protection against surreptitious taping of private conversations. As Part II discusses, state constitutional provisions and state statutes also provide protection against a law enforcement officer or a private individual secretly recording private conversations.

II. STATE CONSTITUTIONAL PRIVACY PROVISIONS AND STATE STATUTES

In addition to the Federal Act, state constitutional privacy provisions and statutes place limits on eavesdropping and wiretapping in a crazy-quilt pattern. The state constitutions of Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington contain privacy provisions; the New York Constitution prohibits unreasonable interception of telephone and telegraph communications; and the Florida Constitution prohibits unreasonable interception of private communications.¹³⁵ State constitutions contain search and seizure provisions substantively similar to the Fourth Amendment.¹³⁶ Every state, except for Vermont, has some type of eavesdropping or wiretapping statute, as does the District of Columbia.¹³⁷ Appendix B lists states with constitutional privacy provisions and eavesdropping and wiretapping statutes.

A. State Constitutional Provisions

How do state constitutional provisions apply to taping conversations and how do they differ from the state eavesdropping statutes? Of the ten states with constitutional privacy provisions, reported decisions of Alaska, Florida, Hawaii, Illinois, Louisiana, Montana, and Washington have considered one or both of these questions.¹³⁸ Mas-

134. *Voice Mail Settlement*, *supra* note 132, at C-10.

135. For the wording of those state constitutional provisions, see Appendix A.

136. For citations of those state constitutional provisions substantively similar to the Fourth Amendment, see Appendix A.

137. For citations to those statutes, see Appendix A. More information on those statutes is contained on the chart comprising Appendix B.

138. See *infra* notes 140-202, 236-52, 278-90 and accompanying text. For example, a 1975 California Supreme Court decision presented a *prima facie* violation of the California constitutional privacy provision by law enforcement officers. *White v. Davis*, 533 P.2d 222, 224 (Cal. 1975). The *White* opinion began with the following two questions:

Do the state and federal constitutions permit police officers, posing as students, to enroll in a major university and engage in the covert practice of recording class discussions, compiling police dossiers and filing 'intelligence' reports, so that the police have 'records' on the professors and students? Is this 'intelligence gathering' by the police

sachusetts, Michigan, Pennsylvania, and Vermont have considered these questions while applying the state constitutional search and seizure provisions.¹³⁹ What follows is a closer examination of these state constitutional provisions.

1. *Alaska*

The Alaska statute requires only one party to consent to the interception of a communication.¹⁴⁰ However, in *State v. Glass*,¹⁴¹ the Alaska Supreme Court construed the privacy provision of its constitution to prohibit "the secret electronic monitoring of conversations upon the mere consent of a participant."¹⁴² In *Glass*, an informant wearing a radio transmitter entered the Glass home to purchase heroin.¹⁴³ Meanwhile, police officers outside the Glass home were monitoring and taping the conversation.¹⁴⁴ The court decided that Alaska could provide additional protection for conversations because the Alaska Constitution contained a specific privacy provision.¹⁴⁵ The court reasoned that "the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction."¹⁴⁶ Were the court to allow the *Glass* taping, law enforcement officers might also target and surreptitiously record conversations of innocent individuals "who have

covering discussions in university classes and in public and private meetings of university-sponsored organizations, constitutionally valid when such reports 'pertain to no illegal activity or acts'?

Id. The California Supreme Court reversed the trial court's judgment sustaining the defendant's demurrer and remanded the case for trial. *Id.* at 235. The court noted that privacy could yield to a compelling government interest; however, assuming facts as stated in the complaint to be true, the classes and organizational meetings involved no illegal activities. *Id.* at 234.

White was decided more than twenty years ago and concerned police informants listening and taking notes rather than electronically intercepting or recording conversations. *Id.* at 224. Even so, *White* may indicate that a California court would apply California's constitutional privacy provision to prohibit law enforcement taping of conversations where law enforcement officers are on a vague fishing expedition.

A related question is whether a student may secretly tape a class lecture. This author has not found any case in which this issue was raised. One would guess that a court faced with this issue might hold that there is no reasonable expectation of privacy in a classroom, either for the professor or for the other students. In a more private setting, like a professor's office, and where fewer people are involved, there might be an reasonable expectation of privacy.

139. See *infra* notes 203-35, 253-77 and accompanying text.

140. ALASKA STAT. § 42.20.310 (a)(1) (Michie 1962).

141. 583 P.2d 872 (Alaska 1978).

142. *Id.* at 879.

143. *Id.* at 874.

144. *Id.*

145. *Id.* at 878.

146. *Id.*

incurred displeasure, have not conformed or have espoused unpopular causes."¹⁴⁷

In later decisions, the Alaska Supreme Court held that taping of a suspect both after an arrest and by an officer while in uniform did not violate the Alaska Constitution. In *Palmer v. State*,¹⁴⁸ John W. Palmer was arrested for driving under the influence of alcohol and was taken to trooper headquarters where he was given breathalyzer and sobriety tests.¹⁴⁹ Palmer's performance on the tests was videotaped.¹⁵⁰ When Palmer challenged the videotape under the state constitution, the court held that even if Palmer had an expectation of privacy, it was not one that society would recognize as reasonable.¹⁵¹ *City and Borough of Juneau v. Quinto*¹⁵² was another drunk driving case. The officer who stopped Marcelo Quinto, Jr. was wearing a small tape recorder on his belt.¹⁵³ The officer turned the tape recorder on after he stopped Quinto and as he approached Quinto's car.¹⁵⁴ The tape recorder kept recording until after the officer arrested Quinto.¹⁵⁵ As in *Palmer*, the court held that the tape was properly admitted because Quinto had no reasonable expectation of privacy under the state constitution.¹⁵⁶

Glass leaves many unanswered questions. Is *Glass* limited to the home? Would the Alaska Constitution permit taping in the home or in another location with the consent of a private party participant?

2. Florida

Article I, section 12 of the Florida Constitution contains a search and seizure provision which prohibits "unreasonable interception of private communications by any means."¹⁵⁷ In *State v. Sarmiento*,¹⁵⁸ the Florida Supreme Court considered whether "the warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home is an unreasonable interception of defendant's private communications in

147. *Id.*

148. 604 P.2d 1106 (Alaska 1979).

149. *Id.* at 1107-08.

150. *Id.* at 1108.

151. *Id.* at 1107-08.

152. 684 P.2d 127 (Alaska 1984).

153. *Id.* at 128.

154. *Id.*

155. *Id.*

156. *Id.* at 129.

157. FLA. CONST. art. I, § 12.

158. 397 So. 2d 643 (Fla. 1981).

violation of article I, section 12, Florida Constitution.”¹⁵⁹ An undercover police officer was in a bar when he asked Sarmiento’s girlfriend about purchasing heroin.¹⁶⁰ The girlfriend invited the officer to Sarmiento’s trailer at 10:30 p.m. that evening.¹⁶¹ The officer went to the trailer that evening wearing a radio transmitter.¹⁶² Two officers outside the trailer were monitoring the conversation when the undercover officer bought the heroin from Sarmiento.¹⁶³ The court found that Sarmiento had a reasonable expectation of privacy in his own home and ruled the Florida eavesdropping statute unconstitutional “insofar as that statute authorizes the warrantless interception of a private conversation conducted in the home.”¹⁶⁴ The court stated that:

We are unwilling to impose upon our citizens the risk of assuming that the uninvited ear of the state is an unseen and unknown listener to every private conversation which they have in their homes. That is too much for a proud and free people to tolerate without taking a long step down the totalitarian road. The home is the one place to which we can retreat, relax, and express ourselves as human beings without fear that an official record is being made of what we say by unknown government agents at their unfettered discretion.¹⁶⁵

An amendment to the Florida Constitution did away with *Sarmiento*.¹⁶⁶ In 1983, article I, section 12 was amended to add the following language as the last sentence of the section: “Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United State Constitution.”¹⁶⁷ This means that an informant or police officer would be able to tape a conversation because the United States Supreme Court has long held that an informant or police officer may tape a conversation if the officer is a party to the conversation or with the consent of a party to the conversation. Article I, section 23 guarantees a right to privacy;¹⁶⁸ however, the Florida Supreme Court has held that article I, section 23 does not ex-

159. *Id.* at 644.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 645.

165. *Id.* (quoting *State v. Sarmiento*, 371 So. 2d 1047, 1051 (Fla. Dist. Ct. App. 1979)).

166. FLA. CONST. art. I, § 12 (amended 1982).

167. *Id.*

168. FLA. CONST. art. I, § 23; see Appendix A.

pand the protection afforded a suspect in the search and seizure context.¹⁶⁹

3. *Hawaii*

Hawaii relies heavily on decisions of the United States Supreme Court involving interception of communications in interpreting its own state constitution's right to privacy. In *State v. Lester*,¹⁷⁰ decided by the Hawaii Supreme Court in 1982, a suspect cooperating with police taped a conversation between himself and Donald Lester in a public park.¹⁷¹ Lester, the suspect, and others had agreed to have Lester's wife murdered, with the \$7,000 price paid by Lester.¹⁷² Lester incriminated himself on the tape.¹⁷³ The court ruled that article I, section 7 of the Hawaii Constitution, a search and seizure provision prohibited "unreasonable . . . invasions of privacy."¹⁷⁴ This "is to be construed in light of the language of *Katz*."¹⁷⁵ The court noted that "[p]articipant or consensual monitoring has withstood constitutional scrutiny by the U.S. Supreme Court on the basis that no eavesdropping is involved since the government agent is free to testify to what was heard and the tape merely preserves his credibility."¹⁷⁶ The court also cited with approval to *Lopez* and *White*, two United States Supreme court cases involving informant taping.¹⁷⁷ Not surprisingly, the Hawaii Supreme Court held that taping Lester did not violate the Hawaii Constitution.¹⁷⁸

4. *Illinois*

Similarly, the Illinois Supreme Court also referred approvingly to *Lopez* and *White* in *People v. Beardsley*.¹⁷⁹ The court mentioned article I, section 6 of the Illinois Constitution¹⁸⁰ in passing and declared, "we are not holding that the limitations on one's conduct imposed by section 14-2 of our eavesdropping statute are coextensive with those imposed on governmental action by the fourth amendment . . . or by the provisions of section 6 of article I of the Illinois Constitution of

169. *State v. Jimeno*, 588 So. 2d 233, 233 (Fla. 1991).

170. 649 P.2d 346 (Haw. 1982).

171. *Id.* at 349.

172. *Id.*

173. *Id.*

174. HAW. CONST. art I, § 7; *see* Appendix A.

175. *Katz*, 649 P.2d at 353.

176. *Id.* at 350-51.

177. *See supra* notes 42-47, 87-96 and accompanying text.

178. *Katz*, 649 P.2d at 353.

179. 503 N.E.2d 346 (Ill. 1986); *see infra* notes 348-73 and accompanying text.

180. *See* Appendix A.

1970.”¹⁸¹ The court held that the recording of a conversation by one physically present was not eavesdropping.¹⁸²

5. Louisiana

In 1982, in *State v. Reeves*,¹⁸³ the Louisiana Supreme Court initially interpreted the state's constitutional privacy provision to require a warrant for participant recording of a conversation; on rehearing the following year, the court reversed itself.¹⁸⁴ Charles W. Reeves, an employee of the Louisiana Department of Elections and Registration, was allegedly involved in a scheme in which employees of the department contributed money to a political candidate and were reimbursed by filing false travel expense reports with the department.¹⁸⁵ Pilley, an employee whom Reeves supervised, reported the scheme and agreed to wear a radio transmitter to the voting warehouse where Reeves and Pilley worked.¹⁸⁶ While Pilley was inside the warehouse, investigators were outside in two cars.¹⁸⁷ One car had a radio receiver and tape recorder and the second car had a device which allowed the investigator in the car to monitor the conversation inside the warehouse.¹⁸⁸ After denying before a grand jury that he had discussed the false travel expense reports, Reeves was convicted of two counts of perjury.¹⁸⁹ The prosecution introduced tape recordings and transcripts of conversations obtained through Pilley at the perjury trial.¹⁹⁰

In *Reeves*, the Louisiana Supreme Court examined the wording of the privacy provision of the 1974 Louisiana Constitution and its legislative history in concluding that law enforcement officers may monitor a conversation with the consent of a participant only after obtaining a warrant.¹⁹¹ On rehearing, the court had to determine: “(1) Whether the defendant's conversations were ‘communications’ within the meaning of Article 1, § 5 and (2) Whether the manner in which the conversations were intercepted constituted an ‘invasion of privacy.’”¹⁹² The court first found that Reeves's conversations were communications and then found that there was no invasion of privacy

181. *Beardsley*, 503 N.E.2d at 351.

182. *Id.* at 350.

183. 427 So. 2d 403 (La. 1982), *reh'g granted*, 427 So. 2d 410 (1983).

184. 427 So. 2d 410, 418.

185. *Id.* at 411.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 404.

191. *Id.* at 404-06, 409-10.

192. *Id.* at 412; *see* Appendix A.

because Reeves had no reasonable expectation of privacy.¹⁹³ The court reasoned that when Reeves discussed the scheme, he risked both that the conversation might be repeated and that the conversation might be taped.¹⁹⁴ The court noted that a tape is more accurate than testimony concerning the conversation.¹⁹⁵ In refuting the argument that surreptitious taping upon the consent of one participant chills open conversation, the court explained that no chilling effect had been discovered, even though the Federal Act allows such taping.¹⁹⁶ Louisiana allowed such taping, at least until the 1982 *Reeves* decision.¹⁹⁷

In a 1993 case, another defendant made a claim under the privacy provision of the Louisiana Constitution. In *State v. Peterson*,¹⁹⁸ Fenton Peterson claimed that a police officer violated his expectation of privacy under Article I, § 5 of the Louisiana Constitution when the officer tape recorded his inculpatory statement after he was arrested.¹⁹⁹ The officer hid a tape recorder in his waistband and recorded Peterson's comment that "'W.C.' had 'fronted' him the cocaine."²⁰⁰ Peterson made the comment after he entered the police building annex narcotics office.²⁰¹ The Louisiana Court of Appeals quickly dismissed Peterson's claim, finding that Peterson did not have an expectation of privacy in the police station following his arrest.²⁰²

6. Massachusetts

The Massachusetts wiretapping and eavesdropping statute allows taping of a conversation only with the consent of all parties to the conversation.²⁰³ As in other states requiring all-party consent, the statute allows a law enforcement officer to tape a conversation if the officer participates or if the officer has the consent of a party to the conversation.²⁰⁴

In *Commonwealth v. Blood*,²⁰⁵ James Blood and several others planned to steal gold bars worth \$3,000,000 from a refining com-

193. *Id.* at 411.

194. *Id.* at 413, 417-18.

195. *Id.* at 418.

196. *Id.*

197. *Id.* at 417-18.

198. 619 So. 2d 786 (La. 1993).

199. *Id.* at 789.

200. *Id.* at 788.

201. *Id.* at 787-88.

202. *Id.* at 789.

203. MASS. GEN. LAWS ANN. ch. 272, § 99(C)(1) (West 1997).

204. *Id.* § 99(D)(1)(c); *Commonwealth v. Blood*, 507 N.E.2d 1029, 1032 (Mass. 1987).

205. 507 N.E.2d 1029 (Mass. 1987).

pany.²⁰⁶ One of the conspirators agreed to tape conversations of the conspirators in exchange for a favorable sentence on other pending charges.²⁰⁷ The taped conversations occurred in the homes of two of the conspirators.²⁰⁸ Blood was arrested, tried, and convicted.²⁰⁹ On appeal the issue was “the sufficiency, in light of art. 14 [the search and seizure provision of the Massachusetts Constitution], of that portion of the statutory design which renders admissible the evidentiary fruits of warrantless electronic surveillance of organized crime where police have obtained the consent of at least one, but not each, party to a conversation.”²¹⁰ The court pointed out that article 14 of the Massachusetts Constitution was adopted in 1780 to guard against the remembered activities of the British.²¹¹ “In like manner, the consent exception puts the conversational liberty of every person in the hands of any officer lucky enough to find a consenting informant. What was intolerable in 1780 remains so today.”²¹² Fearing that “the statutory exception has swallowed up the rule,” the court held that taping the conversations surreptitiously violated article 14 and the tapes should have been excluded.²¹³

In *Commonwealth v. Panetti*,²¹⁴ another interesting case from Massachusetts, “the chief of police of Lenox, entered a crawl space under the defendant’s first-floor apartment on Housatonic Street with the permission of the owner of the property” and overheard a drug transaction.²¹⁵ The court held that even though the chief was lawfully in the crawl space, the interception of the conversation violated article 14.²¹⁶ The court reasoned that “[t]he crawl space is not analogous to an adjoining hotel or motel room. The subjective expectation of privacy here [in Panetti’s home] is more reasonable than that present in the motel-hotel room cases.”²¹⁷

7. Michigan

The Michigan Constitution has no privacy provision, but has a search and seizure provision in Article 1, § 11 similar to that of the

206. *Id.* at 1030.

207. *Id.*

208. *Id.* at 1030-31.

209. *Id.* at 1031.

210. *Id.* at 1031-32.

211. *Id.* at 1035.

212. *Id.*

213. *Id.* at 1038.

214. 547 N.E.2d 46 (Mass. 1989).

215. *Id.*

216. *Id.*

217. *Id.* at 48.

Fourth Amendment.²¹⁸ In *People v. Beavers*,²¹⁹ the Michigan Supreme Court held that, without a warrant, the police may not intercept a private conversation with one party consent.²²⁰ In *Beavers*, a police informant wore a radio transmitter when he went to Beaver's apartment.²²¹ Beaver's son answered the rear door of the apartment and let in the informant.²²² The informant purchased ten dollars worth of heroin and left.²²³ Meanwhile, two police officers sat in an unmarked car with a radio receiver listening to the conversation between the informant and Beavers concerning the heroin sale.²²⁴ The *Beavers* court reviewed the plurality opinion in *United States v. White*, which allowed police informant participant monitoring.²²⁵ The *Beavers* court relied on Justice Harlan's dissenting opinion in *White* rather than Justice White's plurality opinion.²²⁶ Like Justice Harlan, the *Beavers* court distinguished between a participant in a conversation subsequently repeating the conversation and the conversation being simultaneously monitored with the consent of less than all participants, especially where the monitored conversation took place in the non-consenting participant's home.²²⁷ The court found that because none of the warrant exceptions applied, the search and seizure provision of the Michigan Constitution would prohibit the two officers from testifying, while allowing the informant to testify.²²⁸

Sixteen years later the Michigan Supreme Court overruled *Beavers* in *People v. Collins*,²²⁹ holding "that the warrantless participant monitoring in this case violated no reasonable expectation of privacy on the part of the defendant, and that there is no compelling reason to inter-

218. MICH. CONST. art. 1, § 11. Section 11 provides:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Id.

219. 227 N.W.2d 511 (Mich. 1975), overruled by *People v. Collins*, 475 N.W.2d 684, 685 (Mich. 1991).

220. *Id.* at 516.

221. *Id.* at 512.

222. *Id.*

223. *Id.*

224. *Id.* at 517.

225. *Id.* at 513; see *supra* notes 87-96 and accompanying text.

226. *Id.* at 515.

227. *Id.* at 514-15.

228. *Id.* at 516.

229. 475 N.W.2d 684 (Mich. 1991).

pret Const. 1963, art. 1, § 11 as affording greater protection for this defendant than is provided under the Fourth Amendment."²³⁰ In *Collins*, W.C. Collins had allegedly offered the informant \$500 for the informant to testify falsely in a criminal case involving Collins's wife.²³¹ The informant called Collins from the state police office with the police taping the call; the police also taped a conversation of the informant and Collins in Collins's car.²³² The *Collins* court refused to distinguish *Beavers* because the *Beavers* heroin sale occurred in Beavers's home.²³³ "Even if a person's home is where he has the most reasonable expectation of privacy, that expectation is no longer reasonable when the home becomes a site for planning criminal activity."²³⁴ The court also noted that when the Michigan eavesdropping statute was adopted in 1966, eavesdropping with one-party consent was not "otherwise prohibited by law . . . [and the statute allows eavesdropping] not otherwise prohibited by law by a peace officer or his agent of this state or federal government while in the performance of his duties."²³⁵

8. *Montana*

In 1972, the following provision was added to the Montana Constitution: "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."²³⁶ In *State v. Brackman*,²³⁷ the Montana Supreme Court held that the privacy provision of the Montana Constitution prohibited a police informant from recording a conversation with Dale Brackman.²³⁸ Two individuals who allegedly owed Brackman money reported Brackman to the police department for threatening them.²³⁹ They agreed to become police informants, with one wearing a radio transmitter.²⁴⁰ The police officers instructed the informants to discuss the matter with Brackman.²⁴¹ The two twice spoke with Brackman in the parking lot of the shopping center where

230. *Id.* at 698.

231. *Id.* at 685.

232. *Id.*

233. *Id.* at 695 n.40.

234. *Id.*

235. *Id.* at 696 n.45.

236. MONT. CONST. art. II, § 10.

237. 582 P.2d 1216 (Mont. 1978), *overruled by* State v. Brown, 755 P.2d 1364 (Mont. 1988).

238. *Id.* at 1222.

239. *Id.* at 1217.

240. *Id.*

241. *Id.*

Brackman worked.²⁴² While the three spoke, police officers monitored and recorded the conversations.²⁴³ Brackman was charged with intimidation, a felony, and moved to suppress the tapes.²⁴⁴ The court recognized no compelling state interest in law enforcement's surreptitious monitoring and recording of private conversations, noting that such surveillance would be permitted after obtaining a warrant; if there was a fear for the informant's safety, the informant could wear a radio transmitter but no information obtained could be used against the suspect unless a warrant had first been granted.²⁴⁵

Ten years later in *State v. Brown*,²⁴⁶ the Montana Supreme Court overruled *Brackman* without explaining why it was overruling a ten-year-old precedent.²⁴⁷ The *Brown* court held that "warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, performed by law enforcement officers while pursuing their official duties, does not violate . . . the privacy section of the Montana Constitution."²⁴⁸ The monitored conversations concerning a large quantity of marijuana occurred in a car in a parking lot and in the informant's room at a local motel.²⁴⁹ The court reasoned that Katherine Brown had no reasonable expectation that her conversations with the police informant would be kept private by the informant and, further, that the recording of Brown's conversations with the informant was not excessively intrusive.²⁵⁰ The court noted that Brown erred in trusting that the informant would not repeat or record their conversations.²⁵¹ The court reasoned that the informant could testify about the conversations and the recording of the conversations would be more accurate than the informant's testimony.²⁵²

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 1221-22.

246. 755 P.2d 1364 (Mont. 1988).

247. *Id.* at 1369.

248. *Id.* The Montana statute requires all parties to consent to the interception of a communication but allows recording by "duly elected or appointed public officials or employees when the transcription or recording is done in the performance of official duty." MONT. CODE ANN. § 45-8-213 (1995). The *Brown* court specifically ruled that "[t]he exception applies to law enforcement officers while performing their duty," rejecting Brown's argument that the statutory exception was unconstitutionally overly broad. 755 P.2d at 1368.

249. *Brown*, 755 P.2d at 1366.

250. *Id.* at 1370-71.

251. *Id.* at 1371.

252. *Id.* at 1370-71. The dissenting justice criticized the majority for overruling *Brackman* and failing to recognize the additional privacy accorded by the state constitution's explicit privacy provision. *Id.* at 1371-72 (Hunt, J., dissenting). The dissenting justice reasoned that the plain

9. Pennsylvania

The Pennsylvania Constitution has no privacy provision, but has a search and seizure provision in Article 1, § 8 that is similar to the Fourth Amendment.²⁵³ In *Commonwealth v. Brion*,²⁵⁴ the Pennsylvania Supreme Court held that "Article I, § 8 of the Pennsylvania Constitution precludes the police from sending a confidential informer into the home of an individual to electronically record his conversations and transmit them back to the police."²⁵⁵ A confidential informant had purchased about fifteen grams of marijuana from Michael Brion in Brion's home while wearing a body wire.²⁵⁶ The court differentiated *Brion* from *Commonwealth v. Blystone*²⁵⁷ and *Commonwealth v. Henlen*²⁵⁸ because of the location of the taping.²⁵⁹

In *Blystone*, a murder was committed in an open field.²⁶⁰ Blystone described the murder to a confidential informant while the two were in a truck, and the police were surreptitiously monitoring and recording the conversation.²⁶¹ In *Henlen*, a prison guard secretly taped his interrogation by a Pennsylvania State Trooper investigating the theft of inmate property.²⁶² The guard was charged with illegal interception under the Pennsylvania statutes.²⁶³ The courts found that neither Blystone nor the Pennsylvania State Trooper had reasonable expectations of privacy.²⁶⁴

In *Commonwealth v. Myers*,²⁶⁵ the Pennsylvania Superior Court was asked to determine whether an informant and boyhood friend could secretly tape a conversation with Robert Myers on the porch

language of the constitutional privacy provision would seem to protect the privacy of conversations. *Id.*

253. PA. CONST. art. 1, § 8. Section 8 provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Id.

254. 652 A.2d 287 (Pa. 1994).

255. *Id.*

256. *Id.*

257. 549 A.2d 81 (Pa. 1988), *aff'd on other grounds sub nom.* *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

258. 564 A.2d 905 (Pa. 1989).

259. *Brion*, 652 A.2d at 289.

260. *Blystone*, 549 A.2d at 84.

261. *Brion*, 652 A.2d at 288 (citing *Blystone*, 549 A.2d 81 (Pa. 1988)).

262. *Henlen*, 564 A.2d at 905.

263. *Id.*

264. *Blystone*, 549 A.2d at 87-88; *Henlen*, 564 A.2d at 907.

265. 676 A.2d 662 (Pa. 1996).

outside his rural trailer home.²⁶⁶ The informant sought information concerning two robberies of a steakhouse.²⁶⁷ In ruling that the tape should have been suppressed, the court decided that *Brion* controlled because Myers had a reasonable expectation of privacy and a reasonable expectation that his conversation would not be intercepted.²⁶⁸

10. Vermont

The Vermont Constitution has no privacy provision, and Vermont is the only state without a wiretapping or eavesdropping statute. Vermont does have a search and seizure provision in chapter I, Article 11 of its constitution that is similar in substance to the Fourth Amendment, and has been applied to prohibit surreptitious taping in the home, but not in a parking lot.²⁶⁹

In *State v. Blow*,²⁷⁰ a police informant purchased marijuana at Michael Blow's home while the police monitored the conversation.²⁷¹ The Vermont Supreme Court held that "obtaining evidence by electronic monitoring in a defendant's home without his consent and without prior court authorization violates Article 11."²⁷² In *State v. Brooks*,²⁷³ decided approximately one month prior to *Blow*, the Vermont Supreme Court emphasized that the touchstone of whether participant electronic monitoring violates the Vermont Constitution is whether there is a reasonable expectation of privacy.²⁷⁴ In *Brooks*, a suspect in a series of commercial burglaries became a police informant.²⁷⁵ The informant taped a telephone conversation with Edward Brooks and also wore a radio transmitter to a meeting in a shopping center parking lot.²⁷⁶ The court held that "warrantless electronic par-

266. *Id.* at 663.

267. *Id.* at 662.

268. *Id.* at 665. In two other cases, the Pennsylvania Superior Court ruled that *Brion* would not be given retroactive effect. *Commonwealth v. Walko*, 670 A.2d 1153 (Pa. 1996); *Commonwealth v. Metts*, 669 A.2d 346 (Pa. 1995).

269. VT. CONST. ch. I, art. 11. Article 11 provides:

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Id.

270. 602 A.2d 552 (Vt. 1991).

271. *Id.* at 553.

272. *Id.* at 556.

273. 601 A.2d 963 (Vt. 1991).

274. *Id.* at 965.

275. *Id.* at 963.

276. *Id.*

ticipant monitoring of face-to-face conversations, in cases such as this one, where defendant, located in a public parking lot, had no reasonable expectation of privacy, does not violate the protections of Article 11 of the Vermont Constitution."²⁷⁷

11. *Washington*

The Washington Supreme Court has recently applied that state's constitutional privacy provision in two cases concerning surreptitious interception of a conversation with the consent of one participant. In a 1992 case, the court held that a challenged portion of the Washington eavesdropping statute did not violate the privacy provision of the Washington Constitution because the constitution allowed surreptitious recording upon the consent of one participant.²⁷⁸ In a 1994 case, the court held that police officers did not violate the state constitutional privacy provision when they listened to an informant's end of a telephone conversation with the informant's consent.²⁷⁹

In *State v. Salinas*,²⁸⁰ a county police chief authorized the interception and recording of conversations concerning illegal cocaine transactions.²⁸¹ The authorization was made pursuant to the state eavesdropping statutes which allowed such recordings in cases involving illegal drugs after following the procedure detailed in the statutes.²⁸² A paid police informant wore a radio transmitter allowing conversation with Ruben Salinas to be recorded.²⁸³ The informant and Salinas negotiated in a restaurant, over the telephone, and in a parking lot.²⁸⁴ Salinas challenged the statute allowing police authorization as violative of the privacy provision of the state constitution.²⁸⁵ The Washington Supreme Court rejected this challenge.²⁸⁶

277. *Id.* at 965.

278. *State v. Salinas*, 829 P.2d 1068, 1071-72 (Wash. 1992); see Appendix A.

279. *State v. Corliss*, 870 P.2d 317, 321 (Wash. 1994).

280. 829 P.2d 1068 (Wash. 1992).

281. *Id.* at 1070.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1070-71.

286. *Id.* at 1072. The Washington Court of Appeals reached the same conclusion in a decision issued one month prior to *Salinas*. In *State v. Kadorian*, 828 P.2d 45 (Wash. Ct. App. 1992), Kadorian challenged the statutes allowing one party consent in conversations involving controlled substances as violative of the Washington Constitution. *Id.* at 46. The court held that the statutes were constitutional and noted that the statutes included a number of safeguards, including the requirement that the interception be authorized by a supervising officer. *Id.* at 47, 48; see Appendix C.

In *State v. Corliss*,²⁸⁷ an informant spoke to Allan B. Corliss using a pay telephone outside the police department and a telephone in an office within the police department.²⁸⁸ While the informant was on the telephone, he tipped the receiver to allow a police officer to listen to the conversation.²⁸⁹ The Washington Supreme Court held that allowing the officer to listen to the telephone conversation did not violate the Washington Constitution.²⁹⁰

B. *The Ebb and Flow of State Constitutional Protection*

State constitutional protection for conversations has ebbed and flowed in various states with no apparent pattern.²⁹¹ Four states now protect conversations under their respective state constitutions (Alaska, Massachusetts, Pennsylvania, and Vermont) and another four states did so at some time in the past (Florida, Michigan, Montana, and Louisiana).²⁹² The Alaska decision announcing constitutional protection for conversations dates from 1978.²⁹³ Analogous decisions from Massachusetts, Pennsylvania, and Vermont are much more recent; 1987, 1994, and 1991, respectively.²⁹⁴ A common thread running through many of the decisions has been that the protected conversation took place in the home. In six of the eight states, the case in which the protection was announced involved a conversation occurring in a home.

Is there a pattern to the ebb and flow? In 1994, one commentator, Melanie Black-Dubis, saw that there had been an initial expansion of the state constitutional protection for conversations, followed by a

287. 870 P.2d 317 (Wash. 1994).

288. *Id.* at 318-19.

289. *Id.* at 319.

290. *Id.* at 321.

291. See *supra* Part II.A. The state constitutional privacy protection for conversations has ranged from providing the same privacy protection as the state statute (Louisiana, Michigan, Montana, and Washington), to providing more privacy protection than the state statute (Alaska, Massachusetts, and Pennsylvania). Vermont, the only state without an eavesdropping statute, provides some protection through the search and seizure provision of its constitution. See Appendix A. Florida, Hawaii, and Illinois have followed decisions of the United States Supreme Court in interpreting constitutional privacy provisions. For various periods of time, Florida (1981 to 1983), Louisiana (1982 to 1983), Michigan (1974 to 1991), and Montana (1978 to 1988) interpreted their respective state constitutions to provide additional protection against police informant recording of conversations. See *supra* Part II.A.

292. See *supra* Part II.A.

293. See *State v. Glass*, 583 P.2d 872 (1978).

294. See *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987); *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994); *State v. Blow*, 602 A.2d 552 (Vt. 1991).

contraction.²⁹⁵ She saw that a number of states had recognized protection for conversations under their respective state constitutions, but the states had later decided against recognition.²⁹⁶ The factors referenced by the courts as a basis for initially recognizing constitutional protection were "textual differences, legislative history, consideration of federal and state precedent, the privacy of the home, the effect on freedom of speech, and the effect on law enforcement practices."²⁹⁷ She theorized that states took "corrective action" to erase additional constitutional protection; upon further consideration the states decided that the factors referenced in passing in the earlier statutes were not adequate to support state constitutional protection.²⁹⁸ She predicted that the protection now afforded under case law interpretations of the Alaska, Massachusetts, and Vermont Constitutions was susceptible to being withdrawn.²⁹⁹

The predicted ebb in Alaska, Massachusetts, and Vermont has not occurred, and Pennsylvania has since recognized constitutional protection for conversations in the home.³⁰⁰ Beginning with 1978, and ignoring the three year period of 1981 through 1983, the state constitutional protection for conversations has remained fairly constant.³⁰¹ In each of the years from 1978 to 1981 and from 1984 to the present, three or four states have protected conversations under their state constitutions.³⁰²

The privacy of the home, rather than an explicit constitutional privacy provision or the nature of the crime involved, seems to be the indicator of additional protection under a state constitution. Half of the states recognizing additional protection now do so under a search and seizure provision (Massachusetts and Vermont) and half recog-

295. Melanie L. Black-Dubis, *The Consensual Electronic Surveillance Experiment: State Courts React to United States v. White*, 47 VAND. L. REV. 857, 887-88 (1994).

296. *Id.*

297. *Id.* at 873.

298. *Id.* at 888.

299. *Id.* at 873-74, 884-85.

300. *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994).

301. *See supra* Part II.A.

302. *See supra* Part II.A. From 1975 to 1978, Michigan was the only state recognizing constitutional protection. From 1978 to 1981, Michigan was joined by Alaska and Montana. In 1987, Massachusetts added itself to this list. Montana dropped out in 1988, leaving Massachusetts, Michigan, and Alaska until 1991. In 1991, Michigan dropped out and Vermont joined, leaving Massachusetts, Alaska, and Vermont. In 1994, Pennsylvania joined Massachusetts, Alaska, and Vermont. In the three year period of 1981 through 1983 the constitutional protection for conversations remained constant in Michigan, Alaska, and Montana but was chaotic in Florida and Louisiana. In 1981, Florida recognized privacy and was joined by Louisiana in 1982; however, in 1983, the Florida Constitution was amended in response to *Sarmiento* and on the rehearing of *Reeves*, the Louisiana Supreme Court reversed itself.

nize additional protection under a privacy provision (Alaska and Pennsylvania).³⁰³ Cases from Alaska, Massachusetts, Pennsylvania, and Vermont in which additional protection was recognized all involve conversations occurring in the home.³⁰⁴ Of the four states which had recognized additional protection, one relied on a search and seizure provision (Michigan) and three relied on privacy provisions (Florida, Montana, and Louisiana).³⁰⁵ In Florida and Michigan, the location of the conversation was in the home, while in Montana and Louisiana, the conversation occurred in locations other than the home.³⁰⁶

A majority of the cases from the eight states involve illegal drugs (Alaska—*Glass*, Pennsylvania—*Brion*, Michigan—*Beavers*, Vermont—*Blow*, Montana—*Brown*, Florida—*Sarmiento*). Three cases involved robbery or burglary (Pennsylvania—*Myers*, Vermont—*Brooks*, and Massachusetts—*Blood*). *Reeves* (Louisiana) involved false travel expense reports, *Collins* (Michigan) involved giving false testimony, and *Brackman* (Montana) involved a dispute over money owed.

The ebb and flow of state constitutional protection might relate to the types of offenses involved. Let us assume for a moment that only things one knew about the cases were that many involved illegal drugs and half of the states that once protected conversations no longer do so. Based on that assumption one might guess that the states that cut back on protection did so in illegal drug cases. The dissenting opinion in *Beavers* is illustrative of the reasoning one might expect in an opinion announcing that a state would no longer protect drug related conversations under the state constitution:

Because of the inherent necessity for privacy in drug sales and the small size of the product, the law enforcement officer has a uniquely difficult task. A sale may take place anytime, anywhere, and be invisible to the observer. Case history reveals that many, perhaps most, sales take place in someone's dwelling place. The business is operated from within living quarters, as here.

Therefore, the very nature of the illegal traffic demands the use of agents and informants if it is to be controlled. However, one may make a "buy" but be met in court by a series of witnesses who swear that the defendant was somewhere else and the purchaser is lying,

303. See Appendix A.

304. *State v. Glass*, 583 P.2d 872 (Alaska 1978); *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987); *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994); *State v. Blow*, 602 A.2d 552 (Vt. 1991).

305. See Appendix A.

306. *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981); *People v. Beavers*, 227 N.W.2d 511 (Mich. 1975); *State v. Brackman*, 582 P.2d 1216 (Mont. 1978); *State v. Reeves*, 427 So. 2d 403 (La. 1982).

perhaps to save his own skin. The buyer cannot usually bring anyone with him to verify his testimony. The lone buyer is also in physical danger.³⁰⁷

Montana and Florida are states that seem to fit this assumption. In Montana, the Brackman court announced constitutional protection in a case that involved a dispute over money owed. The *Brown* court overruled an earlier case and involved a large quantity of marijuana. In *Sarmiento*, a Florida court which announced constitutional protection involved a heroin sale. Subsequently, the Florida Constitution was amended two years later in response to *Sarmiento*. The other states do not fit the assumption. Louisiana originally granted protection in *Reeves*, a false travel expense reports case, but later reversed the protection. Similarly, Michigan announced protection in a case that involved a heroin sale; but later erased the protection in *Collins*, which involved giving false testimony. Three of the four states recognizing constitutional protection for conversations announced their decisions in illegal drug cases. The Alaska case involved a heroin sale (*Glass*); the Pennsylvania case involved a marijuana sale (*Brion*); and the Vermont case involved a marijuana sale (*Blow*). Thus, although the impetus in some states for eliminating constitutional protection might have been distaste for illegal drug offenses, the assumption does not hold true in a number of the states.

C. State Wiretapping and Eavesdropping Statutes

Of the forty-nine states with some type of eavesdropping or wiretapping statute, the statutes of some thirteen states and the District of Columbia parallel the provisions of the Federal Act, while the statutes of another sixteen are similar to some provisions of the Federal Act to a greater or lesser extent. This information is shown in the chart in Appendix B. All but three states impose criminal sanctions for violation of the state statute and thirty-five states provide for civil relief.³⁰⁸ The civil relief generally includes award of actual or statutory damages of \$100 per day up to a maximum of \$1,000 to \$10,000, whichever

307. *Beavers*, 227 N.W.2d at 517-18 (Coleman, J., dissenting). The dissenting opinion also quoted with approval from a United States Supreme Court case:

[A] government agent obtained narcotics during transactions completed in defendant's home. The agent obtained entry "by misrepresenting his identity and stating his willingness to purchase narcotics."

Acknowledging that "the home is accorded the full range of Fourth Amendment protections" the Court said when the home becomes a market place for unlawful business, "that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street."

Id. at 519 (quoting *Lewis v. United States*, 385 U.S. 206, 207, 211 (1966)).

308. See Appendix B.

is greater, punitive damages, attorney fees, and costs.³⁰⁹ The statutes of eleven states provide for injunctive relief and the statutes of seven states provide for equitable relief.³¹⁰

The Federal Act allows an in-person conversation or telephone conversation to be taped with the consent of one of the participants; the majority of the states similarly allow one-party consent.³¹¹ Fourteen states require all-party consent to tape certain types of conversations.³¹² The statutes of eleven states require consent of all participants to in-person and telephone conversations, at least where none of the participants is a law enforcement officer or informant.³¹³ Of the eleven states, California, Illinois, and Washington allow taping with the consent of one party private participant if a crime is involved.³¹⁴ Two additional states require all-party consent to certain types of conversations.³¹⁵ Connecticut requires consent of all parties to a "private telephonic conversation."³¹⁶ Oregon requires consent of all parties to a conversation but allows taping of a wire communication with the consent of one party; however, Oregon allows taping of a conversation with one-party consent if a felony endangering human life is involved.³¹⁷ This information is summarized in chart form in Appendix B, and the exact wording of the statutes is found in Appendix C.

Private parties are treated much differently than law enforcement officers or informants in the states requiring all-party consent to taping. Six of the eleven states allow one-party consent, so long as the consenting party is a law enforcement officer or informant.³¹⁸ The five remaining states place limitations on electronic surveillance under

309. See Appendix B.

310. See Appendix B.

311. See Appendix B.

312. See Appendix B.

313. See Appendix C. Those eleven states are California, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington.

314. See Appendix B.

315. See Appendix B.

316. See Appendix C.

317. See Appendix C.

318. See Appendix C. Those states are California, Delaware, Florida, Massachusetts, Michigan, and Montana. In Massachusetts, police officers are required to obtain a warrant prior to taping, at least when taping in the home. See *supra* notes 99-102 and accompany text.

For example, one Massachusetts case involved a blend of private and police activity. In *Commonwealth v. Santoro*, 548 N.E.2d 862 (Mass. 1990), telephone conversations between Santoro and another private individual were recorded illegally without Santoro's consent. *Id.* at 863. Subsequently, the police seized the tape of the conversations while executing a search warrant at a home other than Santoro's. *Id.* at 863-64. The court held that even though the conversations had been illegally intercepted, the tape of the conversations should not be suppressed; the police were not involved in the taping and the Massachusetts statute does not require suppression of all illegally intercepted conversations. *Id.* The court reasoned that excluding the conversations

color of law.³¹⁹ Illinois allows a law enforcement officer or informant to tape a conversation concerning certain enumerated felonies for the protection of the law enforcement officer or informant.³²⁰ Maryland allows a law enforcement officer or informant to tape a conversation concerning certain enumerated crimes or a hostage situation.³²¹ Maryland also allows a law enforcement officer to wear a body wire, but not to tape a conversation, if needed to safeguard the officer's safety.³²² New Hampshire allows a law enforcement officer to wear a body wire, presumably to safeguard the officer's safety; upon authorization from the state attorney general's office, a New Hampshire law enforcement officer may tape a conversation concerning certain enumerated offenses.³²³ Oregon allows a law enforcement officer to record a conversation based on one-party consent if the incident involves certain felonies, there are exigent circumstances precluding obtaining a court order or the incident involves a felony endangering human life.³²⁴ Pennsylvania allows a law enforcement officer or informant to tape a conversation upon authorization of the state attorney general's office or in a hostage situation.³²⁵ Washington allows the taping of a conversation concerning a controlled substance on the consent of one-party and prior written authorization.³²⁶ Similarly, Connecticut allows taping of a private telephonic conversation and Oregon allows taping

would have no deterrent effect because the police were not involved in the interception and the suppression of the conversations would protect criminals. *Id.* at 864.

319. See Appendix C.

320. See Appendix C.

321. See Appendix C.

322. See Appendix C.

323. See Appendix C.

324. See Appendix C. These statutory exceptions to all party consent were unsuccessfully challenged in three cases. *State v. Bass*, 868 P.2d 761 (Or. 1994); *State v. Casteel*, 857 P.2d 204 (Or. 1993); *State v. Evans*, 832 P.2d 460 (Or. 1992).

325. See Appendix C. However, the taping may require a warrant, at least where it occurs in the suspect's home. See *supra* notes 254-59 and accompanying text.

326. See Appendix C. In *State v. Knight*, 904 P.2d 1159 (Wash. Ct. App. 1995), *cert. denied*, 914 P.2d 65 (Wash. 1996), Knight argued that the Washington statute allowing taping of a conversation concerning a controlled substance violated the equal protection clause because a conversation not involving a controlled substance could not be taped except upon the consent of all parties. *Id.* at 1163. The court dismissed the equal protection challenge finding that the distinction was justified. *Id.* at 1163-64. According to the court, controlled substance offenses are prevalent, the offenses are routinely investigated by an undercover officer to a greater extent than other offenses, and the challenged statutes protect the safety of the undercover officer investigating controlled substance offenses. *Id.*

In *State v. Salinas*, 853 P.2d 439 (Wash. 1993), the Washington Supreme Court held that because proper authorization for use of a body wire had not been obtained, all evidence, including the officer's visual observations, were required to be excluded. *Id.* at 441.

of a conversation, so long as the consenting party is a law enforcement officer or informant.³²⁷

In 1988, a criminal defendant successfully challenged the Louisiana statute which had required the defendant to obtain all-party consent, but which had allowed a law enforcement officer to tape a conversation on the consent of one party. Prior to *Kirk v. State*,³²⁸ Louisiana's statutes were similar to those of California, Delaware, Florida, Massachusetts, Michigan, and Montana. The predecessor to Louisiana Revised Statutes Annotated section 15:1303, allowed a law enforcement officer or informant to tape a private conversation but otherwise required the consent of all parties.³²⁹ Philip Kirk, Jr. challenged the disparity of treatment between himself and an informant on equal protection grounds. The court commented that:

Kirk presented the following argument in favor of his right to make the recordings: the charges in federal court were based on an alleged scheme between him and employees of Photon, Inc. to defraud the corporation; the Photon employees had actually devised the scheme and were the only witnesses to the alleged scheme; the Photon employees had recorded conversations with him at the behest of government investigators; and recording of conversations by him or his investigator with the same Photon employees was critical to his entrapment defense. Kirk contended that it was fundamentally unfair to allow the prosecutor to tape conversations and to prohibit him from doing so when the true content of those conversations would be a crucial credibility issue at trial.³³⁰

The court agreed with Kirk and held the Louisiana statute unconstitutional.³³¹

D. Case-Law Exceptions to All-Participant Consent

Eleven states require all-party consent to the taping of in-person and telephone conversations.³³² State courts in four of the eleven states have created case-law exceptions to the requirements of all-party consent and allowed participants to tape conversations. Those states are Florida, Illinois, Michigan, and Maryland. As discussed below, the Florida case-law exception is limited to the peculiar facts of the case in which the exception was created. Illinois and Michigan courts interpret statutory language to allow participant taping across

327. See Appendix C.

328. 526 So. 2d 223 (La. 1988).

329. *Id.* at 224.

330. *Id.* at 225.

331. *Id.* at 227.

332. See *supra* note 314 and accompanying text.

the board. A Maryland state court created a novel interpretation to the requirement that the conversation be "willfully" intercepted.

1. Florida

Florida has a constitutional right of privacy³³³ and Florida Security of Communications statutes protect the privacy of communications.³³⁴ *Inciarrano* is the Florida case in which the Florida Supreme Court created a case-law exception to the statutory requirement of all-party consent.³³⁵ Briefly, Phillips, the murder victim, tape recorded Inciarrano committing the murder.³³⁶ Florida law made it a third-degree felony for Phillips to tape record his conversation with Inciarrano unless Inciarrano consented to the taping.³³⁷ The law also excluded any illegally intercepted conversations from evidence.³³⁸ One would think that because of the wording of the Florida statutes, Inciarrano could successfully argue that the tape should be suppressed because it had been obtained illegally, even though he admitted it was his voice on the tape.³³⁹ However, the trial judge denied Inciarrano's motion to suppress.

Inciarrano pleaded no contest and appealed the denial of his motion to suppress.³⁴⁰ On appeal, the Florida District Court of Appeal, feeling constrained by the plain wording of the statutes and prior case law, reversed.³⁴¹ The Florida Supreme Court then had to decide whether to create a case-law exception to the Florida statutes or let a cold-blooded murderer go free. The court phrased the issue as "whether the tape recording made by a victim of his own murder must be excluded from evidence pursuant to chapter 934" and held "that under the circumstances of this case the subject tape recording does not fall within the statutory proscription of chapter 934."³⁴² The court concluded that the statutes did not apply because Inciarrano had no

333. FLA. CONST. art. I, § 23; see Appendix A.

334. FLA. STAT. chs. 934.01 to 934.09 (1995).

335. See *supra* notes 12-15 and accompanying text.

336. *Inciarrano v. State*, 473 So. 2d 1272, 1274 (Fla. 1985).

337. FLA. STAT. chs. 934.03, 934.06.

338. *Id.*

339. *Id.* ch. 934.09(9); Brian Dickerson, *Murder Tape Is Allowed as Evidence*, NAT'L L.J., July 22, 1985, at 5.

340. *Inciarrano*, 473 So. 2d at 1276. In reaching its decision, the trial court noted "the quasi-public nature of the premises within which the conversations occurred, the physical proximity and accessibility of the premises to bystanders, and, the location and visibility to the unaided eye of the microphone used to record the conversations." *Id.* at 1274.

341. *Inciarrano v. State*, 447 So. 2d 386, 388 (Fla. Dist. Ct. App. 1984).

342. *Inciarrano*, 473 So. 2d at 1273-74.

reasonable expectation of privacy.³⁴³ This conclusion was unsupported by any analysis to offer guidance in future cases. The court reasoned:

Inciarrano went to the victim's office with the intent to do him harm. He did not go as a patient. The district court, in the present case, correctly stated: "One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises. Thus, here, if appellant ever had a privilege, it dissolved in the sound of gunfire." Accordingly, we hold that because Inciarrano had no reasonable expectation of privacy, the exclusionary rule of section 934.06 does not apply.³⁴⁴

The two concurrences "flesh out" the majority opinion, though in quite different ways. Justice Overton wrote:

I concur and write to emphasize that when an individual enters someone else's home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply. It is a different question, however, when the individual whose conversation is being recorded is in his own home or office.³⁴⁵

In his concurrence, Justice Ehrlich was much more critical of the majority's reasoning:

Privacy rights attach to individuals, not to actions. . . . [T]o hold, as the majority does, that the commission of a criminal act waives a privacy right requires an entirely new legal definition of privacy rights which would, in turn, shake the foundation of fourth amendment analysis. . . . It would be more judicially honest to admit the error and recede from *Walls* and *Tsavaris* and to hold that the statute is inapplicable. The victim no more "intercepted" the conversation than he "intercepted" the bullets that ended his life. . . . If criminal acts waive privacy rights, as the majority implies, police have the right and duty to intrude without a warrant into a bedroom where the owner/resident is smoking marijuana, reasoning that the fourth amendment protection has "gone up in smoke."³⁴⁶

343. *Id.* at 1276.

344. *Id.* at 1275-76 (citations omitted). Four Florida Supreme Court Justices joined in the opinion and three concurred, two joining in one concurrence and one authoring another concurrence.

345. *Id.* at 1276 (Overton, J., concurring).

346. *Id.* at 1277 (Ehrlich, J., concurring). In *State v. Walls*, 356 So. 2d 294 (Fla. 1978), the alleged victim was in his home when he recorded "extortionary threats" made by two individuals. *Id.* at 295. The Florida Supreme Court held that because the threats were "oral communication" under chapter 934, they could not be taped without the consent of the two individuals. *Id.* at 296. The court also noted that there was no harm done by suppressing the tape-recording because the victim could testify as to the threats. *Id.* at 297. In *State v. Tsavaris*, 394 So. 2d 418 (Fla. 1981), Dr. Louis Tsavaris telephoned the medical examiner concerning the results of the

What Justice Ehrlich seems to suggest is that Florida interprets its statute as requiring "all of the parties to the communication [to] have given prior consent to such interception,"³⁴⁷ thus, allowing a participant to a conversation to lawfully record it.

2. *Illinois*

In *People v. Beardsley*,³⁴⁸ a 1986 Illinois Supreme Court case, Robert Beardsley was stopped for driving twelve miles over the speed limit.³⁴⁹ Beardsley recorded his subsequent conversation with the officer by holding a microphone below the door panel of his car.³⁵⁰ When the officer realized that Beardsley was recording the conversation, the officer asked Beardsley to turn off the tape recorder and warned Beardsley that he could be charged with eavesdropping.³⁵¹ The officers arrested Beardsley and placed him in the back seat of the patrol car but allowed Beardsley to retain possession of the tape recorder.³⁵² The two officers and Beardsley waited in the patrol car until a tow truck arrived for Beardsley's car.³⁵³ While Beardsley was in the back seat, he recorded the conversation of the two officers sitting in the front seat of the patrol car.³⁵⁴ Beardsley was convicted of eavesdropping.³⁵⁵

The issue before the Illinois Supreme Court in *Beardsley* was whether Beardsley could be convicted of eavesdropping.³⁵⁶ The court applied the reasoning of the United States Supreme Court in *Lopez*

decedent's autopsy. *Id.* at 420. A sheriff's detective was in the room with the medical examiner when the medical examiner took the call from Tsavaris by speaker phone. *Id.* The medical examiner recorded the call. *Id.* The Florida Supreme Court held that the recording was made in violation of the Florida statute requiring all parties to consent to the recording of a conversation. *Id.* In reaching its decision, the court noted that the Florida statute had been amended in 1974 to require consent of all parties prior to an interception. *Id.* at 422.

On the floor of the Florida House of Representatives, the only recorded debate on the two-party consent requirement of section 934.03(2)(d) was this comment by Representative Shreve:

(What this bill does) is to prevent, make it illegal, for a person to record a conversation, even though he's a party to it, without the other person's consent. With no further debate, the bill passed the House 109-1.

Id. (footnote omitted).

347. FLA. STAT. ch. 934.03(2)(d) (1995).

348. 503 N.E.2d 346 (Ill. 1986).

349. *Id.* at 347.

350. *Id.*

351. *Id.*

352. *Id.* at 347-48.

353. *Id.* at 348.

354. *Id.*

355. *Id.*

356. *Id.*

and held that “clearly our eavesdropping statute should not prohibit the recording of a conversation by a party to that conversation *or* one known by the parties thereto to be present.”³⁵⁷ The court reasoned that the officers knew that their conversation was not private and that Beardsley could hear everything they said. Beardsley could have taken notes of the conversation or even testified concerning what the officers said. The court opined, however, that a simultaneous transmission of the conversation to someone outside the patrol car would have been different because:

[O]ur holding in this case should not be construed as holding that the same result would necessarily prevail if the defendant here would have been equipped with a transmitter instead of a recorder and, therefore, the conversation by the officers would, by this means, have been overheard or intercepted by another.³⁵⁸

The reasoning of the court is logical. If Beardsley could make notes of the conversation and testify as to what the officers said, why should he not be able to record the conversation? A tape of the conversation would be more accurate than either notes or Beardsley’s recollection of the conversation.

The Illinois statute had previously defined eavesdropping as intercepting “all or any part of an oral conversation without the consent of *any* party thereto.”³⁵⁹ Prior to *Beardsley*, the statute had been amended to prohibit interception without “the consent of *all* of the parties to such conversation.”³⁶⁰ Two Justices concurred in the judgment, reasoning that the officers had consented to the recording; the officers knew that Beardsley had the recorder, they had previously told him he could be charged with eavesdropping, and yet they did not confiscate the recorder before placing Beardsley in the patrol car.³⁶¹ In addition, the officers could have conversed outside the patrol car while Beardsley was handcuffed in the back seat of the patrol car.³⁶² The *Beardsley* concurring opinion criticized the majority’s interpretation of the statute, pointing out that the majority’s interpretation did violence to the plain language of the Illinois eavesdropping statute.³⁶³ “The majority’s construction ignores the mandatory language which replaced the word ‘*any*’ with the word ‘*all*’; it also renders meaningless two other portions of the statute, while at the same time it fails to

357. *Id.* at 351.

358. *Id.* at 352.

359. 38 ILL. REV. STAT. § 14-2(a) (1965).

360. 38 ILL. REV. STAT. § 14-2(a)(1) (1983); *Beardsley*, 503 N.E.2d at 351-52.

361. *Beardsley*, 503 N.E.2d at 354-55.

362. *Id.*

363. *Id.* at 352-54 (Simon, J., concurring).

enforce the plain intent of the law."³⁶⁴ The statute had been amended in 1975 to require all-party consent.³⁶⁵ This occurred the year after the Watergate hearings, and as one Illinois state senator reminded the Illinois legislature during debate on the amendment: "[W]here electronic eavesdropping occurred which one party, of course, consented to it, but the others did not, . . . I think that is a truly reprehensible circumstance. . . . [T]he acquiescence or permission of all parties involved[] ought to be the public policy of this State."³⁶⁶

In a 1994 case, *People v. Herrington*,³⁶⁷ the Illinois Supreme Court relied on *Beardsley*. In *Herrington*, the alleged sexual abuse victim was at the police station when he called Jeffrey Herrington at his job.³⁶⁸ The police taped the conversation with the alleged victim's permission.³⁶⁹ The court held that the taping did not violate the Illinois eavesdropping statute because the statute allows a participant to record a conversation.³⁷⁰ The court reasoned that the tape memorialized the conversation accurately, the person to whom Herrington intended to speak consented to the recording, and the conversation was not transmitted to any third party.³⁷¹ The dissenting justice noted that the statute plainly and clearly requires consent of all parties to a conversation, and that the court's holding was "in direct conflict with the explicit language of the eavesdropping statute."³⁷² The dissenting justice also noted that, whereas in *Beardsley* the officers knew Beardsley had a tape recorder and impliedly consented to the taping, Herrington had no reason to assume that the conversation with the alleged victim was not private.³⁷³

3. Maryland

In *Hawes v. Carberry*,³⁷⁴ the Maryland Court of Special Appeals accepted Hawes' argument that he could not be civilly liable under Maryland's Wiretap and Electronic Surveillance Law because he did not know that the law prohibited surreptitious taping of a conversation to which he was a participant.³⁷⁵ Daniel Hawes, an attorney li-

364. *Id.* at 352.

365. 38 ILL. REV. STAT. § 14-2(a)(1) (1977).

366. *Id.* at 353 (quoting from S. 79-1159, Reg. Sess. (Ill. 1975)).

367. 645 N.E.2d 957 (Ill. 1994).

368. *Id.* at 958.

369. *Id.*

370. *Id.* at 959.

371. *Id.*

372. *Id.* at 959-60 (Bilandic, J., dissenting).

373. *Id.*

374. *Hawes v. Carberry*, 653 A.2d 479 (Md. Ct. Spec. App. 1995).

375. *Id.* at 483-84.

censed in Virginia but not in Maryland, obtained a judgment in a Virginia court against Mr. Carberry and others.³⁷⁶ On March 11, 1992, at approximately 6:00 to 6:30 p.m., Hawes went to Mr. and Mrs. Carberry's home to obtain information about the other defendants.³⁷⁷ Hawes and the Carberrys stood in the doorway of the Carberry home while they discussed the judgment.³⁷⁸ Unknown to the Carberrys, Hawes taped the conversation.³⁷⁹ On March 14, 1992, Hawes filed suit in Maryland state court to enforce the Virginia judgment.³⁸⁰ A transcript of the Hawes/Carberry March 11 conversation was attached to a motion filed in the suit.³⁸¹ On March 5, 1993, the Carberrys filed suit against Hawes, alleging that the secret taping of the conversation violated the Maryland Wiretap and Electronic Surveillance Law.³⁸² During the trial, Hawes represented himself. He asked the following question of himself: "What experience have you had with respect to wiretapping and eavesdropping statutes in the past?"³⁸³ He responded:

The simple answer is none. Before I received notice of this action and the criminal charges, I had never had occasion to read the wiretapping and eavesdropping law of any state much less Maryland. And my knowledge of it was what I had obtained from other attorneys, which was basically that federal law gives a person the right to make a record of his own conversation with other people. Subsequent to these charges having been made and this case being filed, I've had occasion to research the law in more depth and now I know more about Maryland's law. But at the time any of this happened, I had been in Maryland maybe four times in the last ten years all related to this one case, and I have no prior knowledge of anything related to this before having being served. And I believed that federal statute authorized me to do what I was doing.³⁸⁴

Mr. Hawes argued that he could not be held civilly liable because he was not aware that Maryland law prohibited taping without the consent of all parties. On appeal, the court held that the word "willfully" in the Maryland statute required the Carberrys "to show that Mr. Hawes intended to violate the Carberrys' rights under the [Maryland] Act."³⁸⁵ Because the Carberrys did not show this, the trial court

376. *Id.* at 481.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.* at 480.

382. *Id.* at 480-81.

383. *Id.* at 482.

384. *Id.*

385. *Id.* at 483-84.

should have granted judgment for Hawes. The court held that: "While [the Carberrys] proved that [Hawes] was a Virginia lawyer, it could not be legitimately inferred from this fact that he knew the wiretap law of all 50 states or even that he knew the relevant law in Maryland or, for that matter, any other jurisdiction in the Washington metropolitan area."³⁸⁶

4. Michigan

In *Sullivan v. Gray*,³⁸⁷ a Michigan Court of Appeals case, Thomas Sullivan had been negotiating with James Gray for the sale of Sullivan's car dealership to Gray when their negotiations broke down.³⁸⁸ Subsequently, Sullivan and Gray became parties in a lawsuit concerning the proposed sale.³⁸⁹ Gray recorded a telephone conversation with Sullivan relating to the breakdown of their negotiations and Gray used a transcription of the recorded telephone conversation in the dealership litigation.³⁹⁰ Gray recorded his conversation with Sullivan although Michigan law provides that: "Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto . . . is guilty of a felony."³⁹¹ Michigan law defines "eavesdrop" as to "overhear, record, amplify or transmit any part of the *private discourse of others* without the permission of all persons engaged in the discourse."³⁹²

Relying most heavily on the language, "private discourse of others," the *Sullivan* court refused to hold Gray liable, interpreting the statutory language to allow a participant to record the conversation.³⁹³ The court interpreted the words "is present" to include someone physically close to the conversants but not a party to the conversation.³⁹⁴ "We believe the statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.' The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eaves-

386. *Id.*

387. 324 N.W.2d 58 (Mich. Ct. App. 1982).

388. *Id.* at 59.

389. *Id.*

390. *Id.*

391. *Id.* (quoting from MICH. COMP. LAWS § 750.539c).

392. *Id.* (quoting from MICH. COMP. LAWS § 750.539a(2)) (emphasis added).

393. *Id.* at 60.

394. *Id.*

dropped on.”³⁹⁵ The court reasoned that a party to a conversation may always later take notes of the conversation, repeat the conversation, or testify about what was discussed; a tape recording is more accurate than relying on one’s memory or notes.³⁹⁶

The *Sullivan* court acknowledged that its interpretation of the statutes created “one anomaly.”³⁹⁷ “While a participant may record a conversation with apparent impunity, his sole consent is insufficient to make permissible the eavesdropping of a third party. Thus, while a participant may record a conversation, he apparently may not employ third parties to do so for him.”³⁹⁸ The court then explained away the apparent anomaly reasoning that a participant is speaking directly to another participant in a conversation and, because of the participants’ relationship, can gauge whether the conversation will be repeated.³⁹⁹ The court distinguished the status of a participant from that of a third party; a participant who does not know that the conversation is being overheard by a third party has no basis to judge whether the third party will repeat the conversation.⁴⁰⁰

The *Sullivan* dissent disagreed with the majority’s interpretation of the statute. Judge Brennan stated that: “Rather, if the Legislature had intended that the statute not apply to participants, I think that it would have stated that intention in clear language.”⁴⁰¹ The dissent warned of the pervasiveness of electronic eavesdropping and emphasized the role of the courts to protect the secrecy of private conversations by enforcing the plain language of the statutes.⁴⁰² The dissent reasoned that because an unaltered recording is the most accurate record of a conversation, more credence would be given to a recording than to testimony concerning the parties’ dealings.⁴⁰³ The non-recording party is at a disadvantage for several reasons. A tape can easily be altered and the recording party can select the conversations or portions of conversations favoring the recording party while excluding other recordings.⁴⁰⁴

In *Sullivan*, the Michigan Court of Appeals stated in obiter dictum that Michigan law would prohibit a participant to consent to the re-

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 60-61.

401. *Id.* at 61 (Brennan, J., dissenting).

402. *Id.* at 62.

403. *Id.*

404. *Id.*

ording of a conversation by a third party. This hypothetical came alive in *Dickerson v. Raphael*.⁴⁰⁵ "This case involves the surreptitious, nonconsensual recording, simultaneous transmission, and later broadcast of plaintiff's private conversation with her children by certain defendants, who were not themselves parties to the conversation."⁴⁰⁶ Dorothy Dickerson, a long-time member of the Church of Scientology, sued Sally Jessy Raphael for playing four portions of an audio recording of her conversation with family members on a national broadcast of the Sally Jessy Raphael television show.⁴⁰⁷ The television show flew Dickerson family members from out-of-state to Ann Arbor Michigan and paid a company to secretly video and audio tape Dorothy Dickerson's conversation with family members.⁴⁰⁸ One Saturday Dorothy's son and daughter and the daughter's husband arrived unexpectedly at the Scientology office where Dorothy worked.⁴⁰⁹ When the family members went to a nearby public park to talk, the daughter was wearing a microphone under her sweater.⁴¹⁰ The microphone picked up the family conversation and transmitted it to a nearby van where the conversation was recorded.⁴¹¹ The court noted that the visual image could be captured on videotape without running afoul of Michigan law because the family discussion took place in a public park.⁴¹²

In *Dickerson*, the trial court denied Dorothy Dickerson's motion for a directed verdict.⁴¹³ The Michigan Court of Appeals reversed the denial and remanded the case for determination of damages.⁴¹⁴ The court held that Michigan law prohibited a third party from recording and broadcasting a conversation.⁴¹⁵ The court pointed out that Dorothy's family and the show's producers knew that Dorothy would not have consented to the taping and that Dorothy had already refused to appear on the Sally Jessy Raphael television show.⁴¹⁶ The conversation concerned a private personal matter—the family's concern over

405. 564 N.W.2d 85 (Mich. Ct. App. 1997).

406. *Id.* at 87.

407. *Id.* at 87-88.

408. *Id.* at 87.

409. *Id.*

410. *Id.* at 87-88.

411. *Id.* at 88.

412. *Id.* at 90 n.4.

413. *Id.* at 89.

414. *Id.* at 92.

415. *Id.* at 89. The court differentiated this case from *People v. Collins*, 475 N.W.2d 684 (1991), which involved a police informant. *Dickerson*, 564 N.W.2d at 91; see *supra* notes 229-35 and accompanying text.

416. *Dickerson*, 564 N.W.2d at 90.

Dorothy's increasing involvement in Scientology.⁴¹⁷ No one in the park, other than family members, was close enough for the length of time required to eavesdrop, other than through electronic means, on the family's conversation.⁴¹⁸

The *Dickerson* court found that Michigan law clearly prohibited radio transmission of the family conversation to the nearby van.⁴¹⁹ Apparently, the show producer could have given the daughter a tape recorder to hide under her sweater together with the hidden microphone.⁴²⁰ Then the daughter could have recorded the family conversation and turned the tape over to the producer. That way the producer could have obtained the same information without violating Michigan eavesdropping law.

III. PRIVACY

Parts III and IV provide the necessary backdrop to an understanding of federal and state eavesdropping and wiretapping statutes and state constitutional privacy provisions. The statutes and constitutional provisions implicitly recognize privacy as a concept deserving of protection. Although fundamental, the concept must be weighed against other interests such as the individual's natural curiosity, social control, and economic and social advantage.

A. *What is Privacy?*

What is privacy? The number of definitions of privacy is roughly equivalent to the array of scholars writing about privacy.⁴²¹ The array of definitions may be due in part to the variety of personal matters covered by the term. Three "mechanisms of privacy" recognized by one scholar are "privacy-as-seclusion," "privacy-as-informational-con-

417. *Id.* at 87.

418. *Id.* at 90. The court opined that participants in a conversation may waive their privacy "by clear, unequivocal conduct estopping its assertion" just as the common law right of privacy may be waived. *Id.* at 89.

419. *Id.* at 90.

420. For example, in a number of John Grisham's best-selling novels, electronic surveillance allows gathering of crucial information. The information forms a portion of the thread of a tenuous and often far-fetched plot. For example, in *THE CLIENT*, the attorney straps a tape recorder to the chest of her eleven-year-old client so the client can tape his conversation with two FBI agents outside the presence of his attorney. JOHN GRISHAM, *THE CLIENT* 123-37 (paper ed. 1994). The attorney threatens to play the tape if the FBI agents lie. *Id.*; see also *infra* note 505.

421. JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 3 (1992); REGAN, *supra* note 28, at 3; Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 424 (1980); Spiros Simitros, *Reviewing Privacy in an Information Society*, 135 *U. PENN. L. REV.* 707, 708 (1987).

trol," and "privacy of autonomous personal life."⁴²² The subject of this Article, eavesdropping and wiretapping, is most closely associated with informational control and seclusion. The protection afforded by eavesdropping and wiretapping statutes may allow the individual to control the dissemination of information. Seclusion is key in determining the type of information protected because the statutes generally protect only those statements said in private.

Eavesdropping and wiretapping statutes generally maximize the boundaries of personal information over which the individual has control. The statutory scheme emphasizes privacy and at times places a higher value on privacy than on a law enforcement officer obtaining information for use in a criminal prosecution, or on an individual obtaining evidence for use in a civil lawsuit. In a dozen states, a private conversation may not generally be recorded without the consent of all participants.⁴²³ Under the federal wiretapping statutes and the eavesdropping and wiretapping statutes of many states, a private conversation may not be recorded without the consent of at least one participant; however, the conversants lose their expectation of privacy if their conversation is loud enough to allow it to be overheard unaided by any electronic audio interception device.⁴²⁴

Thus, the eavesdropping and wiretapping statutes are grounded in secrecy as a positive value. Under the statutory scheme, protection does not vary based on the subject matter of the private conversation. A private conversation can as easily concern expressions of intimacy as it can hide evidence of a crime, of prohibited discrimination, or of a tort law violation. In fact, a defendant is guilty of a serious crime in the typical criminal case in which a motion to suppress the tape of a conversation is raised.

*Commonwealth v. Parella*⁴²⁵ illustrates a situation in which the husband was almost certainly guilty of murdering his estranged wife, yet the Pennsylvania statutes allowed the husband to suppress the most incriminating piece of evidence. At the trial level, the court suppressed a recording made by the husband's live-in girlfriend of a meet-

422. William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 745-46 (1995). Tort law is usually associated with protection for the first two mechanisms of privacy, while constitutional law is associated with protection for privacy of autonomous personal life. *Id.* at 757. Although Heffernan sees his three mechanisms of privacy as a "coherent whole," others claim that there is no separate right of privacy. *Id.* at 746. The reductionists claim that what may be termed a right to privacy, is an amalgamation of interests protected by a collection of other rights. Gavison, *supra* note 421, at 421-23.

423. See Appendix B.

424. See Appendix B.

425. 610 A.2d 1006 (Pa. Super. Ct. 1992).

ing between the husband and the estranged wife the night of the wife's death.⁴²⁶ The girlfriend was not a party to the conversation.⁴²⁷ After the tape was suppressed, the prosecution appealed, alleging that the suppression of the tape "seriously impair[ed] its ability to present its case and prove the charges of criminal homicide."⁴²⁸ The suspect lived in a second floor apartment over the Mountain House Tavern.⁴²⁹ When the suspect informed the girlfriend that he would be meeting his estranged wife in the apartment, the girlfriend concealed one component of a Fisher Price Baby Monitor in the drop ceiling of the bedroom of the suspect's apartment.⁴³⁰ She placed the receiver component of the baby monitor on a porch of the tavern next to a tape recorder and below the apartment window.⁴³¹ The girlfriend turned on the receiver and tape recorder at the time she expected a meeting between the suspect and his estranged wife.⁴³² The suspect was prosecuted for criminal homicide in connection with the death of his estranged wife the night the tape was made.⁴³³ The court held that the taping violated Pennsylvania law because neither of the participants had consented to the taping.⁴³⁴ The court emphasized that the Pennsylvania Supreme Court and the Pennsylvania Superior Court both held that a conversation may be intercepted only with the consent of all parties, and that the Pennsylvania Wiretapping and Electronic Surveillance Act also requires all-party consent.⁴³⁵

In her article, *Privacy and the Limits of Law*, Ruth Gavison gives a detailed and comprehensive discussion of privacy.⁴³⁶ Gavison views privacy as being comprised of three elements: secrecy, anonymity, and solitude.⁴³⁷ She states that one loses privacy "as others obtain information about an individual [loss of secrecy], pay attention to him [loss of anonymity], or gain access to him [loss of solitude]."⁴³⁸ In *Privacy*

426. *Id.* at 1008.

427. *Id.* at 1007.

428. *Id.* at 1008.

429. *Id.* at 1007.

430. *Id.*

431. *Id.* at 1008.

432. *Id.*

433. *Id.*

434. *Id.* at 1011.

435. *Id.* at 1012.

436. Gavison, *supra* note 421, at 423-24.

437. *Id.* at 433.

438. *Id.* at 428. In contrast, many scholars focus on privacy as comprising one or two of Gavison's three elements. Several focus on privacy as the individual's control over personal information. For example, in *THE POLITICS OF PRIVACY*, privacy is defined as "the restriction of others' access to information about oneself." JAMES RULE ET AL., *THE POLITICS OF PRIVACY* 23 (1980). Arthur Miller defines privacy as "the individual's ability to control the circulation of

and *Its Invasion*, Deckle McLean paints a similar picture of privacy but uses different terminology.⁴³⁹ McLean describes four types of privacy: "access-control privacy," "room-to grow privacy," "safety-valve privacy," and "respect privacy."⁴⁴⁰ McLean's access-control privacy includes both lack of physical access to an individual and the individual's control over personal information; thus it draws on Gavison's elements of secrecy and solitude.⁴⁴¹ McLean's remaining three "types" of privacy would be better described as values of privacy and will be discussed below.

Gavison's privacy construct provides a useful framework for discussing the interception of oral communications. One might picture Gavison's three elements as interlocking spheres arranged in a triangle formation; the spheres overlap such that one area in the center of the formation is common to all three spheres. Privacy is lost when any part of the formation is pierced. The individual may suffer a loss of only one element of privacy, of any two elements of privacy, or all three elements of privacy, depending on the location of the loss of privacy. One element of privacy is lost when an invasion occurs in a

information relating to him." ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 25 (1971). Charles Fried sees privacy as "the control we have over information about ourselves." Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968), reprinted in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 203, 209 (Ferdinand David Schoeman ed., 1984) (emphasis in original). Alan Westin defines privacy as the "[c]laim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." WESTIN, *supra* note 27, at 7. Westin states that individual privacy is comprised of the four states of solitude, intimacy, anonymity, and reserve. *Id.* at 31-32. Westin's "solitude" is the same as Gavison's "solitude," where the individual is totally alone, but the way the two authors value solitude is distinct. For Westin, solitude resembles a penal situation of solitary confinement, while for Gavison, solitude is a positive, desirable state. WESTIN, *supra* note 27, at 31; Gavison, *supra* note 421, at 428-29. Westin's "anonymity" coincides with Gavison's "anonymity." Intimacy marks an individual's relationship with a particular set of individuals—for example, a spouse, the family, or a close-knit group of friends. WESTIN, *supra* note 27, at 31-32; Gavison, *supra* note 421, at 444-56. Westin's "reserve" is McLean's safety-valve privacy. Compare WESTIN, *supra* note 27, at 32, with McLEAN, *infra* note 439, at 125-26. For an explanation of safety-valve privacy, see *infra* notes 220, 222, 232 and accompanying text.

Priscilla Regan, Julie Inness, and Hyman Gross each focus on access to the individual as well as the individual's control over personal information. Regan defines privacy as "the right to control information about and access to oneself." REGAN, *supra* note 28, at 4. For Inness, privacy is "the state of the agent having control over a realm of intimacy, which contains her decisions about intimate access to herself (including intimate informational access) and her decisions about her own intimate actions." INNESS, *supra* note 421, at 56. Gross believes the "[l]oss of privacy occurs when the limits one has set on acquaintance with his personal affairs are not respected." Hyman Gross, *Privacy and Autonomy*, in *PRIVACY* 169, 170 (J. Roland Pennock & John W. Chapman eds., 1971).

439. DECKLE McLEAN, *PRIVACY AND ITS INVASION* (1995).

440. *Id.* at 6, 52.

441. *Id.* at 52.

portion of any one of the three spheres which does not intersect with either of the other two spheres. Two elements of privacy are lost simultaneously when an invasion occurs inside the intersection of any two of the spheres. All three privacy elements are lost simultaneously when the invasion occurs inside the intersection of all three spheres.

In the earlier cited example, where LaSane abducted Weinstein from a restaurant parking lot, Weinstein immediately lost her anonymity and solitude; LaSane was paying attention to her and had gained access to her.⁴⁴² At some later point, she also lost her secrecy when she began to tell LaSane personal details about herself, in hopes of dissuading him from hurting her.⁴⁴³ Because she knew she was in a life or death situation, chances are that Weinstein exposed some of her most intimate personal information from her core self in hopes of saving herself from being murdered. In turn, LaSane relinquished his anonymity and solitude when he abducted Weinstein. Later, LaSane also relinquished his secrecy. In the conversation captured on Weinstein's tape, LaSane disclosed secret personal information about himself, such as his age and first name.⁴⁴⁴

B. Why is Privacy Important?

Why is privacy important? Most scholars view privacy as a concept pertaining to the individual. Gavison sees the following values in privacy: "a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others."⁴⁴⁵ McLean describes privacy as providing the individual room to grow, a safety valve, and respect;⁴⁴⁶ these values are impossible without the existence of one or more of Gavison's elements. Solitude provides the individual room to grow, or, in other words, an opportunity to contemplate past exper-

442. See *supra* notes 1-8 and accompanying text.

443. Gladwell, *supra* note 8, at A1.

444. *Id.* at A12.

445. Gavison, *supra* note 421, at 442. As does Gavison, Inness sees privacy's value in promotion of intimate relationships with others and, as does McLean, in respect for the individual. "[P]rivacy is valuable because it acknowledges our respect for persons as autonomous beings with the capacity to love, care and like—in other words, persons with the potential to freely develop close relationships." INNESS, *supra* note 421, at 95. Fried states that privacy is necessary for "the relationships of love, friendship and trust." Fried, *supra* note 438, at 210-11. Jeffrey Reiman views privacy as the cornerstone of individual autonomy: "Privacy is a social ritual by means of which an individual's moral title to his existence is conferred." Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 300, 310 (Ferdinand David Schoeman ed., 1984) (emphasis in original).

446. McLEAN, *supra* note 439, at 54.

iences, develop new ideas, and mature.⁴⁴⁷ Secrecy within a circle of family or close friends acts as a safety valve; it allows the individual to vent frustrations, discuss personal problems, and explore hidden emotions.⁴⁴⁸ Invasion of one's privacy, whether it be secrecy, anonymity, or solitude, may result in loss of respect or dignity; it may make one feel vulnerable, ashamed, distressed, or embarrassed. In *Privacy and Freedom*,⁴⁴⁹ Alan Westin lists "personal autonomy," "emotional release," "self-evaluation," and "limited and protected communication" as privacy values;⁴⁵⁰ the first is the same value noted by Gavison, the third is part of Deckle's individual room to grow value, and the second and fourth are subsumed in Deckle's safety-valve value.

Like Gavison, Priscilla Regan acknowledges the importance of privacy to the individual and argues that privacy is equally important to society.⁴⁵¹ The thesis of Regan's book, *Legislating Privacy*,⁴⁵² is that Congress was slow in passing wiretapping and eavesdropping legislation, mainly because privacy was framed in terms of the privacy of the individual, and the forces opposed to federal legislation spoke of the threat to law enforcement investigation should the legislation be passed.⁴⁵³ Regan argues that the "common value," the "public value,"

447. *Id.* at 124-25; see Constance T. Fischer, *Privacy and Human Development*, in *PRIVACY* 37, 43 (William C. Bier ed., 1980). "[Privacy provides] an opportunity to get in touch with one's self while not worrying centrally about other people's judgments; . . . is also a condition for imagining different possibilities—of freeing one's self from perceived contingencies, . . . [and allows one to] experience a sense of unity, not only with other people, but with events and the world at large." *Id.* Stanley Benn sees room to grow privacy as vital for an individual "engaged on a kind of self-creative enterprise." Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 223, 242-43 (Ferdinand David Schoeman ed., 1984). The enterprise might not succeed if the individual's privacy is invaded. *Id.*; see also Robert S. Gernstein, *Intimacy and Privacy*, 89 *ETHICS* 76, 77-78 (1978), reprinted in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 265 (Ferdinand David Schoeman ed., 1984).

448. McLEAN, *supra* note 439, at 125-26. Fried sees the privacy of a close circle of friends or family as the opportunity to voice "unpopular or unconventional" views without fear of rebuke, shaming, or ridicule. Fried, *supra* note 438, at 210.

449. WESTIN, *supra* note 27.

450. *Id.* at 33-39.

451. REGAN, *supra* note 28, at xiv. Like Regan, Gavison has a dual focus on the individual and on society:

Two clusters of concern are relevant here. The first relates to our notion of the individual, and the kinds of actions we think people should be allowed to take in order to become fully realized. To this cluster belong the arguments linking privacy to mental health, autonomy, growth, creativity, and the capacity to form and create meaningful relations. The second cluster relates to the type of society we want. First, we want a society that will not hinder individual attainment of the goals mentioned above. For this, society has to be liberal and pluralistic. In addition, we link a concern for privacy to our concept of democracy.

Gavison, *supra* note 421, at 444.

452. REGAN, *supra* note 28.

453. *Id.* at xi-xii, 16, 19.

and the “collective value” of privacy make privacy important to society.⁴⁵⁴ Regan states that privacy has a common value because “all individuals value some degree of privacy and have some common perceptions about privacy.”⁴⁵⁵ She also states that privacy has a public value because of its value to “the democratic political system.”⁴⁵⁶ She also notes that privacy has a collective value because “technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy.”⁴⁵⁷

In reviewing values of privacy, privacy seems to be more fundamental to the individual and to society than any of the rights specifically protected under the United States Constitution. Some scholars view secrecy as negative.⁴⁵⁸ In contrast, Gavison and McLean recognize secrecy as positive.⁴⁵⁹ Secrecy should be viewed as positive because it is the most critical factor enabling the individual to maintain the privacy of personal information.

The type of personal information the individual discloses generally depends on the quality of relationship the individual has with the second person to whom the information is disclosed. The more intimate the relationship, the more likely that intimate information will be disclosed. With a less intimate relationship, it is less likely that the information disclosed will be as intimate. Alan Westin describes the most intimate of an individual’s personal information as located within a “core self” and other personal information as located in one of the concentric spheres surrounding the core self.⁴⁶⁰ The information in the sphere closest to the core self is slightly less intimate than that contained in the core self.⁴⁶¹ The next outer most sphere contains slightly less intimate information and succeeding outer spheres contain less intimate information than the next smaller sphere.⁴⁶² Normally, the individual will not disclose the extremely intimate personal information in the individual’s core self and the individual will disclose the personal information in the next sphere only to a spouse or intimate friend or relative; however, the individual may disclose per-

454. *Id.* at 213.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.* at 215.

459. *Id.* at 214.

460. WESTIN, *supra* note 27, at 33.

461. *Id.*

462. *Id.*

sonal information to a stranger if the individual feels able to disclose personal information without loss of anonymity.⁴⁶³

One individual's concept of privacy may be different from that of a second individual. McLean discusses the different levels of privacy desired by introverts and extroverts.⁴⁶⁴ The extroverted three-quarters of the population favors secrecy to control dissemination of personal information it desires to keep private.⁴⁶⁵ Introverts also favor secrecy. On the other hand, Gavison's solitude and anonymity may be intensely desired by an introvert but viewed as negative by an extrovert.⁴⁶⁶ Solitude is essential for an introvert who draws energy from being alone; an introvert might well prefer to remain anonymous at times. In contrast, an extrovert thrives on interaction with others and will remain anonymous less often than the introvert.⁴⁶⁷ McLean hypothesizes that legal protection for privacy will emphasize concern for secrecy over any concern for solitude or anonymity because extroverts are far in the majority.⁴⁶⁸

C. *How is Privacy Lost?*

How is privacy lost? The lost may be voluntary, as when information, anonymity, or solitude is freely given up by the individual. Two individuals conversing in seclusion may give up their privacy through carelessness or indifference. For example, an individual has a naive understanding of the world to believe that a heated discussion in a paper-thin walled apartment or office will remain private. On the

463. *Id.* Other authors note the corresponding relationship between the degree of intimacy of the information and the relationship the individual has with the person to whom the disclosure is made. Richard Wasserstrom observes that the closeness of interpersonal relationships may be gauged by the type of information one is comfortable in disclosing. Richard A. Wasserstrom, *Privacy: Some Arguments and Assumptions*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 317, 324-25 (Ferdinand David Schoeman ed., 1984). Intimate personal information may be communicated to a close friend but not to a casual acquaintance. *Id.* Ferdinand Schoeman echoes this observation:

It is . . . very awkward to be going about one's business and be confronted with a plea or expectation for personal involvement which, by hypothesis, is unoccasioned by the relationship. Although sometimes welcome, generally such pleas are disturbing for they seem to give us less control over where we will expend our emotional resources. The reason for being reserved in these situations is not fear of being harmed by the content of one's revelations, but rather a realization that such situations call for something personally important to be given without first assuring that it is freely given.

Ferdinand Schoeman, *Privacy and Intimate Information*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 403, 404 (Ferdinand David Schoeman ed., 1984).

464. McLEAN, *supra* note 439, at 66-69.

465. *Id.* at 68.

466. *Id.* at 66-67.

467. *Id.* at 67.

468. *Id.* at 68-69.

other hand, an individual may have a positive desire to reveal private information. For example, an extrovert may freely reveal personal information publicly; however, an introvert may consider the same information too intimate to reveal to anyone other than close friends or relatives. The loss is involuntary when privacy is invaded without the individual's consent. Where the individual voluntarily relinquishes a claim to privacy, the individual is responsible for its loss. Where the loss is involuntary, the loss is not the responsibility of the individual.⁴⁶⁹

The following case illustrates the voluntary loss of privacy occasioned by one speaking in a loud enough voice so that a third party can overhear the conversation without the aid of any electronic interception device. In *Commonwealth v. Louden*,⁴⁷⁰ the Pennsylvania Supreme Court found that "once the conversation, threats and arguments between the Loudens and the screams of the children became audible to the [neighbors], through a dividing wall in their home, the Loudens lost whatever expectation of privacy they had that their secret discussions and conversations would not be overheard."⁴⁷¹

The Loudens operated a day care in their home, one-half of a double house.⁴⁷² Mr. Louden's mother and step-father (the Kuloviches) lived in the other half of the double house. Mr. Louden's sister visited the Kuloviches every day.⁴⁷³ While visiting the Kuloviches, the sister heard "obscene language . . . arguing over explicit sexual issues . . . [and] threats being made at the children" through the common wall between the two halves of the building.⁴⁷⁴ The sister contacted the authorities but "was advised that no action could be taken . . . unless parents complained or a child was hurt."⁴⁷⁵ The sister placed a tape recorder in the hallway in the Kuloviches' home and began to record activity from the Loudens' home which could be heard through the common wall.⁴⁷⁶ The Loudens were arrested for endangering the welfare of a child, but were successful in having the tapes suppressed at the trial level.⁴⁷⁷ The Pennsylvania Supreme Court ruled that the Loudens did not have any expectation

469. See Gross, *supra* note 438, at 171.

470. 638 A.2d 953 (Pa. 1994).

471. *Id.* at 959.

472. *Id.* at 954.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* at 954, 957-58.

of privacy in the tapes because the sounds were audible through the common wall and that the tapes should not have been suppressed.⁴⁷⁸

IV. CURIOSITY, SOCIAL CONTROL, AND ECONOMIC OR SOCIAL ADVANTAGE

If privacy is so vital to the individual, what are the countervailing forces leading to its invasion? Westin points to curiosity and social control.⁴⁷⁹ Another force not noted by Westin is the individual's desire to obtain secret information to give a tactical economic or social advantage. This Part will review the roles of curiosity, social control, and economic or social advantage. In addition, this Part will draw on newspaper accounts and court cases to represent the reasons for invasion of privacy, and to illustrate the pervasiveness of eavesdropping.

A. Curiosity

Curiosity is an ancient, almost primeval force. The individual has the urge to ferret out secret information.⁴⁸⁰ While the individual desires secrecy, anonymity, and solitude, there is an individual urge to investigate the unknown and communicate new found information.⁴⁸¹ For example, the ten to twenty million scanner owners in the United States can use their scanners to keep abreast of what is happening in their local communities.⁴⁸² Law enforcement broadcasts, fire department broadcasts, broadcasts from agents in the Bureau of Alcohol, Tobacco, and Firearms, aircraft communications, and even communications in the drive-through lane in fast food restaurants attract scanner enthusiasts.⁴⁸³ One scanner enthusiast recommends taking a scanner on vacation to monitor action behind the scenes at theme parks.⁴⁸⁴

478. *Id.* at 959.

479. WESTIN, *supra* note 27, at 29-30.

480. In their famous 1890 law review article, Samuel Warren and Louis Brandeis complained of the newspapers being filled with "idle gossip" and "details of sexual relations" to appeal to one's "prurient taste." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

481. Alan Westin calls curiosity and surveillance universal tendencies. WESTIN, *supra* note 27, at 19-21.

482. J.T. Ward, *Can They Ban Your Scanner?*, POPULAR COMM., Apr. 1997, at 32.

483. Marc Saxon, *Scanning the Wild Blue Yonder*, POPULAR ELECTRONICS, Apr. 1997, at 27, 69 (aircraft communications, drive-through lanes at fast food restaurants, communications of ATF agents); Bonnie Zygumt, *Glued to the Scanner*, POPULAR COMM., Apr. 1997, at 34 (law enforcement communications); *How I Got Started Scanning—Maybe It's Hereditary!*, POPULAR COMM., Apr. 1997, at 53 (fire and police department communications).

484. Bill Mauldin, *Radio Resources: Interesting Thoughts and Ideas for Enjoying the Hobby: A Visit to Disney World*, POPULAR COMM., Apr. 1997, at 27. Mauldin suggests that the scanner enthusiast keep the scanner out of sight or be forced to check it until the visit is over. *Id.* at 29.

Some people seem to enjoy learning private details of someone else's life. An Arizona woman liked to listen to her eight-band 150-170 megacycle radio while doing housework.⁴⁸⁵ Suspicious of drug dealing, she reported certain conversations to the Arizona Department of Public Safety ("DPS").⁴⁸⁶ The conversations were coming from a car radio telephone.⁴⁸⁷ All told, she monitored the conversations for approximately a month and the DPS monitored the conversations for another five weeks before three men were arrested on drug charges.⁴⁸⁸

One California man claimed he just liked "to listen to people."⁴⁸⁹ When a police officer stopped the man and searched his van, the officer discovered "electronic equipment, 24 audio cassettes with names of women handwritten on them, a scanner, and a tape recorder."⁴⁹⁰ Apparently, the man had been using the equipment to record women's cordless telephone conversations.⁴⁹¹ The man was convicted of violating the California Penal Code which prohibits malicious interception of a cordless telephone conversation without the consent of all parties.⁴⁹²

Each mode of communicating private information quickly spawned ways of intercepting the information, which then necessitated legislation to guard against the interception. The term "eavesdropping" easily conjures up a picture of some curious individual who centuries ago stood under the eaves of another's home in an attempt to hear private information.⁴⁹³ A method for tapping the telephone quickly followed the invention of the telephone.⁴⁹⁴ Scanners have picked up cordless and cellular telephone conversations for a number of years.

Everyone realizes that conversations may be overheard by eavesdropping.⁴⁹⁵ However, many people are not aware of other technol-

485. *United States v. Hall*, 488 F.2d 193, 194-95 (9th Cir. 1973).

486. *Id.* at 195.

487. *Id.*

488. *Id.*

489. *People v. Stevens*, 40 Cal. Rptr. 2d 92, 93 (Ct. App. 1995).

490. *Id.*

491. *Id.*

492. *Id.*

493. REGAN, *supra* note 28, at 110.

494. WESTIN, *supra* note 27, at 172. The public began using the telephone in the 1880's and tapping soon followed. *Id.* The telephone was patented in 1876 and a telephone scrambler device was patented in 1881. REGAN, *supra* note 28, at 110-11.

495. Eavesdropping is still one way of intercepting valuable information. In November 1994 a jail guard overheard part of a conversation between O.J. Simpson and his "minister of God" former professional football player Rosie Grier. See Vincent J. Schodolski, *Latest O.J. Buzz: What Did He Say?*, ORLANDO SENTINEL, Dec. 18, 1994, at A-17. Simpson and Grier were seated in the jail visitation room separated by a sheet of Plexiglass and the guard was sitting in a control

ogy capable of easily intercepting conversations even though this technology has been in existence for at least thirty years. In his 1967 book, *Privacy and Freedom*, Alan Westin described surveillance technology then in existence.⁴⁹⁶ Telephone taps did not require any physical invasion of telephone wires.⁴⁹⁷ Landline telephones could be tapped with an induction coil.⁴⁹⁸ To intercept a landline telephone conversation, the induction coil is located a few feet away from the telephone or from any of the lines serving that telephone alone. Thus, landline telephone conversations may be intercepted by someone using an induction coil in the waiting room outside a private office or outside a building where the telephone or telephone lines are within a few feet of the induction coil.⁴⁹⁹

Westin also described surveillance equipment which, when employed outside of a building, is capable of intercepting conversations from inside the building without any physical intrusion.⁵⁰⁰ Contact microphones attached to a building pick up sound waves carried through windows, walls, and heating, plumbing and air conditioning equipment.⁵⁰¹ Directional microphones pick up conversations a hundred or so feet away.⁵⁰² These can be used to intercept conversations outdoors or through open windows. An ultrasonic wave may be bounced off a window or a thin wall of a room in which a conversation is taking place and received by the sending device.⁵⁰³ The wave picks up the vibrations from the window or wall.⁵⁰⁴ A more commonly known method of intercepting conversations is to plant a room with "bugs." The tiny microphones pick up any conversation in the room and transmit the conversation to a receiver located somewhere

booth behind a sheet of Plexiglass a few feet away. *Id.* Simpson and Grier were talking quietly to each other over a visitation room telephone when Simpson "slammed the phone down and hit his fist against the counter. . . . Mr. Simpson appeared to be crying. He appeared to be very upset. . . . He was yelling. . . . It was very loud, in a raised voice." *Id.* According to several newspaper reports Simpson shouted, "I did it!" See Grier: *Talks with O.J. Confidential*, ORLANDO SENTINEL, Dec. 10, 1994, at A-5; *Ito Delays Decision on Privacy of O.J.'s Conversation*, ORLANDO SENTINEL, Dec. 17, 1994, at A-5.

496. WESTIN, *supra* note 27.

497. *Id.* at 77-78.

498. *Id.* at 78. The induction coil is the size of a two inch cube and intercepts telephone conversation by drawing off the telephone voice signal from the telephone's magnetic field. *Id.*

499. *Id.*

500. *Id.* at 75-77.

501. *Id.* at 76.

502. *Id.*

503. *Id.*

504. *Id.* at 75-77 n.9.

outside the room.⁵⁰⁵ Another surveillance device is “bionic ears.” The bionic ears allow a conversation to be intercepted where the person conversing is located at a greater distance than that at which conversations may easily be overheard by the naked ear.⁵⁰⁶

Federal law makes it a crime to manufacture, possess, or sell “any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.”⁵⁰⁷ Thus, the sale or use of induction coils, bugs, and long distance and parabolic microphones is illegal because there is no legitimate legal use.⁵⁰⁸ The sale and use of scanners is legal because their primary use is to intercept conversations on frequencies freely accessible to the public. Even though illegal, eavesdropping

505. In three John Grisham novels, bugging appeared as a plot device enabling one or more of the characters to obtain otherwise secret information. JOHN GRISHAM, *THE FIRM* (paper ed. 1991); JOHN GRISHAM, *THE RAINMAKER* (1995); JOHN GRISHAM, *THE PARTNER* (1997). In *THE FIRM*, the homes and cars of the associate attorneys and the offices of the law firm were bugged. JOHN GRISHAM, *THE FIRM* 102-05, 334-36 (paper ed. 1991). In *THE RAINMAKER*, the opposing counsel bugged the plaintiff attorney's law office telephone. JOHN GRISHAM, *THE RAINMAKER* 303-06 (1995). In *THE PARTNER*, the associate planted a bug in the law firm conference room and taped several months worth of conversations. JOHN GRISHAM, *THE PARTNER* 246, 262 (1997); see also *supra* note 420.

506. In two recently decided Florida cases, police officers used bionic ears to intercept the defendants' conversations. *Stevenson v. State*, 667 So. 2d 410, 411 (Fla. Dist. Ct. App. 1996); *Brandin v. State*, 669 So. 2d 280, 281 (Fla. Dist. Ct. App. 1996).

Stevenson and *Brandin* stem from same police operations in which police officers were surveilling a “known narcotic area” in Escambia County, Florida. *Stevenson*, 667 So. 2d at 411; *Brandin*, 669 So. 2d at 281. In both cases, the police officers observed the defendants conduct which appeared to be drug transactions and picked up part of their conversation by using bionic ears. *Stevenson*, 667 So. 2d at 411; *Brandin*, 669 So. 2d at 281. Although it was 9:15 p.m. and dark, they were able to see the defendants using “light intensified” or “light-enhancing” binoculars. *Stevenson*, 667 So. 2d at 411; *Brandin*, 669 So. 2d at 281.

In *Stevenson*, the law enforcement officer used bionic ears to listen to a conversation outside a van stopped on a public street fifty to seventy five feet away. *Stevenson*, 667 So. 2d at 411. On appeal, the court held that *Stevenson* did not have a reasonable expectation of privacy; the intercepted conversation was not a protected “oral communication” because there was no societal expectation of privacy. *Id.* at 411-13. “Here, [*Stevenson's*] van stopped in the road just north of an intersection. The intercepted communication was made in an open, public area rather than in an enclosed, private, or secluded area. . . . [T]he parties . . . met on a public street and did not attempt to enter the van to converse.” *Id.* at 412.

In *Brandin*, the officer overheard *Brandin* talk to two individuals through his truck window while the truck was stopped in the evening in the middle of a public street. *Brandin*, 669 So. 2d at 281. On appeal, the court held that there were sufficient facts to justify an investigatory stop even without considering the conversation heard through use of bionic ears. *Id.* at 281, 282. The court affirmed the trial court denial of the motion to suppress the intercepted conversation “because, disregarding the intercepted conversation, the totality of the circumstances created a basis for well-founded suspicion sufficient to support the search.” *Id.* at 281.

507. 18 U.S.C. § 2512 (1994).

508. See *id.*

equipment is available by mail order. The April 1997 issue of a popular magazine includes advertisements for a "Window Bounce Laser Listener," a "Long Range 'Ultrasonic Ear,'" a "micro-miniature wireless mike," and a "super snooper big ear."⁵⁰⁹

The major differences between intercepting a landline telephone conversation, on one hand, and a cellular or cordless telephone conversation, on the other hand, are the equipment used and the distance at which the conversation can be intercepted. Scanners are readily available at retail at the local electronics store. The Federal Communications Commission adopted a regulation, effective April 26, 1994, which bans the manufacture or importation of scanners capable of picking up cellular telephone conversations.⁵¹⁰ The regulation does not ban the use of scanners manufactured before that date⁵¹¹ and it is apparently relatively easy to alter a later model scanner to pick up the frequencies designated for use by cellular telephones. Scanners designed to omit the frequencies designated for use by cellular telephones sometimes intercept cellular telephone conversations anyway. A statement from Radio Shack comments: "In some cases, proximity to cellular-telephone towers and other transmission phenomena may result in cellular-phone conversations being received on frequencies other than those allocated to cellular phones."⁵¹² Even though interception of cordless telephone conversations was criminalized, effective October 25, 1994, manufacture, importation, and sale of scanners capable of intercepting the frequencies designated for cordless telephones are still legal.⁵¹³

509. These devices are advertised by Information Unlimited and Electronic Rainbow Ind., Inc. POPULAR ELECTRONICS, Apr. 1997, at 72, 83.

The window bounce laser listener is available at \$10.00, for plans, or at \$149.50, for kit and plans. *Id.* at 72. "Aim at window and listen to sounds from reflected light. CAUTION - Not for illegal use." *Id.*

The long range ultra-ear is available at \$8.00, for plans, or at \$149.50, for kit and plans. *Id.* "Parabolic Mic [sic] can hear a distant whisper! BUG Mother Nature! 20 [inch] dish uses satellite technology to capture distant sounds." *Id.*

The kit for the micro-miniature wireless mike is advertised at \$34.95. *Id.* at 83. "So small you could hide this one on some real bugs! It's the smallest we've ever seen. With it's [sic] super sensitive mike it transmits a whisper or a room of conversation to an FM radio . . . with a proper antenna it transmits about ½ mile. . . . Size .35 [inches] x .9 [inches]." *Id.*

The super snooper big ear is available at \$10.95, for the kit, or \$29.95, already built. *Id.* "Listen through walls, hear conversations across the room. Add a parabolic reflector and hear blocks away. The big ear can be hidden about anywhere. . . . SIZE: 1.75 [inches] x 1 [inch]." *Id.*

510. 47 C.F.R. §§ 15.37(f), 15.121(a) (1996).

511. *Id.*

512. Jim Stratton, *Scanner Wasn't Supposed to Pick up Call, but It Did*, ORLANDO SENTINEL, Jan. 18, 1997, at A-15.

513. Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 (1994).

Eavesdropping and wiretapping statutes are designed to guarantee privacy of communications. With the technology available, whether legal or illegal, the privacy promised by the statutes is largely illusory. With the current level of technology, a targeted individual cannot escape surveillance and interception of the individual's private conversations. Technology has obliterated the barriers which had guaranteed privacy. These barriers included physical structures and distance. There are no longer obstacles to collecting information.

B. Social Control

Social control is a force as ancient as curiosity through which society seeks to hunt out and punish non-conforming behavior. Information concerning an otherwise private conversation may be gathered in one of two ways. A participant informer may relay information or a non-participant may overhear and relay information. Informers may be private individuals or police informants. If the information is obtained by a private individual, the individual may seek to exact conforming behavior through social sanction or litigation. In the alternative, the individual may turn the information over to law enforcement for criminal prosecution.⁵¹⁴

In a number of cases a citizen monitored a neighbor's cordless telephone conversations and turned in the neighbor to the police when the conversations indicated that the neighbor was a drug dealer.⁵¹⁵ In New York, an off-duty police officer overheard a drug-related conver-

514. *Jewell's Agent Friend Was Wired During Conversation After Bombing*, ORLANDO SENTINEL, Oct. 28, 1996, at A-5. Sometimes the informer is acting both as a private informer and as a police informer. On July 29, 1996, a longtime friend of Richard Jewell invited Jewell to the friend's apartment for dinner. *Id.* The friend was also a Georgia Bureau of Investigation agent and taped the nearly two hour dinner conversation. *Id.* The tape shed no light on who planted the July 27 bomb that exploded in Centennial Olympic Park. *Id.* The taping was legal because Georgia allows taping with one party consent. *See* Appendix B.

515. *United States v. Smith*, 978 F.2d 171 (5th Cir. 1992); *Tyler v. Berodt*, 877 F.2d 705 (8th Cir. 1989); *United States v. Carr*, 805 F. Supp. 1266 (E.D.N.C. 1992); *State v. McVeigh*, 620 A.2d 133 (Conn. 1993); *State v. Mozo*, 655 So. 2d 1115, 1116 (Fla. 1995); *State v. Neisler*, 666 So. 2d 1064 (La. 1996); *State v. Carston*, 913 P.2d 709 (Or. 1996); *State v. Pendergrass*, No. 01C01-9306-CR-00169, 1995 Tenn. Crim. App. LEXIS 188 (Tenn. Crim. App. Mar. 9, 1995), *rev'd on other grounds*, 937 S.W.2d 834 (Tenn. 1996); *State v. Smith*, 438 N.W.2d 571 (Wis. 1989).

In *Smith*, a citizen intercepted the neighbor's cordless telephone conversations using a Bearcat scanner. 978 F.2d at 173. Instead of learning, as expected, that the neighbor had participated in break-ins at the citizen's home, the citizen learned that the neighbor was trafficking in cocaine. *Id.* The citizen turned in the neighbor to the police. *Id.*

In *Tyler*, the Berodts, using a cordless telephone, monitored conversations on the Tylers cordless telephone even though the two homes were more than four blocks away. 877 F.2d at 705. The Berodts turned in Scott Tyler to the police on suspicion of illegal activity. *Id.* at 705-06. The police suggested the Berodts tape some of the conversations. *Id.* Thereafter, the police filed criminal charges against Tyler. *Id.*

sation over his cordless telephone.⁵¹⁶ The officer recorded several of the conversations that came from a neighbor's apartment and turned the tapes over to a drug task force.⁵¹⁷ In yet another case, a woman listened to a police scanner she got for Christmas when she overheard a murder being planned.⁵¹⁸

Sometimes the interception is unplanned and, in a number of cases, conversations were picked up over an AM/FM radio or short wave

In *Carr*, the citizen suspected a neighbor was a drug dealer because of the unusual amount of activity at the neighbor's apartment. 805 F. Supp. at 1267 n.2. The citizen informed the police of the suspicion. *Id.* The police recorded 42 tapes of conversations using a portable hand-held scanner. *Id.* at 1268.

In *McVeigh*, a citizen suspected a neighbor of drug dealing because of cordless telephone conversations the citizen had intercepted by using a scanner. 620 A.2d at 135. When the citizen reported the conversations to the police, the police set up a Bearcat scanner and tape-recorded the neighbor's conversations for approximately a week. *Id.*

In Florida, police detectives were using a scanner to intercept cordless telephone calls near an apartment complex. *Mozo*, 655 So. 2d at 1116. When they picked up a suspicious conversation, they continued to monitor the same radio frequency and taped calls. *Id.* They obtained a search warrant for an apartment in the complex based on the intercepted information and the unusual amount of activity observed at one apartment. *Id.*

In *Neisler*, a citizen had seen a neighbor using a cordless telephone in his yard. 666 So. 2d at 1065. Using a scanner to intercept the cordless telephone conversations, the citizen believed the neighbor was planning a drug transaction. *Id.* The citizen informed a police officer of the conversation and let the officer hear the conversation picked up by the scanner. *Id.* The police began scanning the neighbor's cordless telephone conversations before receiving a wire tap order. *Id.* at 1065-66.

In *Carston*, a citizen called the police to report information about a drug transaction. 913 P.2d at 710. The citizen had picked up the information from a cordless telephone while using his scanner. *Id.* The police used the intercepted information to locate the drug transaction. *Id.* at 710-11.

In *Pendergrass*, two concerned citizens informed the police that Pendergrass was dealing drugs. 1995 Tenn. Crim. App. LEXIS 188 at *3-*5. Based on the tips, the police intercepted Pendergrass' cordless telephone conversations from a location across the street from her apartment. *Id.* The police used a scanner and recorded nine audio cassettes of conversations during a week of surveillance. *Id.*

In *Smith*, a citizen reported to police that he had overheard a drug-related cordless telephone conversation over his scanner. 438 N.W.2d at 572. The citizen recognized a voice in the conversation as his neighbor's. *Id.* The police came to the citizen's home and taped the neighbor's conversations. *Id.*

516. *People v. Fata*, 559 N.Y.S.2d 348, 349 (App. Div. 1990).

517. *Id.*

518. *Scanner Picks Up, Prevents Plot to Kill Woman's Husband*, ORLANDO SENTINEL, Dec. 31, 1994, at A-7. The overheard cordless telephone conversation was between a neighbor and the neighbor's boyfriend. *Id.* They were planning to have the boyfriend murder the neighbor's husband, make the murder look like part of a break in, and collect the insurance on the neighbor's husband. *Id.*

Are you sure you want to go through with this? . . . Do you really love me enough to kill for me? . . . Yes, I do. Do you have any doubts? . . . If you come through the window, Kenny will hear you, and he'll come and that's when you shoot him.

Id.

radio inadvertently.⁵¹⁹ Once the intercepted conversation piques the interceptor's curiosity, the interceptor often keeps listening to the conversation and may even record it. If the intercepted conversation contains information of a crime, the interceptor may turn the information over to the police. For example, in *State v. Bidinost*,⁵²⁰ some children in an Ohio home were playing with a baby monitor and disconnected the transmitter.⁵²¹ The baby monitor receiver began to pick up the neighbors' cordless telephone conversations.⁵²² The other side of the conversations could not be overheard.⁵²³ One of the neighbors had been arrested the previous day for sexually abusing the children.⁵²⁴ The police and the prosecutor instructed the children's mother to tape record the conversations.⁵²⁵

C. Economic or Social Advantage

Besides idle curiosity and social control, certain secret information may be sought for a strategic reason. One set of authors defines privacy as an individual's control over personal information and then di-

519. *State v. Howard*, 679 P.2d 197 (Kan. 1984); *Sharon v. Sharon*, 558 N.Y.S.2d 468 (Sup. Ct. 1990); *State v. DeLaurier*, 488 A.2d 688 (R.I. 1985). In *Howard*, the citizen picked up conversations from a cordless telephone. 679 P.2d at 198. The citizen tape recorded some of the conversation, which involved drugs, and reported the conversation to the Kansas Bureau of Investigation ("KBI"). *Id.* An agent of the KBI asked the citizen to record any further conversation and the agent provided blank tape. *Id.* The citizen recorded conversations for more than a month. *Id.*

In *Sharon*, the son in the family was listening to a program on his short wave radio when he heard the voices of his mother and her friend. 558 N.Y.S.2d at 469. Apparently the radio picked up a conversation from a cordless telephone his mother was using upstairs in the house. *Id.* The son tape recorded the conversation. *Id.* In the mother and father's divorce proceeding, the father wanted to introduce the tape recorded conversation into evidence. *Id.*

In *DeLaurier*, a citizen reported to the police that her son had been fiddling with an AM radio when the son picked up a cordless telephone conversation concerning a drug transaction. 488 A.2d at 690. The police department monitored the same frequency on the police department's AM radio and recorded conversations involving "the sale of marijuana, cocaine, gambling and prostitution." *Id.*

520. 644 N.E.2d 318 (Ohio 1994).

521. *Id.* at 326.

522. *Id.*

523. *Id.*

524. *Id.* at 321.

525. *Id.* at 326. At trial, the prosecution used the tapes to impeach the credibility of defendant Bidinost's father and sister. *Id.* at 325-26. On appeal, the Ohio Supreme Court held that because the cordless telephone conversations fit the definitions of both an "oral communication" and a "wire communication" under Ohio law, the interception was prohibited and the recorded conversations should have been suppressed. *Id.* at 327. However, use of the recorded conversations was not reversible error because the prosecution had presented "overwhelming" evidence of Bidinost's guilt and the recorded conversations were used only to impeach defense witnesses. *Id.* at 330.

vides privacy into "aesthetic privacy" and "strategic privacy."⁵²⁶ Aesthetic privacy is akin to McLean's respect of privacy. A loss of aesthetic privacy subjects an individual to embarrassment or loss of dignity. Thus, the individual is damaged when another views an otherwise private activity. Strategic privacy is akin to Gavison's "secrecy"; the secret information is a means to a goal and its disclosure may make the goal unattainable.⁵²⁷ For example, if LaSane's desire for Weinstein's automobile and his plan to carjack it had been discovered, Weinstein might still be alive.

A business may wish to learn the trade secrets or business plans of a competitor. An industry giant might gain competitive advantage by prematurely learning of government actions affecting the industry. An estranged spouse might seek potentially embarrassing information to gain advantage in a divorce or custody proceeding. Disclosure of newsworthy and sometimes sensational heretofore secret information by the press sells newspapers. Private parties often wish to gather information to substantiate claims to use in their defense. An employer may wish to tape employees to improve efficiency⁵²⁸ and an employee may wish to tape workplace conversations to gather information for use in future litigation.⁵²⁹

526. RULE, *supra* note 438, at 22-23.

527. *Id.* at 22. Morton Levine makes a similar distinction but talks about "privacy" instead of aesthetic privacy and "secrecy" instead of strategic privacy. Morton H. Levine, *Privacy in the Tradition of the Western World*, in PRIVACY 3, 19 (William C. Bier ed., 1980). "[P]rivacy . . . is the maintenance of a personal life-space within which the individual has a chance to be an individual, to exercise and experience his own uniqueness." *Id.* "Secrecy . . . involves keeping to oneself information which one feels would render one vulnerable to some kind of damage, either practical damage or damage to self-esteem." *Id.*

Inness also distinguishes between privacy and secrecy; privacy encompasses "intimate information" with "intimate" concerning the individual's "expression of love, liking and care," while secrecy encompasses non-intimate information. INNESS, *supra* note 421, at 61, 91. She sees privacy as a fundamental right but sees secrecy as something not necessarily positive; disclosure of certain non-intimate information is morally wrong while disclosure of other non-intimate information is not. *Id.* at 60-61. Inness neither defines the line between these two types of non-intimate information nor discusses the scope of legal protection for private or secret information.

528. In Arkansas, husband and wife owners of a liquor store lived next door to the store. Deborah L. Jacobs, *Are You Guilty of Electronic Trespassing? Surveillance of Employees*, MGMT. REV., Apr. 1994, at 21, 21-22. Because they suspected an employee had been involved in a recent theft, they recorded employee telephone calls using an extension phone in their home. *Id.* The more than twenty-two hours of calls recorded over three months included a conversation between a female employee agreeing to sell merchandise to a customer at a reduced price, as well as amorous exchanges between the two. *Id.* The couple fired the employee and, at some point along the way, informed the employee's husband. *Id.* When the employee and the customer sued, they received a \$40,000 judgment plus legal expenses. *Id.*

529. An employee may secretly tape conversations at work, planning to use the tape in litigation. Christopher Coulter worked for Bank of America as an automatic teller machine technician. *Coulter v. Bank of America, Nat'l Trust & Sav. Assoc.*, 33 Cal. Rptr. 2d 766, 767 (Ct. App. 1994). He recorded over 160 conversations between himself and supervisors or co-workers at

A company's profits may rely heavily on company trade secrets or, perhaps, illegal agreements. Illegally intercepting information on a company's trade secrets may be lucrative; an employee may be tempted to intercept information on a company's illegal actions. A recent newspaper article reported that, "in California, there have been tales of corporate spies-for-hire who cruise Silicon Valley highways to steal secrets for executives talking on their car phones."⁵³⁰

Samuel Warren and Louis Brandeis' famous 1890 law review article, *The Right to Privacy*, was the product of some over zealous newspaper reporting concerning the wedding of Warren's daughter.⁵³¹ Apparently the newspapers had previously carried articles describing Mrs. Warren's entertaining "in highly personal and embarrassing detail," something unseemly in a time in which "a lady and a gentleman kept their names and their personal affairs out of the papers."⁵³²

Also, a journalist might wish to use a tape to back up a newspaper article. In October 1996, John Stossel, host of the ABC television program, "20/20," was facing Maryland felony charges for allegedly secretly taping Dr. Grace E. Ziem, a Baltimore physician.⁵³³ Deborah Stone, an ABC associate producer, and her sister-in-law, Julie Stone, visited Dr. Ziem's office on July 10, 1996 as patients.⁵³⁴ Dr. Ziem is a multiple chemical sensitivity expert who treats patients suffering from exposure to chemicals.⁵³⁵ Stossel allegedly sent the two women to tape their visit for use on an ABC "junk science" news special.⁵³⁶ Another ABC producer told a Mount Sinai Medical Center researcher about the taping and the researcher told Dr. Ziem.⁵³⁷ Dr. Ziem filed

the bank, all by secreting two tape recorders in his pockets. *Id.* Coulter subsequently filed a lawsuit against the bank and thirteen employees. *Id.* at 768. He backed up his claims with 17 tapes containing the over 160 conversations. *Id.* The court awarded the bank and 11 employees \$132,000 in damages against Coulter in their cross complaint for invasion of privacy. *Id.* at 767-68. In affirming the damage award against Coulter, the court relied on the California Privacy Act which prohibits taping a conversation without prior consent of all participants. *Id.* at 770; see CAL. PENAL CODE § 630 (West 1988).

Taping a conversation has many advantages over someone retelling it. The tape is more accurate, captures the exact wording of the conversation, and includes the speaker's tone of voice. Without the taping, the credibility of the person retelling the conversation might be in dispute; leaving the jury to speculate whether the parties really said that.

530. *Cellular Phones Are Handy*, *supra* note 106, at A01.

531. Warren & Brandeis, *supra* note 480, at 193.

532. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).

533. Scott Higham & Robert Schrott, *Baltimore Doctor Stings ABC Team; "20/20" Group Faces Wiretap Charges After Alleged Bogus Interview*, BALTIMORE SUN, Oct. 18, 1996, at 1A, available in LEXIS, News Library, Balsun file.

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

felony charges under a Maryland statute which prohibits taping without the consent of all parties.⁵³⁸ In December 1996, the case was dismissed for lack of evidence.⁵³⁹

V. PRIVACY PROTECTION AGAINST EAVESDROPPING AND WIRETAPPING

On the one hand, privacy is a fundamental idea. As described in Part III, privacy has value to the individual (promoting individual autonomy, mental health, creativity, respect, and emotional release) and to society (promoting a healthy democratic society). Privacy is an idea more fundamental to the individual and to society than any of the rights specifically protected under the United States Constitution. Eavesdropping statutes recognize the importance of privacy in conversations and provide an apparent bright-line test to determine which conversations are deserving of protection.⁵⁴⁰ A conversation overheard by a third party via an electronic listening enhancement device is protected, while a conversation heard by the naked ear is not protected. The statutes specify whether one-party or all-party consent is necessary for participant taping. A non-conversant is not permitted to use technology to intercept private conversations without a court order. The wiretapping statutes have succeeded in stopping widespread use of electronic surveillance devices.⁵⁴¹ Wiretapping statutes are beneficial because they have lessened the occurrence of a practice which would threaten privacy.

On the other hand, privacy is an evolving idea. It changes both because of society and because of technology. For centuries there has been eavesdropping, but there were no statutes passed that outlawed eavesdropping until fairly recently. If perceived as a problem, the eavesdropper was dealt with through social sanction. Within a small community, everyone knew everything about everyone else. If eaves-

538. *Id.*

539. Kate Shatzkin, *Wiretapping Charges Won't Be Pursued; Baltimore Doctor Said ABC News Team Taped Interview Secretly*, BALTIMORE SUN, Dec. 7, 1996, at 2B, available in LEXIS, News Library, Balsun file.

540. See Appendix A. The test is "deceptively easy" because there is no context given to gauge what is "reasonable." Is "reasonable" gauged by a theoretical version of privacy or by reality (privacy covering those conversations not intercepted)? Did police surveillance result in information? Was police surveillance likely to result in information? If "reasonable" is gauged by a theoretical version of privacy, what is privacy? "Privacy" could refer to an ideal based on longstanding tradition dating from before the emergence of technology. "Privacy" could be based on what today's "reasonable person" would consider reasonable, given the capabilities of electronic surveillance. "Privacy" could be based on what most people think should be protected as private.

541. WESTIN, *supra* note 27, at 44.

dropping information was spread, it was not as detrimental to the individual because everyone in the community had more of a context within which to judge the truthfulness and reliability of the information and the small community could judge the character of the person spreading the information. With the move to the city, conversations may be overheard because of the close proximity in which people live and work. In a large city, neighbors may pick up information but would not have the context in which to place the information.⁵⁴² As technology evolves, so does society's idea of what is acceptable and reasonable. Society seems increasingly more comfortable with participant taping; however, society accepts the fact that wiretapping or bugging without a court order is illegal, perhaps in part because it has been illegal for almost thirty years. Technology is far outstripping privacy. With participant taping, a line has to be drawn or technology will continuously alter society's idea of what is acceptable intrusion until there is no privacy left. Given natural tendencies of curiosity and surveillance, a targeted individual has no privacy.

Technology has changed the individual's actual privacy. It would be dangerous, however, to base what is legally protected as private on technology. This term, the United States Supreme Court cautioned against tying Fourth Amendment privacy to "the social norms of a given historical moment."⁵⁴³ Technology makes it relatively easy to wiretap the individual's telephone conversation and electronically eavesdrop on a close friend's conversation. If an individual is alone, even if talking on the telephone, privacy is expected. Privacy is also expected if two close friends are talking in low voices in a room with the door closed. For those who must be sure their conversation is not being overheard, Westin describes the ultimate in protection against eavesdropping.⁵⁴⁴ For top secret discussions, a "floating room" is built

542. *Id.*; Gavison, *supra* note 421, at 466.

543. *Richards v. Wisconsin*, 117 S. Ct. 1416, 1417 (1997). In *Wisconsin*, the United States Supreme Court held that the Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement when police officers are executing a search warrant in a felony drug investigation. 117 S. Ct. at 1420-21.

[C]reating exceptions to the knock-and-announce rule based on the 'culture' surrounding a general category of criminal behavior presents at least two serious concerns. . . . It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness 'is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'

Id. (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)).

544. WESTIN, *supra* note 27, at 83.

within a room.⁵⁴⁵ The floor, ceiling, and walls of the inner are free from bugs and made completely of glass so that any subsequently introduced electronic eavesdropping equipment may be easily detected.⁵⁴⁶ Most people do not have to go to the length of only conversing within a floating room; chances are that most in-person conversations behind closed doors are not overheard. However, the possibility of interception rises if the individual is conversing on the telephone, or the person with whom the individual is speaking, is using a cordless or cellular telephone.

The reason that technology is not a good basis for a legal recognition of privacy is that technology is continually diminishing the individual's actual privacy. If the legal recognition of privacy were to be based on actual privacy, one would only have privacy in a floating room. Privacy under the eavesdropping and wiretapping statutes should flow from a common expectation of what should be private. The individual's concept of privacy which should be the basis for legal protection has not changed. As discussed in Part III, privacy is important to the individual and to society because it serves numerous fundamental values.

A. *Spheres of Privacy*

If this were a perfect world and one were to visualize the area in which an individual could enjoy solitude, anonymity, and secrecy, what would the area look like? One might picture the individual inside two concentric spheres. Inside the inner sphere, the individual could enjoy solitude, the individual would be anonymous, and the individual could keep information secret. The inner sphere would be contained within a larger sphere which would provide privacy for telephone conversations. Ideally, the inner sphere would allow nothing from the outside to access the individual and the outer sphere would not allow non-participants access to telephone conversations.

Unfortunately, this is not a perfect world. Privacy must be balanced to some extent against curiosity, social control, and economic or social advantage. An introverted, reclusive individual who craves privacy may desire a much larger inner sphere than an extrovert would. It may be unrealistic to expect the privacy sphere of someone who desires a great deal of privacy to be coextensive with the legal protection recognized under wiretapping and eavesdropping statutes.

545. *Id.*

546. *Id.*

How might one visualize the privacy permitted by eavesdropping and wiretapping statutes? One might picture the individual protected by two concentric spheres of privacy delineated by eavesdropping and wiretapping statutes. The spheres would be similar in configuration but different in dimension than the concentric spheres of an ideal world. The inner sphere delineates the boundary of privacy protection for oral communications against interception by the government and by private individuals. This sphere also defines privacy against physical governmental intrusion. The larger outer sphere delimits the privacy accorded landline, cordless, and cellular telephone conversations against interception by the government and by private individuals under wiretapping statutes.

How are conversations protected within the inner sphere? Two people may be within the innermost sphere having a conversation private from any third party. For example, A and B are in an office with the door closed and C is outside the office. It is illegal for C to surreptitiously monitor the conversation by using a radio receiver to receive the conversation via a bug concealed in the room. It is also illegal for C to tape record the monitored conversation. For many individuals, the ideal inner sphere of privacy is somewhat more extensive than the privacy provided for oral conversation under the eavesdropping statutes. For example, A and B may have expected their conversation to be private and inaccessible by C; however, it is legal for C to record any part of A and B's conversation audible outside the office by the naked ear. A and B may desire their conversation to remain private even though it would be legal for C to record.

The inner sphere of privacy is perforated with numerous exceptions. With physical searches, law enforcement officers may enter a home in hot pursuit of a fleeing criminal,⁵⁴⁷ seize items in "plain view,"⁵⁴⁸ look through your garbage,⁵⁴⁹ peer in your windows,⁵⁵⁰ walk through your property,⁵⁵¹ stop you on the street,⁵⁵² have a drug dog sniff your luggage,⁵⁵³ and stop your car on the highway for the most minor traffic violation.⁵⁵⁴ As noted below, law enforcement officers may use vision

547. *Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

548. *Harris v. United States*, 390 U.S. 234 (1968).

549. *California v. Greenwood*, 486 U.S. 35 (1988).

550. *Harris*, 390 U.S. at 236. Assuming an officer is not violating one's Fourth Amendment rights by being in a particular location, the officer may observe anything "plainly visible." *Id.* This would include looking in someone's windows.

551. *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

552. *Terry v. Ohio*, 392 U.S. 1 (1968).

553. *United States v. Place*, 462 U.S. 696 (1983).

554. *Whren v. United States*, 116 S. Ct. 1769 (1996).

enhancement technology, such as flashlights and binoculars, to search for physical evidence. In contrast, there is no similar exception to the privacy protection for oral conversations. Oral conversations are protected if there is a reasonable expectation of privacy.⁵⁵⁵ Since *United States v. Katz*,⁵⁵⁶ location does not control whether the individual's privacy is protected. However certain locations, such as the home, traditionally have been associated with individual privacy. Because of this tradition, the implicit presumption is that the home is usually a source of privacy and courts have generally held that there is no expectation of privacy outside the home.⁵⁵⁷

Does it make any difference whether, when one is picturing the individual's sphere of privacy, one is imaging himself or herself, rather than another individual within the sphere? Professors Slobogin and Schumacher co-authored a 1993 law review article entitled *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society."*⁵⁵⁸ One hypothesis they tested was "that searches or seizures of one's own property or person are perceived as more intrusive than those of others."⁵⁵⁹ Survey subjects rated the intrusiveness of various search and seizure scenarios.⁵⁶⁰ In some of the scenarios, the subjects were asked to assume that they were personally involved while other scenarios involved other persons.⁵⁶¹ The subjects did perceive search and seizure scenarios in which they were personally involved, as more intrusive than search and seizure scenarios involving other persons.⁵⁶² The professors commented that "[j]udges, especially the Justices on the Supreme Court, are unlikely to have experienced any type of police intrusion, much less the type of intrusion they are asked to analyze in a particular case."⁵⁶³ The professors referred to a court's

555. *Katz v. United States*, 389 U.S. 347 (1967).

556. 389 U.S. 347 (1967).

557. For example, Florida courts have recognized an expectation of privacy in the home but not in a private business office, a back yard, a parking lot, a motel room, a truck, an informant's home, and a restaurant. Carol M. Bast, *Eavesdropping in Florida: Beware a Time-Honored but Dangerous Pastime*, 21 NOVA L. REV. 431, 449-58 (1996). Courts have consistently held that there is no expectation of privacy in the back of a patrol car. Carol M. Bast & Joseph B. Sanborn, Jr., *Not Just Any Sightseeing Tour: Surreptitious Taping in a Patrol Car*, 32 CRIM. L. BULL. 123, 127-28 (1996).

558. 42 DUKE L.J. 727 (1993).

559. *Id.* at 734.

560. *Id.* at 737.

561. *Id.* at 762-63.

562. *Id.* at 759.

563. *Id.* at 760.

tendency to view a search and seizure scenario from a third person rather than a first person perspective as a "distancing effect."⁵⁶⁴

Which conversations are protected within the outer sphere? The outer sphere protects telephone conversations. For example, if A were in New York having a telephone conversation with B in California, and neither party has consented to interception of the conversation, A is protected against C, a non-party, wiretapping the conversation anywhere between New York and California. The protection applies to any telephone conversation, whether A and B are using landline telephones, cellular telephones, or cordless telephones. The protection applies regardless of whether C may easily intercept the conversation using a scanner. However, any portion of a telephone conversation audible by the naked ear is not protected. What if A were in A's office conversing on the telephone in a loud voice and C were seated outside A's office, with C able to overhear A's end of the conversation? Under those circumstances, it would be legal for C to tape record A's end of the telephone conversation.

The protection afforded by the outer sphere is uniquely different than that provided by the inner sphere. While the inner sphere is perforated by numerous exceptions, the outer sphere is not. Wiretapping and eavesdropping statutes give protection against both state and private action and allow no exceptions. A police officer cannot legally tape a telephone conversation without either the consent of at least one of the participants or a court order. Why do wiretapping and eavesdropping statutes have no exception for state action? Perhaps one reason is the distancing effect described by Professors Slobogin and Schumacher. Legislators and judges do not fear physical intrusion, but they do fear someone bugging them.

Informant consent has pierced a gaping hole in both spheres. The United States Supreme Court has held that, without a court order, law enforcement agents may monitor and record a private conversation by using an informant fitted with a body wire.⁵⁶⁵ The Federal Act and the eavesdropping statutes of all but six states sanction unlimited monitoring and recording of private conversations where one of the participants is a law enforcement officer or police informant.⁵⁶⁶ The eavesdropping statutes of the remaining six states allow limited monitoring and recording under color of law.⁵⁶⁷

564. *Id.*

565. See *supra* notes 87-96 and accompanying text.

566. 18 U.S.C. § 2517 (1994); see Appendix C.

567. See Appendix C.

Police informants or police officers are treated much differently from private individuals under the Fourth Amendment and the eavesdropping and wiretapping statutes. To conduct a search under the Fourth Amendment, police officers must obtain a warrant based on probable cause or must have available some exception to the search warrant requirement.⁵⁶⁸ The Fourth Amendment does not restrict searches by private individuals.⁵⁶⁹ Thus, the Fourth Amendment is more restrictive of police activity than of the activity of private individuals. Eavesdropping and wiretapping statutes are inconsistent with the Fourth Amendment right against unreasonable search and seizure because the statutes place restrictions on individual activity as well as police activity. All-party consent statutes show the greatest inconsistency because they are much more restrictive of individual activity than of police activity.

How is the fit of the eavesdropping statutes reflective of the concept of privacy? The Federal Act and statutes of many states protect oral communications if the speaker has a reasonable expectation of privacy.⁵⁷⁰ The test seems to be easy to apply but may not fit a particular individual's definition of privacy. Loss of privacy is voluntary when done by the privacy holder. It is involuntary when done by others. The ideal is an inner sphere with no perforations. However, the ideal of a privacy sphere containing the individual and permitting no access from outside must be tempered by reality. Assuming a risk analysis, the one who has the information is in the best position to safeguard it. If one chooses unwisely the manner, location, or time of disclosure, one should not have a legal remedy even if one feels violated. Consent is an "absolute defense" to invasion of privacy, but the invasion may not exceed the scope of the consent.⁵⁷¹ In other words, the privacy holder should anticipate the expected consequences of the holder's actions.⁵⁷² This is true at least where one speaks in a loud enough voice so that a third party can overhear the conversation without the aid of any electronic interception device. Is this really true where one is the target of one with access to sophisticated equipment?

568. *Illinois v. Gates*, 462 U.S. 213 (1983).

569. Of course, private individuals may be subject to civil and criminal liability for their search activities.

570. See Appendix A.

571. Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51, 63 (1995). Research failed to discover any case law concerning conditional consent and wiretapping and eavesdropping statutes. However, it seems logical to impose liability for violating any conditions under which consent to taping was given just as conditional consent is honored in relation to the common law right to privacy.

572. *Id.*

How large should the contours of the inner and outer spheres be to guarantee privacy for oral, non-telephonic conversations? Conceptually, doesn't the individual model privacy on an eavesdropping model? This author suggests that privacy for oral conversations should be based on the eavesdropping model. Thus, conversations should be private if they cannot be overheard by the naked ear. The eavesdropping model is already reflected in eavesdropping statutes. Under the eavesdropping statutes, it is illegal for C, a non-participant, to record A and B's conversation unless C can hear the conversation with the naked ear. The anomaly between audio surveillance permitted by statute and constitutionally permissible search and seizure cuts in favor of the statutory restrictions on audio surveillance. Except for the all party consent requirement discussed below, the additional protection afforded oral conversations under eavesdropping statutes should be preserved; however, greater restriction should be placed on participant taping under color of law.

Where a crime is being planned or committed, are the police justified in using informants? Have we stepped over the boundary line and become a coercive society where the informant forms a "close" relationship with the suspect and gains the suspect's trust? Use of informants presents the following advantages. Taping by the informant is not inherently more unfair than the informant testifying to the information learned and the tape is more accurate than the testimony. Taping assures that the informant is not double crossing the police. The informant may be wearing a concealed microphone with the conversation simultaneously being transmitted to law enforcement officers. If so, the law enforcement officers may step in, if needed, to safeguard the informant's safety.

The arguments against allowing informant taping parallel the arguments supporting two party consent. Allowing an informant to tape fosters mistrust of government and the party whose conversation has been intercepted feels "violated." The police may pressure potential informants into collecting information. Informants may actively deceive or tempt rather than simply record information. The disclosure of the informant's role leads to a loss of trust. The individual who has been secretly taped feels violated, deceived. Where the informant intends from the beginning to entrap the individual, it is worse than a former friend turned enemy reporting on a conversation. No finding of probable cause or even reasonable suspicion is required under the Federal Act or in most states prior to informant taping. Informant taping promotes conviction of dangerous felons, but also allows breach of the private individual's privacy. Informant taping

allows law enforcement to negotiate around Fourth Amendment hurdles and obtain the same information. The United States Supreme Court informant case, *United States v. White*,⁵⁷³ was a plurality, rather than a majority, decision and the use of informants to tape conversations has been severely criticized.

Society would love to make inroads into the innermost sphere of privacy to collect evidence of criminal behavior. If one were to use a result analysis, one would conclude that the use of informants is justified where a crime is detected. However, the individual is harmed where law enforcement targeting through use of an informant leads to the individual's loss of privacy, especially where the individual is innocent and the informant fails to obtain evidence of a crime. Use of police informants places safety-valve privacy under attack. The attack may be severe, especially if the use of a police informant is directed to obtaining a criminal conviction. Most eavesdropping and wiretapping statutes allow police officers or police informants to go on fishing expeditions and tape conversations without any prior evidence of criminal activity. Innocent non-conformists or individuals who are members of unpopular organizations might be selected for surveillance.

Surreptitious informant interception and recording of conversations is offensive, though pervasive. As under the Fourth Amendment, a greater restriction should be placed on participant electronic surveillance under color of law than on private activity. A greater restriction is needed because of the immense power of the government, the potential for abuse of this power, and the attendant criminal penalties. Eavesdropping and wiretapping statutes should mirror the Fourth Amendment by requiring law enforcement to demonstrate a certain level of proof of criminal activity before allowing participant taping under color of law. Ideally, eavesdropping and wiretapping statutes should be amended to require a court order based on probable cause prior to participant taping. The state statutes of Illinois, Maryland, New Hampshire, Pennsylvania, Washington, and Oregon contain examples of other, less desirable, options.⁵⁷⁴ These options include re-

573. 401 U.S. 745 (1971); *see supra* notes 87-96 and accompanying text.

574. *See* Appendix C. As explained in Part II, a dozen states require all-party consent to tape a private conversation. Yet, of these dozen states, eight allow surreptitious taping upon the consent of a police informant or officer participant. *See* Appendix B. The remaining five all-party consent states (Illinois, Maryland, New Hampshire, Pennsylvania, and Washington) place certain limits on surreptitious taping under color of state law. *See* Appendix C. Illinois restricts such taping to certain types of crimes and requires prior notification of the state attorney. *See* Appendix C. The resulting tape is inadmissible except where a participant suffers great bodily injury or where the tape is used to impeach a witness. *See* Appendix C. Maryland allows such

stricting taping under color of law to certain types of crimes and prior authorization by the state attorney, attorney general, or a supervisory law enforcement officer.⁵⁷⁵

How large should the contours of the outer sphere be to guarantee privacy for telephone conversations? One inconsistency in the Federal Act was eliminated in 1994.⁵⁷⁶ Now landline, cellular, and cordless telephone conversations are protected against interception under the Federal Act.⁵⁷⁷ Because the Federal Act preempts state wiretapping statutes, any inconsistently worded state statutes are effectively amended to provide at least the same level of protection.⁵⁷⁸ Prior to 1994, the Federal Act afforded protection to landline and cellular telephones but did not protect cordless telephones.⁵⁷⁹ Society accepts that wiretapping landline telephones and bugging oral conversations without court order are illegal; however, the average citizen does not perceive that using a scanner to listen to the neighbor's cordless telephone conversation is wrong. Factors leading to this perception are the wide availability of scanners and the average citizen's personal experience of inadvertently picking up cordless or cellular telephone conversations through a baby monitor or on a cordless telephone.⁵⁸⁰ Society's recognition of the illegality of wiretapping landline telephones and bugging of oral conversations is due in part to the Federal Act and its predecessors (the 1968 Act and the 1986 Act) which have made most electronic surveillance devices illegal. Scanners used to intercept cellular and cordless telephone conversations are excepted from this ban.⁵⁸¹ Interception by scanner is common

taping if related to certain serious crimes. See Appendix C. New Hampshire requires a prior determination by the attorney general's office of reasonable suspicion of certain crimes. See Appendix C. Pennsylvania allows such taping in a hostage situation or upon prior approval of the state attorney general's office. See Appendix C. Washington limits such taping to illegal drug offenses and requires either reasonable suspicion of danger to the consenting participant or prior authorization by a law enforcement officer in a supervisory capacity. See Appendix C. In addition, Oregon, a one party consent state, limits taping under color of law. See Appendix C. Oregon allows such taping if related to a felony or if exigency would not allow the officer to obtain a prior court order. See Appendix C. For the text of applicable portions of the state statutes, see Appendix C.

575. See Appendix C.

576. 18 U.S.C. §2510 (4)(b)(i), (ii) (1994).

577. *Id.*

578. See, e.g., *United States v. Van Horn*, 579 F. Supp. 804 (D.D.C. 1984).

579. 18 U.S.C. § 2510 (4)(b)(i), (ii).

580. The author has discussed the interception of cordless telephone conversations with undergraduate students in legal writing classes. In the spring of 1997, at least two students out of a class of 25 said that they had inadvertently picked up cordless or cellular telephone conversations while using a cordless telephone. The students expressed surprise that intercepting cordless and cellular telephone conversations is illegal.

581. See *supra* note 510.

place, uses no expensive equipment, is not time consuming, and requires no special knowledge. The legal fiction is that one is charged with knowledge of criminal statutes. However, there is a problem with making criminal what is not perceived as a criminal act by the average citizen. This becomes even more a problem as the gap widens between criminal statutes and the average citizen's perception of a "wrong."

Binoculars, on one hand, and scanners, on the other hand, are similar. They are similar in that binoculars and scanners are readily available, are easily and commonly used, are legal, and are used to enhance the senses. Binoculars and scanners have innocent and not so innocent uses. Binoculars are used to see things not otherwise visible. Binoculars may be used to identify birds while on a nature hike or to pick out the visual details at a sporting event, the opera, or a concert. On the other hand, binoculars may be used to look inside someone's home through half drawn curtains. Similarly, scanner enthusiasts enjoy monitoring police and fire department radio transmissions to learn of police and fire department activities. On the other hand, scanners are capable of easily monitoring the neighborhood's cordless telephone conversations.

Surreptitious interception and recording of cordless telephone conversations is offensive, though pervasive. While for many years the interception of cordless telephone conversations was legal, the Federal Act suddenly provides protection far in excess of the technological protection included with the garden-variety cordless telephone. A cordless or cellular telephone user may believe that the telephone conversation will not be intercepted or, even if some telephone calls are, this one will not be. Under the eavesdropping model, scanner interception of cordless and cellular telephone conversations should be illegal. However, criminal penalties should only apply to acts that are clearly wrong. Unless scanners are made illegal, perhaps there should only be injunctive relief available to protect cordless and cellular telephone calls which are not scrambled, encrypted, or similarly protected.

If there is no objective reasonable expectation of privacy, one who intercepts a cordless or cellular telephone conversation should not be subject to criminal prosecution and civil damages. The Federal Act should be amended to give the same level of protection to cordless and cellular telephones as that provided oral communications. Cordless and cellular telephone communications should not have legal protection where the user has taken no affirmative steps to ensure privacy. Steps to ensure privacy might include using a digital, rather

than an analog, cordless or cellular telephone, or one which scrambles or encrypts transmitted conversations. Legislation might provide safe harbors of protection for cellular and cordless telephone conversations which are scrambled, encrypted, or similarly protected, with attendant criminal and civil liability for their interception.

B. One-Party Versus All-Party Consent

Should participant tape recording be equated to participant listening or third-party eavesdropping? It is difficult to distinguish between appropriate and inappropriate participant recording. Although electronic surveillance is widespread, it does not occur as often as one might think, judging by the frequency of bugging in current fiction and movies.⁵⁸² Two-party consent provides unwarranted protection. Participant taping should be allowed, especially where the tape captures evidence of substantial harm to one of the participants, as in *Inciarrano* and *LaSane*. Does the *Inciarrano/LaSane*-type situation happen very often? How could an exception to the requirement of all-party consent be drawn up to avoid the horrible case presented by *Inciarrano*? Does the drafted exception have the potential of being abused by the prosecution and will it encourage eavesdropping?

*Inciarrano*⁵⁸³ illustrates the internal inconsistencies in all-party consent statutes. Florida requires all-party consent for interception by private parties and provides no exception for a murder victim to tape relevant conversations.⁵⁸⁴ The issue in *Inciarrano* was whether illegally intercepted tapes were admissible.⁵⁸⁵ Florida took the result oriented approach and allowed the tape to be admitted on the judicially creative ground that *Inciarrano* had no expectation of privacy.⁵⁸⁶ *In-*

582. See *supra* notes 420, 505. In the 1994 movie *DISCLOSURE*, the female boss sexually harasses the male employee. *DISCLOSURE* (Warner Bros. 1994). When he spurns her, she sues him, claiming sexual harassment, and he countersues claiming the same thing. *Id.* A crucial piece of evidence is a tape of a conversation between the boss and the employee. *Id.* The conversation was accidentally recorded on someone's answering machine when the employee hit the telephone redial button and the boss interrupted him before he could hang up the handset. *Id.* The recording was made during an encounter in which the female boss blatantly tried to seduce the male employee. *Id.* This is the only piece of evidence against the boss. *Id.*

The 1996 movie, *THE JUROR*, centers around the prosecution of a Mafia boss. *THE JUROR* (Columbia Pictures 1996). A mobster threatens to harm a female juror's son if she does not vote not guilty and swing the jury in the same direction. *Id.* The mobster gives her a pendant to wear. *Id.* The pendant contains a bug which transmits the conversations from the jury room to the mob. *Id.*

583. 447 So. 2d 386 (Dist. Ct. App. Fla. 1984).

584. FLA. STAT. ANN. §934.01 (1995).

585. *Inciarrano v. State*, 447 So. 2d 386, 387 (Fla. Dist. Ct. App. 1984).

586. *Id.* at 389-90.

ciarrano was truly a hard case because the tape was the only evidence against *Inciarrano*.⁵⁸⁷

Illinois statutes contain carefully worded exceptions to all-party consent.⁵⁸⁸ The Illinois statutes allow informant or law enforcement officer participant taping upon prior notification to the appropriate county state attorney's office.⁵⁸⁹ The resulting tape is inadmissible unless the informant or officer is physically harmed or the tape can be used for direct impeachment of a witness. A private-party participant is allowed to record if the participant has reasonable suspicion that another party is committing a crime against the interceptor, or the interceptor's immediate household and evidence of the crime may be gained by taping.⁵⁹⁰ *Inciarrano* would have been an easy case if the Florida statutes contained similar exceptions.

The reasons for allowing taping on the consent of one private participant far outweigh the reasons requiring all participants to consent. The principle arguments supporting two-party consent are that surreptitious taping will have a chilling effect on conversation and that it is unfair. Those who focus on the chilling effect emphasize that surreptitious taping will make people feel that they cannot say what they really mean, let off steam, complain, tell jokes, or criticize without running afoul of the "thought police." "Big brother" will be monitoring what you say and you will be punished if your speech is not politically correct. Another facet of the argument is that taping without the other person's consent is ethically and morally wrong. There must be some devious purpose if one has to tape without receiving the other party's consent. Why not just ask for consent if you want to gather information or have the taping serve as a memory aid? Discovering later that the conversation has been taped will be regarded as a betrayal of confidence.

The reasons for allowing one participant to tape are many. The many legitimate reasons for taping include aiding one's memory, having an accurate record, gathering information of a crime or tort, and defending oneself. The reasons for a law enforcement officer or informant to tape are to gather evidence and to ensure physical safety. After all, how else could you protect yourself against charges such as sexual harassment or employment discrimination? How can law enforcement otherwise gather evidence of certain crimes? It is irrational

587. *Id.* at 388.

588. *See* Appendix A.

589. *Id.*

590. *See* Appendix C.

to allow someone to testify about a conversation,⁵⁹¹ but to not allow a tape recording of the same conversation to be admitted into evidence. A tape recording is much more accurate than someone testifying as to that person's recollection of what happened and captures statements in context. A tape might be vital where the testimony of witnesses is so conflicting that you know someone is lying. What would have happened if Clarence Thomas or Anita Hill had taped their conversations? A damaging tape would have kept him off the United States Supreme Court. If he had taped a particular conversation that she testified to in detail, he could use the tape to impeach her credibility.

The statute requiring two-party consent follows someone's perceived idea of morality and sweeps too broadly, potentially capturing public-minded citizens within its grasp. Wiretapping and eavesdropping statutes are the only "search and seizure" proscription against private action. Otherwise state action has to be involved to have evidence excluded. Criminals like Inciarrano are the ones to benefit if the plain language of all-party consent statutes is followed. Inciarrano could have sued for civil damages and filed felony charges against Phillips, had Phillips survived. Public figures and those involved in criminal activity, like Inciarrano, have the right to believe that a confidence may be betrayed. They are the ones who will be more careful anyway and will perhaps guard themselves against surreptitious interception. Otherwise, if there is nothing illegal going on, the likelihood of someone taping a private conversation is small. It is usually too cumbersome to set up a taping and it is too difficult to infiltrate a group and gain its confidence. The risk that someone will tape a conversation is approximately the same or less than the risk that the party will divulge the contents of a confidential conversation.

Some people foolishly trust the other party to the conversation not to record the conversation and have the unpleasant surprise later of learning that the conversation was recorded. Other people, who may or may not have something to hide, are shrewd enough to know that things that are not said cannot be taped. In 1990, a daughter testified from her repressed memory that years before she had seen her father murder her best friend, then eight years old.⁵⁹² The father was tried and convicted.⁵⁹³ Before trial, the daughter went to visit the father in prison.⁵⁹⁴ In the prison visitation room, the daughter asked the father

591. See, e.g., FED. R. EVID. 803-04 (allowing over 24 exceptions to the exclusion of hearsay evidence).

592. *Franklin v. Duncan*, 884 F. Supp. 1435 (N.D. Cal. 1995), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

593. *Id.* at 1446-47.

594. *Id.* at 1451.

to admit he had murdered her friend.⁵⁹⁵ The father pointed to the sign on the wall, "Conversations May Be Monitored" and refused to answer.⁵⁹⁶ At trial, the daughter was allowed to testify about her father's refusal to answer.⁵⁹⁷ On appeal, a federal judge ruled that the conviction could not stand.⁵⁹⁸ One of the errors ruled reversible by the judge was the admittance into evidence of comments on the father's refusal to answer the daughter's question.⁵⁹⁹

Does the all-party consent requirement coincide with the public's expectations? Many people in all-party consent states may not realize the state has such a requirement. Inadvertently, they may thus subject themselves to being prosecuted and to being sued civilly. For most other crimes with similarly severe punishment, there is at least a feeling that the action is wrong. In contrast, participant taping of a conversation may be entirely innocent. People's idea of morality is changing. Surreptitious taping is not perceived by many to be wrong. This is the electronic age. Like Inciarrano's victim, most people would not imagine that clicking on a tape recorder without asking the other person for consent would be illegal. For an action that many people do not realize is illegal, the punishment is severe. Disclosure is also illegal and carries the same penalties.

Why do states need interception of communications to deal with criminally and civilly? Most "bad" interception is already dealt with in other criminal statutes or there is a tort action available. For example, someone can be charged with blackmail or be sued for invasion of privacy. Because it is very difficult to draw the line between legitimate and illegitimate reasons for taping, it would be almost impossible to draft an appropriate statute.

The two-party consent requirement is irrational and state statutes should be amended to eliminate it. If not eliminated, two-party consent should be subject to a carefully worded exception which would allow a crime victim to tape the perpetrator's incriminating statements. The wording of the Illinois statute could be considered as a model.⁶⁰⁰ Another amendment to the state statutes should decriminalize surreptitious taping so long as one party consents.

595. Tamar Lewin, *Judge Upsets Murder Conviction Focused on 'Repressed Memory'*, N.Y. TIMES, Apr. 5, 1995, at A18.

596. *Franklin*, 884 F. Supp. at 1445.

597. *Id.*

598. *Id.* at 1439.

599. *Id.* at 1446-47.

600. See Appendix C.

Many all-party consent jurisdictions allow interception of oral and wire communications with the consent of a police officer participant or an informant, at least to a limited extent. In most all-party consent states, a private party participant must obtain consent of all participants before taping, whereas a police officer or police informant participant may tape with impunity. The greater restriction on private party participant taping than taping under color of law is irrational and should be eliminated.

V. CONCLUSION

The constitutional provisions and statutes creating this crazy-quilt pattern of privacy are inconsistent and irrational. There is less protection against physical intrusion by law enforcement than against audio intrusion by law enforcement or by private individuals. Law enforcement would not be allowed to search a home without a warrant, but it could have an informant gather the same information. Eavesdropping and wiretapping statutes impose severe civil and criminal penalties for eavesdropping; no similar penalties apply to physical intrusion. A participant may repeat but may not tape in all-party consent states, even though a tape is more accurate. Generally, law enforcement agencies are treated more favorably than private individuals. Law enforcement agencies may obtain court orders enabling them to intercept conversations without the consent of any party; private individuals may not. In a number of all-party consent states, private individuals are prohibited from taping, but an informant participant may tape. Court orders are not available for crimes not listed under the eavesdropping and wiretapping statutes, but informants may be used; law enforcement can obtain a court order to intercept a conversation with no party consenting. State prohibitions against electronic surveillance without all-party consent can be avoided by joint federal/state investigation. Cordless and cellular telephone calls are protected even though they are relatively easy to intercept with a scanner.⁶⁰¹ Eavesdropping statutes generally apply to audio, but not video interception. Thus, in many jurisdictions, a private individual may videotape a sexual encounter so long as the audio is turned off, but they may not audio tape the encounter.⁶⁰²

601. Carol M. Bast, *Cordless Telephones: If You Can't Say Something Nice, You Might Want to Send a Letter*, 32 CRIM. L. BULL. 403, 403 (1996).

602. For example, in Miami Shores, someone videotaped two police officers, one married, "hugging and kissing." *Too Close for Comfort—Kissing Cops Caught in the Act*, ORLANDO SENTINEL, Jan. 18, 1997, at D-3. The videotape became public in January 1997. *Id.*

The incoherence between constitutionally permissible searches, on one hand, and limited electronic surveillance permitted by statute, on the other hand, is one inconsistency to which the title of this Article refers.⁶⁰³ The Fourth Amendment to the United States Constitution guarantees against governmental physical intrusion, though not against physical intrusion by a private individual;⁶⁰⁴ federal and state statutes and state constitutional provisions protect against private or governmental interception of oral and wire communications.

The difference between the interception of conversations and obtaining other information under the Fourth Amendment is the role of technology. Use of technology to intercept conversations is largely prohibited, while the use of technology is permitted to obtain other information. For example, binoculars and flashlights are simple constitutionally permitted devices which enhance one's vision. Binoculars allow someone to spy on another individual at a distance and flashlights allow observation of people and objects not otherwise visible at night. Other constitutionally permitted devices include helicopters, airplanes, pen registers, location beepers, and aerial photographic cameras. The United States Supreme Court has held that, without a search warrant, law enforcement agents may fly a helicopter or airplane over your home,⁶⁰⁵ use a pen register to monitor the telephone numbers you have called,⁶⁰⁶ monitor a beeper placed in your car,⁶⁰⁷ and photograph your business using high powered aerial photography.⁶⁰⁸ In contrast, the Federal Act does not permit the use of induction coils, parabolic microphones, bugs, and ultrasonic wave devices to intercept private conversations.

Wiretapping and eavesdropping statutes place a higher value on privacy than obtaining evidence. The statutes promote fairness because there are no exceptions, as under the Fourth Amendment, except for

603. See Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 20 (1989); Kent Greenfield, Comment, *Cameras in Teddy Bears: Electronic Visual Surveillance and the Fourth Amendment*, 58 U. CHI. L. REV. 1045, 1046 (1991).

In addition, internal inconsistencies appear in many state statutes. Connecticut requires all-party consent to intercept a "private telephonic conversation" but allows interception of an oral communication upon one party consent. See Appendix C. In contrast, Oregon requires all-party consent for an oral conversation but allows interception of a telephone conversation with one-party consent. See Appendix C. The North Carolina statute prohibits wiretapping but has no similar proscription for oral communication. See Appendix C.

604. U.S. CONST. amend. IV.

605. *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

606. *Smith v. Maryland*, 442 U.S. 735 (1979).

607. *United States v. Knotts*, 460 U.S. 276 (1983).

608. *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986).

the use of informants. Perhaps the line drawn in Fourth Amendment search and seizure cases should ideally coincide with the one drawn in the eavesdropping statutes. Case law interpretation of the Fourth Amendment will probably not change because of the distancing effect, and the fact that the typical case in which the motion to suppress is raised is one where the defendant is guilty of a serious crime. Eavesdropping statutes draw a more conservative line. Recent search and seizure cases seem to sanction behavior which is very close to crossing the line into engaging in practices abhorrent to a free society. Except for all-party consent, the more favorable protection against electronic surveillance provided under the eavesdropping statutes should be preserved.

Another inconsistency is also irrational. This inconsistency is the requirement of all-party consent in a dozen states and allowance of electronic surveillance by one private party participant in the balance of the states. The consent required to tape varies from jurisdiction to jurisdiction. Traveling on the Interstate from Maine to Florida, one would start in Maine (one-party consent), and travel through New Hampshire and Massachusetts (two-party consent), Connecticut (one-party consent for oral conversation and two-party consent for telephone conversation), Rhode Island, New York, and New Jersey (one-party consent), Delaware and Maryland (two-party consent), and Virginia, North Carolina, and South Carolina (one-party consent), to Florida (two-party consent). Thus, from Maine to Florida there are at least six major changes in eavesdropping law, which show how confusing and complicated it is to keep eavesdropping requirements straight. The present statutory protection against third-party monitoring and taping should be preserved; however, the all-party consent requirement in a dozen states should be eliminated.

A final inconsistency is also irrational. This inconsistency is the use of informants to conduct electronic surveillance without a threshold level of proof as is required under the Fourth Amendment. In most all-party consent states, the private party who tapes a conversation is liable to be punished much more severely than a police officer or an informant. A police officer is allowed to tape a conversation and to have the conversation admitted into evidence if the police officer is a party to the conversation or an informant-participant has consented to the taping. In contrast, a private party is prohibited from taping without all participants' consent, and a conversation taped with only one party consent is inadmissible. This, in effect, sanctions the entrance of big brother into the conversation, but allows someone taping a conversation for innocent reasons to be prosecuted for the taping. The

most frequently given reasons for allowing law enforcement body wires is officer or informant safety and obtaining evidence. Safety and gathering evidence are not unique to the police officer or informant. An additional reason for informant recording is to verify the informant's trustworthiness. Monitoring and taping through the use of police officers and informants should not be allowed except upon some type of prior review. The threshold should ideally be a court order. If that threshold is unattainable, prior notification or authorization would provide some protection.

APPENDIX A
STATE CONSTITUTIONAL PROVISIONS AND STATE
STATUTES

Alabama

ALA. CONST. art. 1, § 5. Unreasonable search and seizure; search warrants.

ALA. CODE §§ 13A-11-30 to 13A-11-37 (1996).

Alaska

ALASKA CONST. art. I, § 22. Right of Privacy: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." *Id.*

ALASKA STAT. § 42.20.300-390 (Michie 1996).

Arizona

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." *Id.*

ARIZ. REV. STAT. §§ 13-3004 to 13-3017 (1996).

Arkansas

ARK. CONST. art. 2, § 15. Unreasonable search and seizures.

ARK. CODE ANN. §§ 5-60-120, 23-17-107 (Michie 1995).

California

CAL. CONST. art. 1, § 1. Inalienable rights: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*

CAL. PENAL CODE §§ 630-637.5 (West 1995).

Colorado

COLO. CONST. art. II, § 7. Security of person and property—searches, seizures, warrants.

COLO. REV. STAT. §§ 16-15-101 to 16-15-104, 18-9-301 to 18-9-305 (1996).

Connecticut

CONN. CONST. art. 1, § 7. Security from searches and seizures.
CONN. GEN. STAT. §§ 52-184a, 52-570d, 53a-187 to 53a-189, 54-41a to 54-41t (1995).

Delaware

DEL. CONST. art. I, § 6. Searches and seizures.
DEL. CODE ANN. tit. 11, §§ 1335, 1336 (1996).

District of Columbia

D.C. CODE ANN. §§ 23-541 to 23-556 (1996).

Florida

FLA. CONST. art. I, § 12. Searches and Seizures:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United State Supreme Court construing the 4th Amendment to the United States Constitution.

Id.

FLA. CONST. art. I, § 23. Right of 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. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Id.*

FLA. STAT. ch. 934.01 to 934.10 (1995).

Georgia

GA. CONST. art. 1, § 1, ¶ 13. Searches, seizures, and warrants.
GA. CODE ANN. §§ 16-11-60 to 16-11-69 (Michie 1996).

Hawaii

HAW. CONST. art. I, § 6. Right to Privacy: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." *Id.*

HAW. CONST. art. I, § 7. Searches, Seizures and Invasion Of Privacy:

The right of the people be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy 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 or the communications sought to be intercepted.

Id.

HAW. REV. STAT. §§ 711-1111, 803-41 to 803-49 (1996).

Idaho

IDAHO CONST. art. 1, § 17. Unreasonable searches and seizures prohibited.

IDAHO CODE §§ 18-6701 to 18-6709 (1996).

Illinois

ILL. CONST. art. 1, § 6. Searches, Seizures, Privacy and Interceptions:

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Id.

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." *Id.*

720 ILL. COMP. STAT. §§ 5/14-1 to 5/14-9, 725 ILL. COMP. STAT. §§ 5/108A, 5/108B (West 1996).

Indiana

IND. CONST. art. 1, § 11. Unreasonable search or seizure.

IND. CODE §§ 35-33.5-4-1. to 35-33.5-5-6. (1996).

Iowa

IOWA CONST. art. 1, § 8. Personal security—search and seizures.

IOWA CODE ANN. §§ 808B.1.-808B.8. (West 1995).

Kansas

KAN. CONST. Bill of Rights § 15. Search and seizure.

KAN. STAT. ANN. §§ 21-4001 to 21-4002, 22-2514 to 22-2519 (1995).

Kentucky

KY. CONST. Bill of Rights § 10. Security from search and seizure—
Conditions of issuance of warrant.

KY. REV. STAT. ANN. §§ 526.010-526.080 (Banks-Baldwin 1996).

Louisiana

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. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Id.

LA. REV. STAT. ANN. §§ 15:1302 to 15:1312 (West 1995).

Maine

ME. CONST. art. 1, § 5. Unreasonable searches prohibited.

ME. REV. STAT. ANN. tit. 15, §§ 709-13, tit. 17-A, § 511 (West 1996).

Maryland

MD. CONST. Declaration of Rights art. 26. Warrants.

MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to 10-414 (1996).

Massachusetts

MASS. CONST. pt. 1, art. xiv. Freedom from unreasonable searches and seizures; warrants.

MASS. GEN. LAWS ch. 272, § 99 (1996).

Michigan

MICH. CONST. art. 1, § 11. Searches and seizures.

MICH. COMP. LAWS §§ 750.539a-750.539i (1996).

Minnesota

MINN. CONST. art. I, § 10. Unreasonable searches and seizures prohibited.

MINN. STAT. §§ 626A.01-626A.25 (1996).

Mississippi

MISS. CONST. art. 3, § 23.

MISS. CODE ANN. §§ 41-29-501 to 41-29-537 (1996).

Missouri

MO. CONST. art. 1, § 15. Unreasonable search and seizure prohibited—contents and basis of warrants.

MO. REV. STAT. §§ 542.400-542.422 (1996).

Montana

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.” *Id.*

MONT. CODE ANN. § 45-8-213 (1995).

Nebraska

NEB. CONST. art. I, § 7. Search and seizure.

NEB. REV. STAT. §§ 86-701 to 86-707.02 (1995).

Nevada

NEV. CONST. art. 1, § 18. Unreasonable seizure and search; issuance of warrants.

NEV. REV. STAT. §§ 179.410 to 179.525, 200.610 to 200.690, 209.419, 704.195 (1995).

New Hampshire

N.H. CONST. pt. 1, art. 19. Searches and Seizures Regulated.

N.H. REV. STAT. ANN. §§ 570-A:1 to 570-A:11, 644:9 (1995).

New Jersey

N.J. CONST. art. 1, ¶ 7. Freedom from unreasonable searches and seizures; warrant.

N.J. REV. STAT. ANN. §§ 2A:156A-1 to 2A:156A-26 (West 1996).

New Mexico

N.M. CONST. art. II, § 10. Searches and seizures.

N.M. STAT. ANN. §§ 30-12-1 to 30-12-11 (Michie 1996).

New York

N.Y. CONST. art. 1, § 12. Securing against unreasonable searches, seizures and interceptions:

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.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Id.

N.Y. CRIM. PROC. § 710.10 (McKinney 1996); N.Y. C.P.L.R. 4506 (McKinney 1996); N.Y. PENAL LAW §§ 250.00-250.35 (McKinney 1996).

North Carolina

N.C. CONST. art. I, § 20. General warrants.

N.C. GEN. STAT. § 14-155 (1996).

North Dakota

N.D. CONST. art. I, § 8.

N.D. CENT. CODE §§ 12.1-15-02, 29-29.2-01 to 29-29.2-05 (1995).

Ohio

OHIO CONST. art. I, § 14. Search warrants and general warrants.

OHIO REV. CODE ANN. §§ 2933.51-2933.66 (Anderson 1996).

Oklahoma

OKLA. CONST. art. 2, § 30. Unreasonable searches or seizures—Warrants, issuance of.

OKLA. STAT. tit. 13, §§ 176.1-176.14 (1996).

Oregon

OR. CONST. art. I, § 9. Unreasonable searches and seizures.
OR. REV. STAT. §§ 133.721-133.739, 165.535-165.549 (1995).

Pennsylvania

PA. CONST. art. 1, § 8. Security from searches and seizures.
18 PA. CONS. STAT. §§ 5704-5728 (1996).

Rhode Island

R.I. CONST. art. 1, § 6. Search and seizure.
R.I. GEN. LAWS §§ 11-35-21 to 11-35-25, 12-5.1-1 to 12-5.1-16 (1995).

South Carolina

S.C. CONST. art. I, § 10. Searches 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, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

Id.

S.C. CODE ANN. §§ 16-17-470 to 16-17-480 (Law. Co-op. 1995).

South Dakota

S.D. CONST. art. VI, § 11. Search and seizure.
S.D. CODIFIED LAWS §§ 23A-35A-1 to 23A-35A-21 (Michie 1996).

Tennessee

TENN. CONST. art. I, § 7. Unreasonable searches and seizures—General warrants.
TENN. CODE ANN. §§ 39-13-601 to 39-13-604 (1996).

Texas

TEX. CONST. art. 1, § 9. Searches and seizures.
TEX. PENAL CODE ANN. § 16.02 (West 1995); TEX. CRIM. CODE ANN. art. 18.20 (West 1995).

Utah

UTAH CONST. art. I, § 14. Unreasonable searches forbidden—Issuance of warrant.

UTAH CODE ANN. §§ 76-9-401 to 76-9-406, 77-23a-1 to 77-23a-12 (1996).

Vermont

VT. CONST., ch. I, art. 11. Search and seizure regulated.
No statute.

Virginia

VA. CONST. art. I, § 10. General warrants of search or seizure prohibited.

VA. CODE ANN. §§ 19.2-61 to 19.2-70 (Michie 1996).

Washington

WASH. CONST. art. 1, § 7. Invasion of Private Affairs or Home Prohibited: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." *Id.*

WASH. REV. CODE §§ 9.73.030-9.73.250 (1996).

West Virginia

W. VA. CONST. art. 3, § 6. Unreasonable Searches and Seizures Prohibited.

W. VA. CODE §§ 62-1D-1 to 62-1D-16 (1996).

Wisconsin

WIS. CONST. art. 1, § 11. Searches and seizures.

WIS. STAT. §§ 968.27-968.33 (1995).

Wyoming

WYO. CONST. art. 1, § 4. Security against search and seizure.

WYO. STAT. ANN. §§ 7-3-601 to 7-3-611 (Michie 1996).

APPENDIX B

Federal Act	Const. priv. prov.	Eavesdrop. stat.	Two-party consent	Color of law-one party	One-party consent	Case law excep.	Word. sim. to fed. act	Crime	Civil action	Statutory damages	Punitive dam.	Atty fees	Costs	Injunc.	Declar.
Federal Act		X		X	X		Federal Act	fine/5 years	X	\$100 to \$10,000	X	X	X	X	X
Alabama		X		X	X			class A mis/ class B mis							
Alaska	X, see <i>Glass</i>	X		X, but see <i>Glass</i>	X			class A mis-demeanor							
Arizona	X	X		X	X		loosely	class 5 felony							
Arkansas		X		X	X			class A mis-demeanor							
California	X	X	X	X	if crime			\$250, 1yr/ 2nd off \$10,000	X	\$100 - \$1,000/ \$5,000, 3x	X	X	X	X	
Colorado		X		X	X		those included	class 6 felony							
Connecticut		X	telephonic conver.	X	X			class D felony		\$100 to \$1,000	X	X	X		
Delaware		X	X	X	X		partially parallels	\$10,000/5 years	X	\$100 to \$1,000	X	X	X	X	X
District of Columbia		X		X	X		X	\$10,000/5 years	X	\$100 to \$1,000	X	X	X		
Florida	X	X	X	X	X		X	3rd degree felony	X	\$100 to \$1,000	X	X	X	X	X
Georgia		X		X	X			felony (1-5)/ \$10,000 fine							
Hawaii	X	X		X	X		X	class C felony	X	\$100 to \$10,000	X	X	X	X	X
Idaho		X		X	X		X	5 years, \$5,000 fine	X	\$100 to \$1,000	X	X	X		
Illinois	X	X	X	limited				class 4 fel/ 2nd off class 3 felony	X		X			X	

APPENDIX B (con't.)

	Const. priv. prov.	Eaves-drop. stat.	Two-party consent	Color of law-one party	One-party consent	Case law excep.	Word. sim. to fed. act some similarity	Crime	Civil action	Statutory damages	Punitive dam.	Atty fees	Costs	Injunc.	Declar.
Indiana		X		X	X		some similarity	class C felony	X	\$100 to \$1,000	X	X	X		
Iowa		X		X	X		X	class D felony	X	\$100 to \$1,000	X	X	X	X	
Kansas		X		X	X			class A nonperson misde-meanor	X	\$100 to \$1,000	X	X	X		
Kentucky		X		X	X			D felony intercept A. misdem.-divulge							
Louisiana	X	X		X	X		X	\$10,000, 2 yr prison, 10 labor	X	\$100 to \$1,000	X	X	X		
Maine		X		X	X			class C crime	X	\$100	X	X	X		
Maryland		X	X	limited		<i>Hawes</i>	partially parallels	5 years, \$10,000	X	\$100 to \$1,000	X	X	X		
Massachusetts	see <i>Blood</i>	X	X	X, but see <i>Blood</i>			partially parallels	5 years, \$10,000	X	\$100 to \$1,000	X	X	X		
Michigan		X	X	X		<i>Sullivan</i>		2 years, \$2,000	X		X				
Minnesota		X		X	X		X	\$20,000, 5 years	treble dam.	\$100 to \$10,000	X	X	X	X	X
Mississippi		X		X	X		X	1 yr, \$10,000/5 yr, \$10,000	X	\$100 to \$1,000	X	X	X		
Missouri		X		X	X		partially similar	class D felony	X	\$100 to \$10,000	X	X	X	X	
Montana	X	X	X	X				\$500, 6 mos. - 1st violation							

APPENDIX B (con't.)

	Const. priv. prov.	Eaves-dropp. stat.	Two-party consent	Color of law-one party	One-party consent	Case law excep.	Word, sim. to fed. act	Crime	Civil action	Statutory damages	Punitive dam.	Atty fees	Costs	Injunc.	Declar.
Nebraska		X		X	X		X	class IV felony - \$500 mandatory category D felony	X	\$100 to \$10,000		X	X	X	X
Nevada		X		X	X			category D felony	X	\$100 to \$1,000	X	X	X		
New Hampshire		X	X	limited			partially similar	class B felony	X	\$100 to \$1,000	X	X	X		
New Jersey		X		X	X		partially similar	crime of 3rd degree	X	\$100 to \$1,000	X	X	X		
New Mexico		X		X	X		very loosely based	misde-meanor	X	\$100 to \$1,000	X	X	X		
New York	interception	X		X	X			class E felony							
North Carolina		wiretap		X	X, case law										
North Dakota		X		X	X		some similar	class C felony							
Ohio		X		X	X		partially similar	4th degree felony	X	\$200 to \$10,000	X	X	X		
Oklahoma		X		X	X		loosely similar	\$5,000, 5 years							
Oregon		X	conversation	limited	wire communication		based loosely	class A misdemeanor	X	\$100 to \$1,000	X	X			
Pennsylvania	see <i>Brion</i>	X	X	limited, also see <i>Brion</i>			partially similar	3rd degree felony	X	\$100 to \$1,000	X	X	X		
Rhode Island		X		X	X		X	5 years	X	\$100 to \$1,000	X	X	X		
South Carolina	X	X		X	X			\$500, 3 years							
South Dakota		X		X											
Tennessee		X		X	X			class D felony	X	\$100 to \$1,000	X	X	X		

APPENDIX B (cont.)

	Const. priv. prov.	Eaves-drop. stat.	Two-party consent	Color of law-one party	One-party consent	Case law excep.	Word. sim. to fed. act	Crime	Civil action	Statutory damages	Punitive dam.	Atty fees	Costs	Injunc.	Declar.
Texas		X		X	X			2nd degree felony	X	\$100 to \$1,000	X	X	X		
Utah		X		X	X		similar	3rd degree felony	X	\$100 to \$10,000	X	X	X	X	X
Vermont	see <i>Blow</i>			X, but see <i>Blow</i>											
Virginia		X		X	X		X	class 6 felony	X	\$100 to \$1,000	X	X	X		
Washington	X	X	X	limited to drugs	crime			class C felony (drugs), misdemeanor	X	\$100 to \$1,000		X	X		
West Virginia		X		X	X		X	5 years, \$10,000	X	\$100	X	X	X		
Wisconsin		X		X	X		X	\$10,000, 5 years	X	\$100 to \$1,000	X	X	X		
Wyoming		X		X	X		X	\$1,000, 5 years	X	\$100	X	X	X		

Appendix C
Applicable Provisions of State Wiretapping and
Eavesdropping Statutes

California

CALIFORNIA PENAL CODE sections 631, 632, 633, and 633.5 provide in pertinent part:

§ 631(a) . . . Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while at the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts of things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both a fine and imprisonment in the county jail or in the state prison.

§ 632(a) . . . Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both that fine and imprisonment.

§ 633 . . . Nothing in Section 631, 632 . . . prohibits the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, any officer of the California Highway Patrol, any chief of police, assistant chief of police, or police officer of a city and county, any sheriff, undersheriff, or deputy sheriff regularly employed and paid in that capacity by a county, or any person acting pursuant to the direction of one of these officers acting within the scope of his or her authority, from overhearing or recording any commu-

nication that they could lawfully overhear or record prior to the effective date of this chapter.

§ 633.5 . . . Section 631, 632 . . . prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnaping, bribery, any felony involving violence against the person, or a violation of Section 653m.

CAL. PENAL CODE §§ 631, 632, 633, 633.5 (West 1995).

Connecticut

CONNECTICUT GENERAL STATUTES ANNOTATED section 52-570d provides in pertinent part:

(a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.

(b) The provisions of subsection (a) of this section shall not apply to: (1) Any federal, state or local criminal law enforcement official who in the lawful performance of his duties records telephonic communications; (2) Any officer, employee or agent of a public or private safety agency, as defined in section 28-25, who in the lawful performance of his duties records telephonic communications of an emergency nature; (3) Any person who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication.

CONN. GEN. STAT. ANN. § 52-570d (West 1995).

Delaware

DELAWARE CODE ANNOTATED title 11, section 1336 provides in pertinent part:

(b) (1) Except as otherwise specifically provided in this section or otherwise by law, any person who: (i) Wilfully intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept any wire or oral communication; or (ii) wilfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the informa-

tion was obtained through the interception of a wire or oral communication in violation of this section; or (iii) wilfully uses or endeavors to use the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this section; shall be guilty of a class G felony.

(c) It shall not be unlawful under this section for: . . . (2) A person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or 1 of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

DEL. CODE ANN. tit. 11, § 1336 (1996).

Florida

FLORIDA STATUTE chapter 934.03 provides in pertinent part:

(1) Except as otherwise specifically provided in this chapter, any person who (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication; (b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when: 1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or 2. Such device transmits communications by radio or interferes with the transmission of such communication; (c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or (d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; shall be punished as provided in subsection (4).

(2) . . . (c) It is lawful under §§ 934.03-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act. (d) It is lawful under §§934.03-934.09 for a person to intercept a wire,

oral, or electronic communication when all of the parties to the communication have given prior consent to such interception. (e) It is unlawful to intercept any communication for the purpose of committing any criminal act.

FLA. STAT. ch. 934.03 (1995).

Illinois

720 ILLINOIS COMPILED STATUTES sections 5/14-2 and 5/14-3 provide in pertinent part:

Sec. 5/14-2 . . . A person commits eavesdropping when he: (a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation

Sec. 5/14-3 . . . The following activities shall be exempt from the provisions of this Article: (g) With prior notification to the State's Attorney of the county in which it is to occur, recording or listening with the aid of any device to any conversation where a law enforcement officer, or any person acting at the direction of law enforcement, is a party to the conversation and has consented to it being intercepted or recorded under circumstances where the use of the device is necessary for the protection of the law enforcement officer or any person acting at the direction of law enforcement, in the course of an investigation of a forcible felony, a felony violation of the Illinois Controlled Substances Act, a felony violation of the Cannabis Control Act, or any "streetgang related" or "gang-related" felony as those terms are defined in the Illinois Streetgang Terrorism Omnibus Prevention Act. Any recording or evidence derived as the result of this exemption shall be inadmissible in any proceeding, criminal, civil or administrative, except (i) where a party to the conversation suffers great bodily injury or is killed during such conversation, or (ii) when used as direct impeachment of a witness concerning matters contained in the interception or recording. The Director of the Department of State Police shall issue regulations as are necessary concerning the use of devices, retention of tape recordings, and reports regarding their use. (i) 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. §§ 5/14-2, 5/14-3 (1996).

Maryland

MARYLAND CODE ANNOTATED, COURTS & JUDICIAL PROCEDURE section 10-402 provides in pertinent part:

(a) *Unlawful acts.* — Except as otherwise specifically provided in this subtitle it is unlawful for any person to: (1) Wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; (2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or (3) Wilfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

(b) *Penalty.* — Any person who violates subsection (a) of this section is guilty of a felony and is subject to imprisonment for not more than 5 years or a fine of not more than \$10,000, or both.

(c) *Lawful acts.* — . . . (2) It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication in order to provide evidence of the commission of the offenses of murder, kidnaping, rape, a sexual offense in the first or second degree, child abuse, gambling, robbery, any felony punishable under the “Arson and Burning” subheading of Article 27, bribery, extortion, or dealing in controlled dangerous substances, including violations of Article 27, § 286B or § 287A, fraudulent insurance acts, as defined in Article 48A, § 233 or any conspiracy or solicitation to commit any of these offenses, or where any person has created a barricade situation and probable cause exists for the investigative or law enforcement officer to believe a hostage or hostages may be involved, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception. (3) It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State. (4) It is lawful under this subtitle for a law enforcement officer in the course of the officer’s regular duty to intercept an oral communication, if: (i) The law enforcement officer initially detained a vehicle for a traffic violation; (ii) The law enforcement officer is a party to the oral communication; (iii)

The law enforcement officer has been identified as a law enforcement officer to the other parties to the oral communication prior to any interception; (iv) The law enforcement officer informs all other parties to the communication of the interception at the beginning of the communication; and (v) The oral interception is being made as part of a video tape recording. (5) It is lawful under this subtitle for an officer, employee, or agent of a governmental emergency communications center to intercept a wire, oral, or electronic communication where the officer, agent or employee is a party to a conversation concerning an emergency. (6) (i) It is lawful under this subtitle for law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy. (ii) Communications intercepted under this paragraph may not be recorded, and may not be used against the defendant in a criminal proceeding.

MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (1996).

Massachusetts

MASSACHUSETTS GENERAL LAWS chapter 272, section 99 provides in pertinent part:

B. Definitions. As used in this section—. . . 4. The term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

MASS. GEN. LAWS ch. 272, § 99 (1996).

Michigan

MICHIGAN COMPILED LAWS sections 750.539a, 750.539c, 750.539g provide in pertinent part:

Sec. 539a . . . As used in sections 539a to 539i : . . (2) "Eavesdrop" or "eavesdropping" means to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse. Neither this definition or any other provision of this act shall modify or affect any law or regulation concerning interception, divulgence or re-

coding of messages transmitted by communications common carriers. . . .

Sec. 539c. Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$ 2,000.00, or both. . . .

Sec. 539g. Sections 539a to 539f do not prohibit any of the following: (a) Eavesdropping or surveillance not otherwise prohibited by law by a peace officer of this state or of the federal government, or the officer's agent, while in the performance of the officer's duties

MICH. COMP. LAWS § 750.539a, 750.539c, 750.539g (1996).

Montana

MONTANA CODE ANNOTATED section 45-8-213 provides in pertinent part:

(1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if he knowingly or purposely: . . . (c) records or causes to be recorded any conversation by use of a hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Subsection (c) does not apply to duly elected or appointed public officials or employees when the transcription or recording is done in the performance of official duty, to persons speaking at public meetings, or to persons given warning of the recording. . . .

MONT. CODE ANN. § 45-8-213 (1997).

New Hampshire

NEW HAMPSHIRE REVISED STATUTES ANNOTATED section 570-A:2 provides in pertinent part:

I. A person is guilty of a class B felony if, except as otherwise specifically provided in this chapter or without the consent of all parties to the communication, he: (a) Wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; (b) Wilfully uses, endeavors to use, or procures any other person to use of endeavor to use any electronic, mechanical, or other device to intercept any oral communication (c) Wilfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this paragraph

II. It shall not be unlawful under this chapter for: . . . (c) Any law enforcement officer, when conducting investigations of or making arrests for offenses enumerated in this chapter, to carry with him on his person an electronic, mechanical or other device which intercepts oral communications and transmits such communications by radio. (d) An investigative or law enforcement officer in the ordinary course of his duties pertaining to the conducting of investigations of organized crime, offenses enumerated in this chapter, solid waste violations under RSA 149-M:10, I and I-a, or harassing or obscene telephone calls to intercept a telecommunication or oral communication, when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the attorney general, the deputy attorney general, or an assistant attorney general designated by the attorney general determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. . . . (g) any law enforcement officer, when conducting investigations of or making arrests for offenses enumerated in this chapter, to carry with him on his person an electronic, mechanical or other device which intercepts oral communications and transmits such communications by radio. . . .

N.H. REV. STAT. ANN. § 570-A:2 (1995).

Oregon

OREGON REVISED STATUTES section 165.540 provides in pertinent part:

(1) Except as otherwise provided in ORS 133.724 or subsections (2) to (7) of this section, no person shall: (a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which such person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant. (b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or facilities of a telecommunication or radio communication company over which messages are transmitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which such person is not a participant. (c) Obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if all participants in the conversation are not specifically informed that their conversation is being obtained. (d) Obtain the whole or any part of a conversation, telecommunication or radio communication from any person, while knowing or having good reason to believe that such conversation, telecommunication or radio communica-

tion was initially obtained in a manner prohibited by this section.
 (e) Use or attempt to use, or divulge to others any conversation, telecommunication or radio communication obtained by any means prohibited by this section. . . .

(3) The prohibitions in subsection (1)(a), (b) or (c) of this section shall not apply to subscribers or members of their family who perform the acts prohibited in subsection (1) of this section in their homes. . . .

(5)(a) The prohibitions in subsection (1)(c) of this section do not apply: . . . (B) When a law enforcement officer obtains a conversation between the officer, or someone under the direct supervision of the officer, and a person who the officer has probable cause to believe has committed, is engaged in committing or is about to commit a crime punishable as a felony under ORS 475.992 or 475.995 or the circumstances at the time the conversation is obtained are of such exigency that it would be unreasonable to obtain the court order under ORS 133.726, providing the person who obtains or records the conversation does not intentionally fail to record and preserve the conversation in its entirety. . . .

(6) The provisions in subsection (1)(c) of this section do not apply to a person who records a conversation during a felony that endangers human life.

OR. REV. STAT. § 165.540 (1995).

Pennsylvania

PENNSYLVANIA CONSOLIDATED STATUTES title 18, sections 5703-5704 provide in pertinent part:

§ 5703 . . . Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he: (1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication; (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or (3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

§ 5704 . . . It shall not be unlawful under this chapter for: . . . (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities where: (i) such officer or person is a party to the communication; (ii) one of

the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom. . . . (4) A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception. . . . (12) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where the officer or the person is a party to the communication and there is reasonable cause to believe that: (i) the other party to the communication is either: (A) holding a hostage; or (B) has barricaded himself and taken a position of confinement to avoid apprehension; and (ii) that party: (A) will resist with the use of weapons; or (B) is threatening suicide or harm to others.

18 PA. CONS. STAT. §§ 5703-5704 (1996).

Washington

REVISED CODE OF WASHINGTON sections 9.73.030, 9.73.110, 9.73.210, and 9.73.230 provide in pertinent part:

§ 9.73.030 . . .

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any: (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication; (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the

reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: *Provided*, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full time or contractual or part time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

§ 9.73.110 . . .

It shall not be unlawful for the owner or person entitled to use and possession of a building, as defined in RCW 9A.04.110(5), or the agent of such person, to intercept, record, or disclose communications or conversations which occur within such building if the persons engaged in such communication or conversation are engaged in a criminal act at the time of such communication or conversation by virtue of unlawful entry or remaining unlawfully in such building.

§ 9.73.210 . . .

(1) If a police commander or officer above the rank of first line supervisor has reasonable suspicion that the safety of the consenting party is in danger, law enforcement personnel may, for the sole purpose of protecting the safety of the consenting party, intercept, transmit, or record a private conversation or communication concerning the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW.

(2) Before any interception, transmission, or recording of a private conversation or communication pursuant to this section, the police commander or officer making the determination required by subsection (1) of this section shall complete a written authori-

zation which shall include (a) the date and time the authorization is given; (b) the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known; (c) the expected date, location, and approximate time of the conversation or communication; and (d) the reasons for believing the consenting party's safety will be in danger.

§ 9.73.230 . . .

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances: (a) At least one party to the conversation or communication has consented to the interception, transmission, or recording; (b) Probable cause exists to believe that the conversation or communication involves the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; and (c) A written report has been completed as required by subsection (2) of this section.

WASH. REV. CODE §§ 9.73.030, 9.73.110, 9.73.210, 9.73.230 (1996).