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Privacy, Eavesdropping, and Wiretapping Across the United States: Reasonable Expectation of Privacy and Judicial Discretion

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PRIVACY, EAVESDROPPING, AND WIRETAPPING ACROSS THE UNITED STATES: REASONABLE EXPECTATION OF PRIVACY AND JUDICIAL DISCRETION

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One-party consent and all-party consent eavesdropping and wiretapping statutes are two broad pathways for federal and state legislation to deal with the problem of secret taping; in addition, some states protect conversation under state constitutions. Whether a conversation is protected against being taped as a private conversation is often gauged by the reasonable expectation of privacy standard. Judges in both all-party consent and one-party consent jurisdictions have had to use their leeway under the reasonable expectation of privacy standard to arrive at what at the time seemed to be the most appropriate solution, perhaps in doing so creating a case-law exception.

Although privacy is difficult to define, Alan Westin provided the following definition in his classic book *Privacy and Freedom*: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[1] An individual who provides private information to the government or to a second individual loses control over the information, ceding power to another entity or individual. The individual may feel helpless in the face of such a loss.

Curiosity about the private activities of others and enforcement of laws through government surveillance are widespread yet have their limits. Eavesdropping, typified by nosy neighbors secretly spying upon one's private conversations, has been disfavored for hundreds of years. Another historic privacy protection is against government intrusion, enshrined in the Fourth Amendment to the United States Constitution as the prohibition against unreasonable search and seizure. The right against unreasonable search and seizure is similarly safeguarded in the Bill of Rights provisions of the constitutions of all fifty states, with the constitutions of certain states explicitly guaranteeing a right to privacy. There were some historic exceptions to the right to privacy. By the 1900s, law enforcement was using government informants to secretly intercept a suspect's conversations and could use a wiretap to secretly listen to a suspect's telephone conversations.

Federal protection against eavesdropping and wiretapping did not come until two-thirds through the twentieth century. In *United States v. Katz* in 1967,[2] the United States Supreme Court announced that Fourth Amendment protection covered wiretapping so long as the suspect had a reasonable expectation of privacy. The following year, Congress enacted federal legislation regulating government and private citizen eavesdropping and wiretapping.[3] The federal

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1 ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

2 Katz v. United States, 389 U.S. 347, 358 (1967). The reasonable expectation of privacy test came from Justice Harlan's concurrence in Katz: "there is a twofold requirement, 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.'"; *Id.* at 361 (Harlan, J., concurring).

3 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat.

legislation did permit recording with the consent of one party to the conversation. Some states had already enacted protection against eavesdropping and wiretapping by 1968 and most states followed suit after 1968.[4] Many states followed the federal legislation, permitting recording with the consent of one party to the conversation. However, a minority of the states require all party consent to record a conversation.[5]

Section I explains the reasons for communication privacy protection. Section II includes case-law examples of states deciding whether to protect privacy under state constitutions, with a primary focus on an informant or a police officer and the home. Section III gives an overview of state constitutional privacy provisions and the subject matter of state eavesdropping and wiretapping statutes. Sections IV and V provide case-law examples interpreting all-party and one-party consent statutes. Section VI gives an overview of judicial discretion in applying the reasonable expectation of privacy standard. Sections VII, VIII, and IX review case-law interpreting state constitutions, all-party consent statutes, and one-party consent statutes with a focus on the use of the reasonable expectation of privacy standard.

I. COMMUNICATION PRIVACY

Rapid advances in technology that might almost effortlessly and secretly capture otherwise private conversation are a cause for concern. In 1966, certain scholars were sufficiently prescient to recognize that the effects of technology on privacy should be studied: "Of paramount importance was the challenge perceived to individual privacy. Not only privacy from unscrupulous, criminal, or pathological persons. Not alone privacy from aggregations of public or private power, but privacy also from simply the aggressive, or the curious, who may be tempted to use the new techniques."[6]

In a conversation disclosing intimate or confidential details, the person speaking may be trusting in their relationship with the other parties to the conversation that the other parties not reveal matters disclosed in confidence. There may be little difference in some circumstances of recounting the substance of a conversation versus playing the tape of a conversation. A party to a conversation is typically unconstrained from repeating the conversation later.

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197 (codified as amended at 18 U.S.C.A. §§ 2510-2521).

4 *Laws on Recording Conversations In All 50 States (2019)*, MATTHIENSEN, WICKERT & LEHRER, S.C., https://www.mwl-law.com/wp-content/uploads/2018/02/RECORDING-CONVERSATIONS-CHART.pdf (last updated Oct. 24, 2019).

5 *Id.* at 2.

6 Oscar M. Ruebhausen, *Preface to* ALAN F. WESTIN, PRIVACY AND FREEDOM ix & xi (1967).

Another party shows respect for the speaker in keeping the information confidential. However, the speaker may not have gauged the relationship accurately as one of trust, or the parties may have a falling out. One party may harbor ill-will toward the speaker that the speaker is unaware of and may have malicious intentions in secretly taping a conversation. A party who discloses the speaker's information breaches the speaker's trust and confidence, demonstrating disrespect for the speaker.

An outsider or a false friend, such as an informant, may use false pretenses to enter an otherwise private area to secretly tape a conversation. Each individual has something that the individual would rather keep hidden from public view. Someone else might use the private information to the individual's disadvantage. The information might appear to embarrass or discredit the individual, tarnish the individual's reputation, expose the individual to ridicule or scorn, or place the individual in disrepute. An outsider may use an individual's personal information to blackmail the individual.

Keeping something hidden may be sometimes equated with having done something wrong that the person wants to conceal or keep secret. A common misperception is that one has nothing to hide if one has done nothing wrong. This perception may persuade society to sacrifice individual privacy in favor of national security when faced with a crisis.[7] However, the Fourth Amendment guarantees the individual's security by prohibiting government intrusion into the individual's privacy.[8] The individual should be able to safeguard private information free from government intrusion and without fear that it may be secretly recorded, whether by government agents or by others. Privacy is a valuable individual commodity vital to the person's wellbeing and should be viewed as positive. Human nature desires a certain modicum of respite or personal distance from others and needs to control the flow of personal information to others. Privacy enables the individual to determine when, where, and in what manner personal details are disclosed to others.

Erratic or aberrant behavior may lead to unreasonable suspicion of someone who operates outside usual societal norms even if the behavior is in no way unlawful and might be forward-thinking, simply an expression of individuality. What society characterizes as negative differences can be strengths when an individual arrives at alternate solutions to problems faced. The initial reaction might be for society to ostracize someone exhibiting deviant but not unlawful or harmful behavior. Expression of varying viewpoints may be valuable. The individual exhibiting behavior outside the norm might be acting out of an

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[7] *See* Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 748–53 (2007).

[8] U.S. CONST. art. IV; *e.g.*, Derek M Alphran, *Changing Tides: A Lesser Expectation of Privacy in a Post 9/11 World*, 13 RICH. PUB. INT. L. REV. 89, 95 (2019).

artistic, musical, or intellectual bend that later is recognized as genius. The behavior may be an expression of free speech or political activism even if society has a negative regard for behavior differing from the norm. Disclosure of the behavior may result in the individual having to justify the behavior.

The individual finds it almost impossible to successfully conduct business, professional, governmental, and personal affairs without verbally communicating information to others. There may be good reasons to prohibit secret taping to guard against loss of trade secrets, business information beneficial to a competitor, government secrets crucial to national security, strategic information of a political party, and secrets of private and religious organizations. The information disclosed in an otherwise private conversation may be sensitive or intimate, such that disclosing it would injure someone psychologically or physically. Giving someone with nefarious motives access to financial or other sensitive information may lead to financial insecurity or loss. Disclosing secretly taped information may lead to hurt feelings of insecurity, embarrassment, or betrayal and may damage one's reputation or personality, perhaps by placing someone in a false light. If the taping involves a politician, an opposing candidate could use a secretly made tape to the opposing candidate's advantage. Some fear that legalizing one-party taping may stifle free and open conversation. Some may value privacy above the ability to later share a tape of a conversation with others.

Safeguarding certain areas of one's life as personal may be essential to one's wellbeing, dignity, reputation, intellectual freedom, freedom of association, and personal autonomy. The individual must keep a certain social distance between the individual and other members of society. The individual needs an area safe from interference by society or one might feel powerless and unable to freely control one's decisions. At times, the individual merits an area of seclusion free from outside intrusion. Outside intrusion into one's personal life may inhibit one's activities, may harm one's reputation, and do harm to a person's psyche by permitting social control.

Fear of surveillance may lead to one's inability to make decisions freely. Discrete pieces of information, which do not harm the individual, might be aggregated to invade a person's privacy. Society may gain a mistaken, distorted impression of the individual, should less than the whole story be revealed. The harm may be incremental as an outsider pieces together information about the individual's private life. Sometimes, an individual discloses personal information for a limited purpose to a third party with the understanding that the information will not be further disclosed. Loss of privacy may be a product of information being used for a purpose different from the reason for which it was originally collected. Knowledge of one's otherwise private information can

create a power imbalance with an outsider forcing the individual to behave in a certain way or lose privileges or opportunities.

It used to be that one could be assured of privacy if speaking in an enclosed space and, to some extent, society is comfortable with the loss of privacy attendant on technological advances; however, technology has made vast inroads into what was formerly considered private. With recording capability available in each cell phone, it is tempting to tape conversations. This contrasts with the limited access to recording equipment prior to the ubiquity of the cell phone that nearly each person carries. With the ready access to cell phone recording capability, one might anticipate many conversations being secretly taped.

In the past, the invasiveness of one not a party to a conversation taping the conversation has seemed much more intrusive than a party taping a conversation. Rapid advances in technology may have altered this perception. The commonplace use of technology, such as digital assistants, child monitors, children's toys, and home and business security systems, has impacted this viewpoint. This technology is readily available, widely used, and heavily promoted. Many front home entrances and garages are protected against theft through the use of security systems with audio and video recording capability. These security systems capture the actions and conversations of anyone within range, including neighbors and persons passing by.

One may have a socially beneficial reason for secretly taping a conversation, such as gathering evidence of criminal activity or exposing other wrongdoing. This behavior includes unlawful discrimination, abuse, and sexual harassment. Alleged abuse might include child, sexual, domestic, or elder abuse, evidence of which is otherwise almost impossible to gather. A taped conversation is considerably more reliable and accurate than a party testifying later about the content of the conversation, even if the testimony is convincing. The recorded conversation is direct, substantive evidence of what transpired. A recorded conversation is more powerful than secondhand testimony about the conversation because the recording memorializes the conversation and captures the exact words used, the tone of voice, and other inflections that might not otherwise be apparent. Someone who later tries to distort the conversation runs the risk of being confronted with the taped conversation. Other legitimate reasons for taping include transparency, security, and speaker accountability, especially for one with administrative, monitoring, or reporting responsibilities.

Sometimes social good and the individual's privacy must be balanced against each other. The government often uses friends of the suspect as government informants. Use of government informants is troublesome in that it diminishes the suspect's freedom of association. The suspect may disclose sensitive information to a longtime friend turned government informant and the informant

may be motivated out of self-preservation to gather illicit information from the suspect to garner better treatment from the government. With the prevalence of criminal statutes, government monitoring of private activities is troublesome. An activity that might seem innocuous may become the basis for prosecution when combined with other circumstances. The government may assume that one fitting a particular stereotype will act in a stereotypical way. The individual cannot refute this conclusion if the individual is unaware of the conclusion.

One-party consent could permit an informant to secretly tape a conversation, to the detriment of the suspect's sense of security and susceptibility to government surveillance. The pernicious effect of informant taping could be multiplied by the informant transmitting the conversation to non-participant government agents. In *United States v. White*, a government informant secretly transmitted a number of a suspect's conversations, one of which occurred in the suspect's home, to third-party government agents.[9] The conversation was not recorded so it was admitted at trial without issue.[10] The government agents who conducted the surveillance testified at White's trial, and the jury convicted White.[11] The informant was unavailable and did not testify at trial.[12] In 1971, in a plurality decision in *White*, the United States Supreme Court held that the electronic surveillance did not violate White's Fourth Amendment right against unreasonable search and seizure.[13]

White exposes two opposing views on how a suspect's conversation should be analyzed. One view is that whatever the suspect voluntarily reveals to another is at the risk that the second party may repeat or record the conversation. The *White* plurality explained that, "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police."[14] A suspect's taped conversation benefits from accuracy in that "[a]n electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent."[15] Other benefits of taping are that "[i]t may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony."[16]

The second view, represented by Justice Harlan's dissent, focused on the

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9 United States v. White, 401 U.S. 745, 747 (1971).
10 *Id.* at 749.
11 *Id.* at 747.
12 *Id.*
13 *Id.* at 754.
14 *Id.* at 752.
15 *Id.* at 753.
16 *Id.*

suspect's expectation of privacy.[17] Constitutional protection should be afforded to a suspect's conversation in a situation in which the suspect's sense of security is heightened. In his dissent, Justice Harlan stated, "[f]or those more extensive intrusions that significantly jeopardize the sense of security, which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants should be necessary."[18]

II. STATE CONSTITUTIONAL PRIVACY PROVISIONS, INFORMANTS, AND THE HOME

As stated in the introduction, the constitutions of certain states include an explicit right to privacy. In addition, the courts of certain states have interpreted the state constitution to protect communication privacy.

The home has long been recognized as a place deserving special protection against government surveillance. An informant often is a false friend who has known the suspect in the past but is not acting in a trustworthy fashion in gathering evidence from the suspect. An informant usually acts at the behest of the government, not out of a desire to perform a public act but to receive a personal benefit such as a reduced sentence. The entrance of an informant equipped with a radio transmitter or a secret recording device into a suspect's home is a lethal combination. The plurality decision in *United States v. White* has been roundly criticized as representing one of the worst configurations of government surveillance, with one of the conversations with White secretly transmitted by the informant from the sanctity of White's home.[19]

As more fully described below, the highest courts in six states have interpreted the state constitutions to outlaw secret taping of a suspect by an informant in the suspect's home. Those six states are Alaska, Massachusetts, Montana, Pennsylvania, Vermont, and West Virginia. The Supreme Court of Wyoming declined to provide a similar protection under the Wyoming Constitution. The Supreme Court of Connecticut declined to require all-party consent protection under the Connecticut Constitution for telephone conversations. The Supreme Court of North Dakota declined to require all-party consent protection for a face-to-face conversation occurring in an informant's vehicle.

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17 *Id.* at 781 (Harlan, J., dissenting).

18 *Id.* at 786–87.

19 Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L. REV. 573, 613–26 (1996).

A. Alaska

Alaska is one of the states that explicitly protects privacy in its Constitution. Article I, section 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."[20] The Alaskan legislature has not chosen to protect its citizens against secret taping through all-party consent, instead permitting secret taping on the consent of one party. Even so, the Supreme Court of Alaska has interpreted the privacy provision of the Alaskan Constitution to require all-party consent when the suspect is in the suspect's home but not when the suspect is on a roadway or in a workplace.[21]

In 1978 in *State v. Glass*, narcotics team officers sent an informant equipped with a radio transmitter into Glass' home to purchase heroin from Glass.[22] The police officers stationed outside Glass' home monitored and recorded the conversation through the radio transmission.[23] The Supreme Court of Alaska pointed out that a state constitution could provide broader protection to a suspect than that guaranteed under the United States Constitution: "Federal courts have recognized the power of the states to regulate rights to privacy in a manner broader than the federal protections."[24]

In interpreting the privacy provision of the state constitution, the Supreme Court of Alaska looked to *Katz v. United States* for guidance. In *Katz*, the United States Supreme Court reasoned that "[o]ne who occupies [the phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[25] Although the facts of *Glass* more closely paralleled those of *White* than the facts of *Katz*, the Supreme Court of Alaska declined to follow *White* because *White* was not "a clear-cut agreement by any majority of the justices."[26] In addition, the Supreme Court of Alaska pointed out that because there were eight monitored conversations in *White*, "based on an affidavit of the informant as to earlier non-monitored conversations, a warrant was obtainable."[27]

After reviewing *Katz*, the Supreme Court of Alaska applied the two-prong test of Justice Harlan's concurring opinion and stated, "[w]e believe that one who

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20 ALASKA CONST. art. I, § 22.
21 State v. Glass, 583 P.2d 872, 874–75 (Alaska 1978).
22 *Id.* at 874.
23 *Id.*
24 *Id.* at 879.
25 Katz v. United States, 389 U.S. 347, 352 (1967).
26 *Glass*, 583 P.2d at 876.
27 *Id.* at 880–81.

engages in a private conversation is similarly entitled to assume that his words will not be broadcast or recorded absent his consent or a warrant."[28] The court reasoned that it would not have been too onerous for law enforcement officers to have obtained a warrant prior to recording Glass' conversation with the informant.[29] The court concluded that "Alaska's Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations."[30]

Following *Glass*, the parameters of the Alaska Constitution's protection against secret recordings was unclear. The privacy protection was fleshed out to some extent in 1984 in *City and Borough of Juneau v. Quinto* and in 2001 in *Cowles v. State*.[31]

In 1984, in *Quinto*, a police officer taped his conversation with Quinto who was suspected of driving drunk.[32] The officer made the recording by using a small tape recorder attached to the officer's belt.[33] The officer began taping as he approached Quinto and the taping continued throughout Quinto's arrest.[34] The court noted that even though Quinto did not know that the conversation was being taped, he should have known that he was speaking with a police officer because the officer was in uniform.[35]

The Supreme Court of Alaska considered the circumstances of the vehicle stop: "Lewkowski stopped Quinto based upon a reasonable and articulable suspicion that Quinto was driving while intoxicated. Thus, the stop was lawful. Quinto knew, or reasonably should have known, that he was speaking to a police officer, since Lewkowski was in full uniform."[36] The court added, "[a]lso, it should have been clear to Quinto that Lewkowski was performing his official duties throughout the period covered by the recording."[37] The court concluded that the recording did not violate the privacy provision of the Alaska Constitution: "Under these circumstances, we hold that Quinto's expectation of privacy, *i.e.* his assumed expectation that his conversation with Lewkowski would not be recorded, is not an expectation which society is willing to accept as reasonable."[38]

The court recognized that the privacy provision of the Alaska Constitution

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28 *Id.* at 875.
29 *Id.* at 881.
30 *Id.*
31 Juneau v. Quinto, 684 P.2d 127, 128 (Alaska 1984); Cowles v. State, 23 P.3d 1168 (Alaska 2001).
32 *Quinto*, 684 P.2d at 128.
33 *Id.* at 129.
34 *Id.*
35 *Id.* at 128, nn.2–4.
36 *Id.* at 129.
37 *Id.*
38 *Id.*

was designed to protect "those values and characteristics typical of and necessary for a free society. Some of these are the sharing of thoughts and ideas, personal trust between individuals, free expression, and individuality."[39] The key in *Quinto* was the presence of a police officer investigating drunk driving, "[i]n such case, one's candor and willingness to share personal confidences are unlikely to be any more effectively chilled than they already are by the added possibility that what is being said may be electronically recorded."[40]

In 2001, in *Cowles v. State*, Lindalee Cowles was suspected of stealing cash from the University of Alaska's box office.[41] To gather evidence on the alleged theft, the university police installed a hidden video camera in the ceiling above Cowles' desk, which captured Cowles' theft but no audio.[42] A co-worker had reported the cash theft and an audit showed cash shortages.[43] Cowles' desk was visible to the public through the ticket window and there was a flow of persons through the box office during the taping.[44] Cowles claimed that the videotaped evidence should be suppressed because the evidence was obtained in violation of her constitutional rights.[45]

The three-justice majority of the Supreme Court of Alaska concluded that "Cowles did not have an expectation of privacy at the time and place in question that society should recognize as reasonable."[46] The physical layout of the ticket office was crucial in the decision: "[T]he University box office was not a private office . . . . It was open to the public at the time of the videotaping. Moreover, numerous University employees, who were in no sense co-conspirators of Cowles, had regular access to it."[47]

In a lengthy dissent, the remaining two justices opined that the Alaska Constitution privacy provision should have excluded the videotaped evidence because Cowles' expectation of privacy was reasonable: "No case law or other authority supports the novel proposition that an employee's fiduciary duty should reduce her reasonable expectation of privacy from police surveillance at her desk. . . ."[48] The dissent added: "Today's holding dramatically restricts the rights of Alaskans who do not occupy their own offices: It establishes that secret video monitoring by the police should be among their reasonable

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39 *Id.*
40 *Id.*
41 Cowles v. State, 23 P.3d 1168, 1170 (Alaska 2001).
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 1175.
47 *Id.* at 1174.
48 *Id.* at 1185 (Fabe, J., dissenting).

expectations."[49]

B. Connecticut

The Supreme Court of Connecticut has interpreted the Connecticut Constitution to require only one party to consent to secretly tape a telephone conversation.

In 2015, in *State v. Skok*, Skok allegedly defrauded Becker, an elderly widow of tens of thousands of dollars.[50] When her granddaughter became suspicious, family members contacted the police who provided equipment so that Becker could secretly tape telephone calls with Skok.[51] Skok claimed that secretly taping Skok's telephone conversation with Becker with one party's consent violated the search-and-seizure provision of the Connecticut Constitution.[52] The Supreme Court of Connecticut held that the Connecticut Constitution did not make the secret taping with one party's consent unconstitutional.[53] In making this determination, the court used a six-factor analysis,[54] but the court concluded that Skok's expectation of privacy was not reasonable because Skok reminded Becker a number of times that Becker should not permit family to overhear their conversation, indicating that Skok believed in the possibility that Becker's family would overhear the conversations.[55] The Connecticut statutes are unusual in that one whose telephone conversation has been secretly taped, without the consent of all parties, has a private right of action against the party who secretly taped the conversation, but the secret taping was not a crime.[56] Presumably, this is the reason that Skok tried to have the secretly taped conversation suppressed under the state constitution rather than under state statute.[57]

C. Massachusetts

The Massachusetts Constitution does not contain an explicit privacy provision; however, in 1987, in *Commonwealth v. Blood*, the Supreme Judicial

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49 *Id.*
50 State v. Skok, 122 A.3d 608, 610–11 (Conn. 2015).
51 *Id.* at 612.
52 *Id.* at 610.
53 *Id.*
54 *Id.* at 614.
55 *Id.* at 621.
56 *Id.* at 620.
57 A state statute permits a conversation to be suppressed, but only if the taping was illegal. CONN. GEN. STAT. ANN. § 54-41m (West 2020); Another state statute makes it a class D felony to illegally wiretap a conversation. CONN. GEN. STAT. ANN. § 53a-189; However, the definition of wiretapping excludes recording a telephone conversation on one-party consent. CONN. GEN. STAT. ANN. § 53a-187(a)(1).

Court of Massachusetts held that the search-and-seizure provision of the Massachusetts Constitution safeguards against electronic interception by an informant secretly facilitating police officers taping conversations.[58]

In *Blood*, Hudson was a convicted felon who agreed to act as an informant and to wear a hidden radio transmitter so that police officers could secretly tape conversations in which Blood and others formulated a plan to steal gold bars from a refinery.[59] Hudson participated in three planning conversations, each of which occurred in a private home.[60] Hudson transmitted the three conversations to police officers who secretly taped them.[61] The prosecution used the taped conversations at Blood's trial, and Blood was convicted.[62]

The Supreme Judicial Court of Massachusetts considered the Massachusetts statute governing electronic surveillance against the search-and-seizure provision of the Massachusetts Constitution.[63] The statute generally requires all-party consent to tape a conversation.[64] An exception permits a police officer who is a party to the conversation or has the consent of a party to the conversation to secretly tape the conversation if the conversation concerns one of the listed organized-crime offenses.[65] Presumably, the circumstances in *Blood*, like the circumstances in a number of the cases discussed below, would have permitted the taping under the Massachusetts statute because a party to the conversations had given his consent to the taping to the police officers and the conversations concerned organized crime offenses.[66]

The Massachusetts court recognized how the circumstances in *Blood* were similar to those in *United States v. White*, but the court criticized the plurality decision in *White* because the decision failed to take into account the paramount importance of "conversational liberty" and the chilling effect of a "consenting informant."[67] For the Massachusetts court, the liberty of conversing with friends was vital to a free society: "For us, however, a distinction lies in the disparity between that sense of security which is felt among trusted friends and the feelings of hostility encountered among competitors or combatants. The sense of security is essential to liberty of thought, speech, and association."[68]

The Massachusetts court noted that the locations of the conversations in *Blood*

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58 Commonwealth v. Blood, 507 N.E.2d 1029, 1038 (Mass. 1987).
59 *Id.* at 1030.
60 *Id.* at 1030–31.
61 *Id.* at 1030.
62 *Id.* at 1030–31.
63 *Id.* at 1031–32.
64 MASS. GEN. LAWS ANN. ch. 272, § 99 at B4, B7, C1 (West 2020).
65 *Id.*
66 Commonwealth v. Blood, 507 N.E.2d 1029, 1030 (Mass. 1987).
67 *Id.* at 1035.
68 *Id.* at 1036.

were private homes, and there were no exigent circumstances involved: "Each conversation whose recorded contents was admitted at trial had unfolded in a person's home, in circumstances not even remotely suggestive of any speaker's intent to be heard beyond the circle of known listeners."[69] The court concluded that the secret taping violated the search-and-seizure provision of the Massachusetts Constitution: "As to each of those conversations, we hold that its warrantless electronic search by surreptitious transmission and its electronic seizure by surreptitious recording were in violation of art. 14."[70]

After *Blood*, it was unclear how the court's interpretation of the search-and-seizure provision of the Massachusetts Constitution would be applied. The following year, in *Commonwealth v. Fini*, the court considered whether a conversation taped in circumstances similar to those in *Blood* could be used to impeach Fini's testimony.[71] In disallowing the use of the secretly taped conversation for impeachment purposes, the court emphasized the value of not permitting the prosecution to use the unconstitutionally-obtained conversation for any purpose: "Given the magnitude of the unconstitutional intrusion accomplished by electronic eavesdropping in and about a private home, . . . we conclude that half measures of deterrence are not enough."[72]

In 1989, in *Commonwealth v. Panetti*, the Supreme Judicial Court of Massachusetts extended *Blood* to apply to a crawl space underneath Panetti's apartment.[73] In *Panetti*, the police chief, sanctioned by the landlord to be in the crawl space, listened to Panetti negotiate illegal drug sales for more than two hours.[74] The police chief used the eavesdropped conversations to obtain a warrant, which led to Panetti's conviction. Panetti appealed the denial of his motion to suppress the overheard conversations.[75]

The task of the Massachusetts court was to determine if Panetti's claimed expectation of privacy was reasonable.[76] The court distinguished an adjacent motel or hotel room or apartment from the *Panetti* crawl space: "Society should honor the privacy interests that apartment dwellers and condominium owners have in being free from warrantless eavesdropping by police who have infiltrated crawl spaces and other areas to which neither the public nor any other occupant of the multiple dwelling has access."[77] The court concluded that Panetti's expectation of privacy was reasonable and the police chief's

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69 *Id.* at 1038.
70 *Id.*
71 Commonwealth v. Fini, 531 N.E.2d 570, 571 (Mass. 1988).
72 *Id.* at 573–74.
73 Commonwealth v. Panetti, 547 N.E.2d 46, 48 (Mass. 1989).
74 *Id.* at 46.
75 *Id.*
76 *Id.* at 46–47.
77 *Id.* at 48.

eavesdropping on over two hours of conversations did violate the search-and-seizure provision of the Massachusetts Constitution.[78]

In *Commonwealth v. Price*, undercover police officers arranged a sting operation in a local motel room in which Price offered to purchase a large quantity of marijuana.[79] Massachusetts State troopers, who were in the adjoining motel room, secretly taped the transaction.[80] The officers had previously obtained a search warrant, although not the type required by the Massachusetts statute regulating electronic surveillance.[81]

Price challenged the admissibility of the taped conversations under the search-and-seizure provisions of the Massachusetts Constitution and United States Constitution.[82] Standing matters aside, the crucial question for the Supreme Judicial Court of Massachusetts was whether Price had an expectation of privacy that was reasonable in the motel room in which the taped conversations transpired.[83] The court determined that Price had an expectation of privacy, but the expectation was not reasonable.[84]

The Massachusetts court distinguished the circumstances of the *Price* taping, in a motel room with strangers, from the secret taping in *Blood*, which occurred in private homes with known associates.[85] In *Blood*, Blood previously knew the persons with whom he was meeting. Unlike Price, who had not previously met a number of the individuals at the meeting: "[Price] and his associates were engaged in negotiating a major business transaction with people whom he had just met, and whom his associates had first met the day before."[86] The location in *Price* was much different than the private homes in which the secretly taped conversations occurred in *Blood*.[87] In *Price*, the location of the secretly taped conversations was "a motel room that was not registered in [Price's] name, but rather in the name of someone about whom he knew almost nothing."[88] The Massachusetts court summarized Price's activities: "He engaged in an arm's length business negotiation with strangers in a place over which he had neither control nor a right to control and which had been selected by the strangers."[89]

Interestingly enough, Chief Justice Llacos, the author of the decision in *Blood*,

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78 *Id.*
79 Commonwealth v. Price, 562 N.E.2d 1355, 1356 (Mass. 1990).
80 *Id.*
81 *Id.* at 1357.
82 *Id.* at 1357–58.
83 *Id.*
84 *Id.* at 1358.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*

dissented from the *Price* decision.[90] One concern was with the majority's analysis of a suspect's standing to enforce privacy rights under the Massachusetts Constitution: "The analysis adopted by the court . . . could be applied just as easily to deny standing to challenge secret videotapes of any number of legal activities undertaken by citizens of this Commonwealth each day."[91] Another concern of the dissent was that "the court's opinion will encourage the police to engage in surreptitious videotaping without a warrant specifically authorizing such activity . . . thereby diminishing the privacy rights of the people of this Commonwealth."[92]

In *Commonwealth v. Eason*, two state troopers were investigating an apartment invasion.[93] The informant was the woman with whom Eason had been living at the time of the incident.[94] The troopers asked the informant to call Eason. The troopers were able to persuade her to call Eason.[95] The informant reluctantly made two calls to Eason in his home, which the troopers listened to through a telephone extension and secretly taped.[96] The Supreme Judicial Court of Massachusetts decided that Eason's claimed expectation of privacy was not reasonable under the search-and-seizure provision of the Massachusetts Constitution:[97] "Any expectation of privacy in a telephone conversation is not objectively reasonable, because a person is not reasonably entitled to assume that no one is listening in on an extension telephone."[98]

In *Commonwealth v. Rodriguez*, the United States Customs Service alerted the state police that it had detected a significant amount of cocaine in a package that had come from Colombia and was addressed to Pedro Tirado.[99] After the package was delivered, police officers operating under a search warrant broke down Tirado's door.[100] Tirado claimed that the package belonged to Rodriguez who had offered Tirado $400 for Tirado to accept the package on Rodriguez' behalf.[101] Tirado telephoned Rodriguez as instructed, with a police officer listening to Tirado's end of the conversation.[102] By the time Rodriguez arrived to collect the package, a police officer had equipped Tirado with a hidden

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90 *Id.* at 1360.
91 *Id.* (Liacos, J., dissenting).
92 *Id.*
93 Commonwealth v. Eason, 694 N.E.2d 1264, 1265 (Mass. 1998).
94 *Id.*
95 *Id.*
96 Commonwealth v. Eason, 681 N.E.2d 863, 864 (Mass. App. Ct. 1997), *rev'd*, 694 N.E.2d 1264 (Mass. 1998).
97 Eason, 694 N.E.2d at 1268.
98 *Id.*
99 Commonwealth v. Rodriguez, 877 N.E.2d 1274, 1276–77 (Mass. 2007).
100 *Id.*
101 *Id.* at 1277.
102 *Id.*

monitoring and taping device, which transmitted the conversation between Tirado and Rodriguez to Trooper Colon located in a vehicle outside Tirado's apartment.[103]

Rodriguez claimed that Trooper Colon's trial testimony about the transmitted conversation between Tirado and Rodriguez violated the search-and-seizure provision of the Massachusetts Constitution.[104] The Massachusetts court disagreed: "We determine that probable cause and exigent circumstances justified the warrantless interception of the conversation, and there was thus no violation of art. 14."[105] The court explained "that the standards for an exigency are strict . . . and police cannot intentionally create exigencies to evade the warrant requirement."[106] The court opined that the officers acted appropriately as the events transpired quickly after their encounter with Tirado: "[T]he police acted reasonably in the course of their investigation and, given the unexpected turn of events, had no opportunity to obtain a warrant."[107]

D. Montana

The Montana Constitution contains an explicit privacy provision, as well as a search-and- seizure provision.[108] The Supreme Court of Montana has not been consistent in its interpretation of whether the Montana Constitution protects a suspect against being secretly taped. In 1978, in *State v. Brackman*,[109] the court concluded that the Montana Constitution did protect a suspect from being secretly taped by an informant. However, in 1988, in *State v. Brown*, the court overruled *Brackman*. [110] Twenty years later, the Supreme Court of Montana overruled *Brown* in *State v. Goetz*.[111] Four years later, the Supreme Court of Montana expanded its interpretation of the Montana Constitution to protect a telephone conversation from being secretly taped in *State v. Allen*.[112] With *Goetz* and *Allen*, the Montana Constitution provides fairly broad protection for face-to-face and telephone conversations.[113]

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103 *Id*.
104 *Id*. at 1278.
105 *Id*. at 1276.
106 *Id*. at 1279.
107 *Id*.
108 MONT. CONST. art. II, § 11.
109 State v. Brackman, 582 P.2d 1216, 1222 (Mont. 1978), *overruled* by State v. Brown, 755 P.2d 1364 (Mont. 1988).
110 State v. Brown, 755 P.2d 1364, 1369 (Mont. 1988), *overruled* by State v. Goetz, 191 P.3d 489 (Mont. 2008).
111 State v. Goetz, 191 P.3d 489, 497 (Mont. 2008).
112 State v. Allen, 241 P.3d 1045, 1049, 1061 (Mont. 2010).
113 *Goetz*, 191 P.3d at 517; *Allen*, 241 P.3d at 1061.

In 2008, in *State v. Goetz*, the Supreme Court of Montana considered the applicability of the Montana Constitution to an informant wearing a transmitter who allegedly purchased illegal drugs from Goetz in Goetz's home while police detectives were secretly taping the conversation.[114] The other case that was consolidated with *Goetz* involved Hamper as the suspect.[115] An informant allegedly made two illegal drug purchases from Hamper, one in a vehicle in a parking lot and the other in Hamper's home.[116] During each of the alleged purchases, the informant was wearing a transmitter and detectives were secretly taping the conversation.[117]

The Montana court found that the secretly taped conversations should have been suppressed because "[t]he electronic monitoring and recording of those conversations without a warrant or the existence of an established exception to the warrant requirement violated the Defendants' rights under Article II, Sections 10 and 11."[118] In reaching this holding, the court first found that the defendants did have an expectation of privacy because each conversation occurred either in a home or in a vehicle removed from others.[119] Then the court found that the expectation that the government would not be secretly recording in such locations was reasonable.[120] The court found the third factor—if there is a compelling state interest for the secret taping—was inapplicable.[121]

One concurring justice thought that protection under the Montana Constitution against informant secret taping should not be limited to a home or vehicle.[122] A second justice concurred with the majority's protection for a conversation occurring in the suspect's home but dissented from providing protection for a conversation occurring inside a vehicle.[123] A dissenting opinion stated that the secretly taped conversations should not be protected under the Montana Constitution because the subject matter of conversations was business and the transactions were with persons the suspects did not previously know: "The public and commercial nature of the criminal enterprise at issue here—the sale of illegal drugs to strangers—separates this case from other kinds of crimes, even drug-related. . . ."[124]

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114 *Goetz*, 191 P.3d at 492–93.
115 *Id.* at 493.
116 *Id.*
117 *Id.*
118 *Id.* at 504.
119 *Id.* at 499–500.
120 *Id.* at 500.
121 *Id.* at 504.
122 *Id.* at 504 (Leaphart, J., specially concurring); *see also id.* at 519–20 (Cotter, J., concurring).
123 *Id.* at 507 (Morris, J., concurring and dissenting).
124 *Id.* at 512 (Rice, J., dissenting); *see also id.* at 519 (Warner, J., dissenting) (agreeing with Justice Rice's dissent).

In 2010, in *State v. Allen*, the Supreme Court of Montana decided that the Montana Constitution should protect against an informant secretly taping cell-phone conversations between the suspect and the informant.[125] In reaching its decision, the Montana court employed the same three-step test used in *Goetz*.[126] The court found that Allen had an expectation of privacy in his cell-phone conversation under the circumstances. It ruled that society would recognize this expectation as reasonable based on the state's constitutional convention, and there was no compelling state interest for the secret taping.[127]

The concurring opinion would have extended the protection under the state constitution to the informant's testimony about the secretly taped cell-phone conversation.[128] The opinion concurring in part and dissenting in part disagreed with the majority that the Montana Constitution mandated the suppression of the secretly taped cell phone conversation based on an interpretation of the history of the state constitutional convention that differed from that of the majority.[129]

In 2012, in *State v. Stewart*, Stewart had allegedly been sexually molesting his daughter for eleven years.[130] After the daughter turned eighteen, she reported the sexual molestation and began working with a local law enforcement detective.[131] The detective secured a search warrant for the family home, where he gathered evidence, and spoke with an older brother who corroborated the daughter's story.[132] The detective persuaded the daughter to call her father on his cell phone, while he and her mother were traveling, from the home landline telephone to which the detective had connected monitoring and taping equipment.[133] The detective secretly taped four calls between the daughter and father without obtaining a warrant.[134]

State v. Allen was decided after Stewart was convicted, and Stewart filed a motion for a new trial based on the use of the secretly taped telephone conversations at trial.[135] The court applied the three-step test and found that Stewart's rights were violated under the Montana Constitution.[136] The court concluded that the admission of the secretly taped telephone conversations was

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125 State v. Allen, 241 P.3d 1045, 1049, 1061 (Mont. 2010).
126 *Id.* at 1057.
127 *Id.* at 1058–60.
128 *Id.* at 1082 (Nelson, J., concurring).
129 *Id.* at 1084–85 (Rice, J., concurring in part and dissenting in part).
130 State v. Stewart, 291 P.3d 1187, 1191 (Mont. 2012).
131 *Id.* at 1192.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.* at 1195 (Mont. 2012); *see* State v. Allen, 241 P.3d 1045, 1061 (Mont. 2010).
136 *Stewart*, 291 P.3d at 1200–01.

harmless error.[137] The parties characterized the taped information both as inculpatory and exculpatory, while Stewart's attorney attempted to use the taped information to impeach the daughter at trial.[138] The Montana court explained its rationale for its harmless error conclusion: "Qualitatively, nothing on the recordings is any more inflammatory or prejudicial than the other, admissible evidence at trial."[139]

E. North Dakota

The Supreme Court of North Dakota has interpreted the North Dakota Constitution to require only one-party consent to secretly tape a conversation between the suspect and the informant in the informant's vehicle.

In 2010, in *State v. Loh*, the suspect claimed that the search-and-seizure provision of the North Dakota Constitution should be interpreted to protect his conversations with an informant in the informant's car from being transmitted and secretly taped by police officers monitoring the conversations.[140] The Supreme Court of North Dakota stated, "We are not persuaded that our state constitution was violated by law enforcement's warrantless electronic monitoring of Loh's face-to-face conversations with the confidential informant when the conversations and drug transactions occurred in the informant's car and the informant consented to the police's electronic monitoring."[141] Loh suggested that the North Dakota court follow Montana's lead in *Goetz*, in which the Supreme Court of Montana interpreted the Montana Constitution to protect a suspect against secret taping, but the North Dakota court declined to do so.[142] The North Dakota court noted that the Montana Constitution contains an explicit right to privacy and, while some states protect privacy similarly to the protection afforded by Montana, most states follow the U.S. Supreme Court in *White*.[143]

F. Pennsylvania

The Pennsylvania Constitution does not contain an explicit privacy provision, but in 1994, in *Commonwealth v. Brion*, the Supreme Court of Pennsylvania interpreted the search-and-seizure provision of the Pennsylvania Constitution to safeguard a conversation against electronic interception where an informant wearing a radio transmitter met with a suspect in the suspect's home and

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137 *Id.* at 1201–03.
138 *Id.* at 1203.
139 *Id.*
140 State v. Loh, 780 N.W.2d 719, 720 (N.D. 2010).
141 *Id.* at 724.
142 *Id.* at 723.
143 *Id.*

transmitted the conversation to police officers who were secretly recording.[144] Pennsylvania is an all-party consent state but, at the time *Brion* was decided, the eavesdropping statutes permitted secret taping, with the consent of one party, if an officer was a party to the conversation or a party to the conversation consented to the officer secretly taping the conversation.[145]

The Pennsylvania court found that *Brion* differed from earlier cases because of "the sanctity of one's home."[146] The court stated, "We hold that an individual can reasonably expect that his right to privacy will not be violated in his home through the use of any electronic surveillance."[147] Thus, the search-and-seizure provision of the Pennsylvania Constitution would require a warrant prior to secret taping in the suspect's home.[148] The court ruled that, because there was no indication that Brion's expectation of privacy was not reasonable, the secretly taped conversation should have been suppressed.[149] In addition, the court found that "there is no good faith exception to the exclusionary rule."[150]

In *Commonwealth v. Rekasie*, the issue before the Supreme Court of Pennsylvania was whether the search-and-seizure provision of the Pennsylvania Constitution should be interpreted to require a probable cause determination by a judge prior to the police secretly taping a telephone conversation that an informant made from the police station to Rekasie in his home.[151] Prior to the conversation, the Deputy Attorney General authorized the informant to permit his telephone conversations with Rekasie and others to be secretly taped, with the authorization done in accordance with the requirement of the Pennsylvania statute.[152] The Pennsylvania court distinguished a face-to-face conversation from a telephone conversation: "A telephone call received by or placed to another is readily subject to numerous means of intrusion at the other end of the call, all without the knowledge of the individual on the call."[153] The court thus determined that a telephone conversation could be treated differently than a face-to-face conversation: "Based upon these realities of telephonic

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

145 *Id.* at 288. The statute has since been amended to permit secret taping in very limited situations, such as on prior authorization, in the prosecution for harm done to an officer, and on court order. The portion of the statute requiring a court order is for a secret taping in the suspect's home. There is an exception if there is probable cause and exigent circumstances. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 5703 (West 2020), the pertinent provisions of which are included in Appendix C.

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

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 290.

151 Commonwealth v. Rekasie, 778 A.2d 624, 625–26 (Pa. 2001).

152 *Id.*

153 *Id.* at 631.

communication, . . . we hold that Rekasie did not harbor an expectation of privacy in his telephone conversation with Tubridy that society is willing to recognize as reasonable."[154]

The two dissenting opinions questioned that *Rekasie* should be decided differently from *Brion*, given that Rekasie was in his home when he spoke with the informant.[155] The first dissenting opinion stated: "The majority has authorized the government to seize our words as spoken to another on a telephone in our own homes, requiring nothing more than a willing participant to place the call."[156] The second dissenting opinion saw the majority's opinion as one step farther along a slippery slope: "Given the ever-increasing technological means for eavesdropping into private affairs, it appears, under the majority's rationale, that it is only a matter of time before there is no privacy anywhere or in anything."[157]

In *Commonwealth v. Dunnavent*, the Supreme Court of Pennsylvania, being evenly divided, affirmed per curiam the lower court decisions.[158] In *Dunnavent*, a confident informant wearing a hidden, soundless video device, was sent to make an illegal drug purchase from Dunnavent on a street corner.[159] Dunnavent took the informant to Dunnavent's home where the informant was invited inside, and the informant made the drug purchase.[160] The trial court suppressed the videotape information, and the intermediate appellate court affirmed.[161]

In the Supreme Court of Pennsylvania, there were two opinions in support of affirmance and two opinions in support of reversal. The first opinion in support of affirmance acknowledged the argument for reversal was that "the confidential informant was not *sent* by the police into the home, but instead was unexpectedly *invited* into the home."[162] Therefore, "unless and until *Brion* is overruled, individuals in Appellee's position are entitled to suppression of secretly made video recordings capturing events transpiring within the confines of their home, regardless of whether the police originally expected and/or intended that those events would occur outside the residence."[163] The second opinion in favor of affirmance emphasized the home location to be the "critical factor" in reaching a conclusion that the videotaping was a violation of the state constitution.[164] In addition, "the nature of the government sanctioned activity at issue here—

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154 *Id.*
155 *Id.* at 635 (Zappala, J., dissenting).
156 *Id.*
157 *Id.* at 638 (Flaherty, J., dissenting).
158 Commonwealth v. Dunnavent, 107 A.3d 29, 30 (Pa. 2014).
159 *Id.* at 31 (Saylor, J., in support of affirmance).
160 *Id.*
161 *Id.* at 32–33 (Castille, C.J., in support of reversal).
162 *Id.* at 30 (Saylor, J., in support of affirmance).
163 *Id.* at 31.
164 *Id.* (Todd, J., in support of affirmance).

videotaping—to pose an even greater risk of unjustified invasion of the right of privacy than the audiotaping at issue in *Brion*."[165]

The first opinion in support of reversal found that "this case is properly controlled by . . . the deliberate nature of police conduct."[166] The opinion concluded that "given the exigent circumstances and given that there was no underlying unlawful governmental conduct, such as 'sending' a CI into a citizen's home for the purpose of recording a conversation, no constitutional violation occurred."[167] The second opinion in support of reversal recognized that police officers should be on a par with suspects in the use of technology: "Just as the criminal element recognize the importance of and take advantage of technological advances, so must law enforcement be permitted to take advantage of technological advances in meeting its responsibilities under the law."[168] The dissenting justice would not have *Brion* control where there is an invitation by the suspect: "The expectation of privacy is lost when the suspect voluntarily exposes his illicit activities regardless of where it occurs and regardless if the police deliberately sent the informant to the home or not."[169]

G. Vermont

Vermont is the sole state without an eavesdropping or wiretapping statute, and the Vermont Constitution does not contain an explicit right to privacy. The Vermont case that was most like *Glass*, *Blood*, and *Brion* was *State v. Blow*.[170] In 1991, in *Blow*, an informant volunteered to wear a radio transmitter and purchase illegal drugs from Blow in Blow's home.[171] On the two occasions, on which the informant completed the purchase in Blow's home, a police detective monitored the radio transmissions and secretly taped the conversations.[172]

Blow claimed that the secret taping violated the search-and-seizure provision of the Vermont Constitution.[173] In analyzing Blow's claim, the Supreme Court of Vermont employed the *Katz* two-step reasonable expectation of privacy test.[174] The Vermont court agreed with Blow and held "that warrantless electronic participant monitoring conducted in a home offends the core values

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165 *Id.* at 32.
166 *Id.* at 50 (Castille, C.J., in support of reversal).
167 *Id.* at 51.
168 *Id.* at 52 (Stevens, J., in support of reversal).
169 *Id.*
170 *See* State v. Blow, 602 A.2d 552, 556 (Vt. 1991) (highlighting the similarities between this case, State v. Glass, and Commonwealth v. Blood).
171 *Id.* at 553.
172 *Id.*
173 *Id.* at 555.
174 *Id.*

of Article 11 [the search-and-seizure provision of the Vermont Constitution]."[175] The court added: "Accordingly, where the State uses an agent to enter a home for the purposes of eliciting and electronically transmitting evidence from an occupant of the home, it is the burden of the State to obtain a warrant upon probable cause prior to conducting that search."[176]

In 1991, in *State v. Brooks*, the Supreme Court of Vermont distinguished *Brooks* from *Blow* because the secretly taped conversation in *Brooks* occurred in a parking lot rather than in the suspect's home.[177] In *Brooks*, an informant agreed to cooperate with the police after being arrested.[178] The informant called Brooks when Brooks was in his home, and they agreed to meet in a shopping center parking lot.[179] During the telephone conversation, Brooks expressed some suspicion that the telephone call might be secretly taped, which it was.[180] In the parking lot, Brooks and the informant remained in their vehicles as they spoke through open windows.[181] The informant used a hidden radio transmitter to convey the conversation to police officers taping the conversation a short distance away in another vehicle.[182] Brooks incriminated himself in the discussion, and the police used that information to obtain a search warrant for Brooks' home and vehicle.[183]

The Supreme Court of Vermont used the *Katz* two-step test in reviewing the trial court's denial of Brooks' motion to suppress the secretly taped conversations.[184] The Vermont court of last resort found that Brooks' claimed expectation of privacy was not reasonable: "Applying these guidelines to the facts of this case, we find that defendant, regardless of what he actually expected, did not enjoy a reasonable expectation of privacy in a public parking lot. In that setting, conversations are subject to the eyes and ears of passersby."[185] The court added, "The distinction between the reasonable expectation of privacy within the home and outside of it is well-grounded in the law and in our culture."[186] The court recognized that the use of informants was an undesirable one: "The widespread and unrestricted use of government informants is surely one of the basic characteristics of a totalitarian state."[187] However, the court accepted the

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175 *Id.* at 556.
176 *Id.*
177 State v. Brooks, 601 A.2d 963, 965 (Vt. 1991).
178 *Id.* at 963.
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.* at 964 (citing Katz v. United States, 389 U.S. 347, 361) (Harland, J., concurring)).
185 *Id.*
186 *Id.*
187 *Id.* at 965.

use of informants as the price of safeguarding society.[188]

The dissent in *Brooks* was three times as long as the majority opinion.[189] The most salient point of the dissent drew attention to the fact that Brooks was originally in his home for the telephone conversation.[190] The police could use the *Brooks* decision to lure the suspect outside the home and then secretly record an incriminating conversation without the bother of obtaining a warrant.[191] Justice Morse expresses in his dissent: "It is no small irony that the suspect in this case was coaxed from his house by a telephone call to meet and talk in a shopping center parking lot. The police may now monitor without limitation the words of any person it considers suspect, dangerous, undesirable, or unpopular."[192]

In 2002 in *State v. Geraw*, the Supreme Court of Vermont interpreted the search-and- seizure provision of the Vermont Constitution to protect a conversation in Geraw's home from being secretly recorded by two officers.[193] In finding that Geraw's secretly taped conversation was correctly suppressed, the Vermont court rejected the State's argument that the fact that Geraw knew he was speaking with police officers lowered Geraw's expectation of privacy.[194] Knowingly speaking with police officers "is a far different expectation, however, from knowingly exposing every word and phrase one speaks, every inflection or laugh or aside one utters, to the scrutiny of the world at large."[195] The court emphasized that there was an underhanded reason that the officers failed to disclose that the conversation was being taped.[196]

The lengthy dissent distinguished *Geraw* from *Blow* because Geraw invited the persons he knew to be officers into his home when he knew that they were investigating Geraw's involvement in the serious criminal offense of child sexual molestation:[197] "Vermonters would not find reasonable a suspect's expectations that his responses to police questions about possible involvement in a crime are private."[198]

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188 *Id.*
189 *Id.* at 965–72 (Morse, J., dissenting).
190 *Id.* at 965–66.
191 *Id.* at 965.
192 *Id.*
193 State v. Geraw, 795 A.2d 1219, 1220 (Vt. 2002).
194 *Id.* at 1224.
195 *Id.*
196 *Id.* at 1225.
197 *Id.* at 1229–30 (Skoglund, J., dissenting).
198 *Id.* at 1233.

H. West Virginia

The West Virginia Constitution does not contain an explicit privacy provision, but in 2007, in *State v. Mullens*,[199] the Supreme Court of Appeals of West Virginia interpreted the search-and-seizure provision of the West Virginia Constitution to safeguard a conversation against electronic interception where an informant wearing a device with audio-and-video capability met with a suspect, and the suspect's wife, in the suspect's home and secretly taped their conversation. In doing so, the court overruled a prior 1986 decision.[200] In *Mullens*, the court recognized its "long history of protecting the sanctity of the home from warrantless searches and seizures."[201] The state legislation permitting secret taping through one-party consent would still apply outside the home: "Our ruling today merely limits the one-party consent provision of the Act from being used to send an informant into the home of a suspect to record communications therein without having obtained a search warrant authorizing such conduct."[202]

Two justices dissented from *Mullens* and each wrote a separate dissenting opinion.[203] Justice Benjamin was troubled by the majority overruling its prior opinion in *State v. Thompson* without what the justice thought to be adequate reasoning.[204] Justice Benjamin pointed out that the recording equipment used in *Mullens* was not in any way sophisticated, but the advantage of recording a conversation is that it produces reliable evidence for use in a criminal case, and the informant was invited into the Mullens home.[205] In his dissent, Justice Maynard also criticized the majority's decision for less than "sound reasoning."[206] He observed that, under the court's ruling, an informant can enter the suspect's home and gather evidence by taking notes of a conversation with the suspect; however, an informant is precluded from secretly taping that same conversation, with "the likely effect . . . to make legitimate police investigations of criminal suspects more time-consuming, complex, and difficult."[207]

In response to *Mullens*, the West Virginia Legislature passed the Electronic Interception of Person's Conduct or Oral Communications in the Home by Law Enforcement Act (the "Electronic Interception Act").[208] The Electronic

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199 State v. Mullens, 650 S.E.2d 169, 171, 190 (W. Va. 2007).
200 *Id.* at 190.
201 *Id.* at 189.
202 *Id.* at 190.
203 *Id.* at 191 (Benjamin, J., dissenting); *see also id.* at 214 (Maynard, J., dissenting).
204 *Id.* at 191–92 (Benjamin, J., dissenting); *see also* State v. Thompson, 342 S.E.2d 268 (W. Va. 1986), *overruled by* State v. Mullens, 650 S.E.2d 169, 190 (W. Va. 2007).
205 *Mullens*, 650 S.E.2d at 193–94, 196.
206 *Id.* at 216 (Maynard, J., dissenting).
207 *Id.*
208 W. VA. CODE ANN. §§ 62-1F-1 to -9 (West 2020).

Interception Act generally requires law enforcement to obtain a court order prior to secretly taping a suspect in the suspect's home, but law enforcement can obtain a retroactive court order if there are exigent circumstances.[209]

In 2014, in *State ex rel State v. Burnside*, the Supreme Court of Appeals of West Virginia had the occasion to review the portion of the West Virginia statute that protects an attorney-client conversation against being secretly taped.[210] In *Burnside*, a confidential informant drove Hardison from his home to his law office where the informant allegedly purchased cocaine from the attorney.[211] The informant secretly taped their conversations in the informant's vehicle and in Hardison's law office. At the time, the informant was an acquaintance and client of Hardison.[212] The trial court suppressed the secretly taped conversations because they were considered attorney-client communication.[213]

On appeal, the Supreme Court of Appeals of West Virginia held that the statute "is intended to prevent attorney-client privileged communications from being monitored by wiretapping or through electronic surveillance."[214] The West Virginia court found that "Lawyer Hardison was not acting in his capacity as a lawyer during his April 6, 2012, conversation with the confidential informant."[215] The court concluded in *Burnside* that the secretly taped conversations between the informant and the suspect should not have been suppressed.[216] The court added: "The confidential informant was not seeking legal advice from Lawyer Hardison; he was allegedly only seeking to purchase cocaine from him. Further, the confidential informant, having agreed to wear a recording device, did not intend that this conversation be kept confidential."[217]

Burnside garnered two concurring opinions and a dissenting opinion.[218] Both concurring opinions supported the conclusion that the majority opinion struck the proper balance of safeguarding the attorney-client privilege and protecting the public against criminal activity.[219] The dissent was more protective of law-office conversation: "In permitting electronically intercepted non attorney-client communications emanating from a law office of any attorney licensed to practice law in this state, the majority has placed the sanctity of the attorney-client

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209 *Id.* at §§ 62-1F-2, -9.

210 State *ex rel.* State v. Burnside, 757 S.E.2d 803, 804 (W. Va. 2014); W. VA. CODE ANN. § 62-1D-9(d) (West 2020).

211 *Burnside*, 757 S.E.2d at 805.

212 *Id.*

213 *Id.* at 804.

214 *Id.* at 811.

215 *Id.* at 812.

216 *Id.*

217 *Id.*

218 *Id.* at 812, 814–15.

219 *Id.* at 812 (Benjamin, J., concurring); *see also id.* at 814 (Loughry, J., concurring).

relationship on a dangerous slope."[220]

In 2020, in *State v. Howells*, the Supreme Court of Appeals of West Virginia considered the exigent circumstances exception.[221] Two undercover detectives looking for a confidential informant found out that the informant was staying at Howells' home.[222] They knocked at Howells' front door inquiring about the informant and indicating that the informant was their usual illegal drug supplier.[223] While speaking on the front porch, Howells offered to sell them drugs if they could return a little later.[224] The detectives returned a short while later after one of the detectives equipped himself with a hidden taping device.[225] The detectives returned, Howells invited them into his home, and the detectives purchased drugs from Howells.[226] One of the detectives obtained a retroactive court order prior to their next meeting with Howells in a shopping center parking lot.[227] The detectives purchased drugs from Howells while they were in Howells' vehicle in the parking lot.[228] Both the second meeting in Howells' home and the meeting in his vehicle were secretly taped.[229] On appeal, Howells claimed that the conversation and other evidence relating to it should have been suppressed because the conversation was secretly taped without a court order.[230]

The West Virginia court found that the sequence of events did amount to exigent circumstances: "The Detectives believed that the drug transaction would occur on [Howells'] porch and therefore they did not initially seek a court order to wear the audio/video recorder."[231] Then the circumstances quickly changed: "Once [Howells] invited the Detectives into his home, it was simply not practical for them to abruptly tell [Howells] they had to go, but they would be back."[232]

One justice dissented, pointing out that the serious deficiencies in the court order did not comply with the statutory requirements for a retroactive court order.[233] The dissent opined that the detectives should have dispensed with secretly taping the in-home drug purchase, and they could have still testified concerning the event.[234] The dissent concluded that the majority's "strained

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220 *Id.* at 818 (Sims, J., dissenting).
221 State v. Howells, 842 S.E.2d 205, 209 (W. Va. 2020).
222 *Id.* at 207.
223 *Id.*
224 *Id.*
225 *Id.*
226 *Id.*
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.* at 207–08.
231 *Id.* at 206.
232 *Id.*
233 *Id.* at 212 (Workman, J., dissenting).
234 *Id.* at 213–14.

analysis has cast a troubling cloud over our citizens' right to be free of unlawful interception of their in-home communications."[235]

I. Wyoming

The Supreme Court of Wyoming has interpreted the Wyoming Constitution to require only one-party consent to secretly tape a conversation between the suspect, an undercover agent, and informants in the suspect's home.[236]

In 1999, in *Almada v. State*, Almada was allegedly selling cocaine when he invited an undercover agent, two informants, and a buyer into his home.[237] The agent and one of the informants were wearing hidden devices with taping and transmitting capability and after the agent made a purchase, Almada was arrested.[238] Almada claimed that the secretly taped conversation should have been suppressed.[239]

The Supreme Court of Wyoming first considered Almada's claims that a law enforcement officer could not qualify as a participant who could consent to the secret taping and that a court order is required.[240] The Wyoming court held that a law enforcement officer may provide the one-party consent necessary and, with the one-party consent, a court order is not required.[241]

Next the court considered whether the Wyoming eavesdropping statutes violated the search-and-seizure provision of the Wyoming Constitution.[242] The court decided, "We hold participant monitoring without a warrant or court order pursuant to the Act does not violate Art. 1, § 4 of the Wyoming [Constitution,]" finding that "Almada had no reasonable expectation of privacy which might implicate constitutional protection in this case."[243] The court reasoned, "The comprehensive nature of the Act and its many safeguards couched in constitutional terms suggest that compliance with the Act weighs heavily in favor of finding the interception constitutional on independent state grounds."[244] The court added, "The significant limitations placed on the interception of communications by peace officers clearly signifies a legislative intent to draw a balance between the interest of the state in protecting its citizens from crime and

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235 *Id.* at 216.
236 Almada v. State, 994 P.2d 299, 311 (Wyo. 1999).
237 *Id.* at 302.
238 *Id.*
239 *Id.*
240 *Id.* at 307.
241 *Id.*
242 *Id.* at 307–08.
243 *Id.* at 311.
244 *Id.*

its interest in preserving individual freedom from overly intrusive governmental invasion."[245]

III. STATE CONSTITUTIONAL PRIVACY PROVISIONS AND STATE STATUTES

The preceding section explained that case law in six states protects the suspect from being secretly taped in the suspect's home where the taping was facilitated by an informant who spoke to the suspect while in the suspect's home. Only Alaska and Montana drew this protection from an explicit privacy provision in the state constitution. Courts in Massachusetts, Pennsylvania, West Virginia, and Vermont interpreted a state constitutional search-and-seizure provision to provide this protection against secret taping in the home. Of the six states, Massachusetts, Montana, and Pennsylvania are all-party consent states.[246]

Dozens of state constitutions contain explicit privacy provisions.[247] These states are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, New York, South Carolina, and Washington.[248] The state constitutions of California, Florida, and Hawaii each have two explicit privacy references, with one found in the search-and-seizure provision and the other in a separate privacy provision.[249] New York limits its constitutional privacy protection to telephone conversations.[250]

The existence of an explicit privacy provision in a state constitution does not necessarily correspond to the statutes for the state providing more protection against a conversation being secretly taped. Some states with an explicit constitutional privacy provision also protect against secret taping by requiring all-party consent, while some states do not.

Generally, state statutes follow one of two patterns for protecting a conversation against secret taping. The majority of the states and the federal statute require one-party consent.[251] The states requiring only one-party consent are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut (limited to a face-to-face conversation), District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada (limited to a face-to-face conversation), New

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245 *Id.*

246 Christina Pici, *Making Sense of Pennsylvania's Two-Party Consent Law*, JURIS MAG. (Dec. 1, 2019), https://sites.law.duq.edu/juris/2019/12/01/making-sense-of-pennsylvanias-two-party-consent-law/.

247 *See* Appendix A.

248 *See* Appendix A.

249 *See* Appendix A.

250 *See* Appendix A.

251 *See* Appendix B.

Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon (limited to telephone conversation), Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. A minority of the states require all-party consent.[252] These states are California,[253] Connecticut (limited to telephone conversation), Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada (limited to telephone conversation), New Hampshire, Oregon (limited to face-to-face conversation), Pennsylvania, and Washington.[254]

Thus, when one compares the existence of an explicit constitutional privacy provision with the state statutes, one finds little correlation. California, Florida, Illinois, Montana, New Hampshire, and Washington are the six states that have both an explicit constitutional privacy provision and all-party consent statutes. Alaska, Arizona, Hawaii, Louisiana, New York, and South Carolina are the six states that have an explicit constitutional privacy provision and one-party consent statutes.[255]

Various factors may be used to compare different state statutes providing protection against secret taping.[256] One factor described above is the amount of consent required to tape a conversation, with some states requiring one-party consent and other states requiring all-party consent. Many state statutes contain some type of exception permitting someone operating under color of law, such as a police officer, to tape a conversation with one-party consent, although as explained below, this exception varies widely. The language of statutes in a number of states borrows from the language of the federal statutes, which a court may find helpful in interpreting a state statute. Most states make violation of the state statute a crime that entails a term of imprisonment and the possibility of a fine.[257] The severity of the punishment varies widely from state to state.[258] Many states provide a private right of action to a person whose conversation was illegally taped. The person may be entitled to statutory damages, punitive damages, attorney fees, costs, injunction, and declaratory relief, depending on the state. The amount awardable in statutory damages varies widely from state to state.[259]

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252 *See* Appendix B.

253 Several provisions of the California statutes have either been repealed or held to be unconstitutional. *See* Appendix A. California statutes still require all-party consent to tape a cellular telephone conversation. *See* Appendix C.

254 *See* Appendix C.

255 *See* Appendix B.

256 *See* Appendix B.

257 *See* Appendix B.

258 *See* Appendix B.

259 *See* Appendix B.

The federal act, often referred to as the Electronic Communications Privacy Act,[260] requires one-party consent to secretly tape a conversation unless the purpose of taping the conversation is to commit a crime or tort.[261] A number of one-party consent states have this same exception that would not permit secret taping on one-party consent if the purpose of taping the conversation is to commit a crime or tort. These states include: Delaware,[262] District of Columbia,[263] Hawaii,[264] Idaho (limited to a crime),[265] Iowa,[266] Louisiana,[267] Minnesota,[268] Mississippi,[269] Missouri,[270] Nebraska,[271] New Jersey,[272] North Dakota (limited to a crime or "unlawful harm"),[273] Ohio,[274] Oklahoma (limited to a crime),[275] Rhode Island,[276] Tennessee,[277] Texas (limited to an "unlawful act"),[278] Utah,[279] West Virginia,[280] Wisconsin,[281] and Wyoming.[282]

The federal act contains the typical color of law exemption permitting a police officer to secretly tape a conversation where the officer is a party to the conversation or a party to the conversation has given consent to have the conversation secretly taped.[283] Because the federal act serves as a model, statutes of a number of states contain a similar provision, such as: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee,

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260 *See* Hannah Clarisse, *Wiretapping in a Wireless World: Enacting a Vermont Wiretap Statute to Protect Privacy against Modern Technology*, 43 VT. L. REV. 369, 377, 377 n.63-66 (2018).

261 18 U.S.C.A. § 2511(2)(d) (West, Westlaw through Pub. L. No. 116-140).

262 DEL. CODE ANN. tit. 11, § 2402(c) (West 2020).

263 D.C. CODE ANN. § 23-542(b) (West 2020).

264 HAW. REV. STAT. ANN. § 803-42(b)(3)(A) (West 2019).

265 IDAHO CODE ANN. § 18-6702(2)(d), (e) (West 2020).

266 IOWA CODE ANN. § 808B.2.c. (West 2020).

267 LA. STAT. ANN. § 15:1303 (C)(4) (2019).

268 MINN. STAT. ANN. § 626A.02(subdiv.2)(d) (West 2020).

269 MISS. CODE ANN. § 41-29-531(e) (West 2020).

270 MO. ANN. STAT. § 542.402 (subdiv.2)(3) (West 2019).

271 NEB. REV. STAT. ANN. § 86-290(2)(c) (West 2020).

272 N.J. REV. STAT. ANN. § 2A:156A-4(d) (West 2020).

273 N.D. CENT. CODE ANN. § 12.1-15-02 (subdiv.3) (West 2020).

274 OHIO REV. CODE ANN. § 2933.52(B)(4) (West 2020).

275 OKLA. STAT. ANN. tit. 13, § 176.4 (West 2020).

276 R.I. GEN. LAWS ANN. § 11-35-21(c) (West 2020).

277 TENN. CODE ANN. § 39-13-601(b)(5) (West 2020).

278 TEX. PENAL CODE ANN. § 16.02(c) (West 2019).

279 UTAH CODE ANN. § 77-23a-4(7)(b) (West 2020).

280 W. VA. CODE ANN. § 62-1D-3(e) (West 2020).

281 WIS. STAT. ANN. § 968.31(2) (West 2019).

282 WYO. STAT. ANN. § 7-3-702(b) (West 2020).

283 18 U.S.C.A. § 2511(2)(c) (West, Westlaw through Pub. L. No. 116-140).

Texas, Utah, and Wisconsin. The Montana color of law exception is quite broad in permitting a public official to tape when performing official duties.[284] The statutes of several states have no color of law exception, including: Indiana, Kansas, Kentucky, New York, South Dakota, Virginia, West Virginia, and Wyoming. As explained below, the color of law exception is limited in certain states, including California, Illinois, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Pennsylvania, Washington, and West Virginia.

California is a state whose color of law exception is limited to certain enumerated crimes such as extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, domestic violence, or an emergency situation that involves the taking of a hostage or the barricading of a location.[285] In addition, an exception exists for a university police officer investigating a sexual offense.[286]

Illinois limits its color of law exception to patrol cars, taser use, a hostage or barricade situation,[287] or a kidnapping, hostage, or barricade situation with associated danger of death or great bodily harm.[288]

Maryland limits its color of law exception to the following offenses or solicitation or conspiracy to commit the following offenses: murder, kidnapping, rape, a sexual offense in the first or second degree, child abuse in the first or second degree, child pornography, gambling, robbery, arson, bribery, extortion, dealing in a controlled dangerous substance, a fraudulent insurance act, an offense relating to destructive devices, a human trafficking offense, sexual solicitation of a minor, an offense relating to obstructing justice, sexual abuse of a minor, a theft scheme involving at least $10,000, abuse or neglect of a vulnerable adult, an offense relating to Medicaid fraud, an offense involving a firearm, or a barricade situation with a hostage.[289]

Massachusetts limits its color of law exception to a situation necessary to ensure the safety of an undercover officer or agent.[290]

Nevada limits its color of law exception to a situation involving a barricade, hostage, or explosive,[291] or an emergency situation with the consent of one party.[292]

New Hampshire limits its color of law exception to an officer carrying a radio

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284 MONT. CODE ANN. § 45-8-213(2)(a)(i) (West 2019).
285 CAL. PENAL CODE §§ 633.5, .8 (West 2020).
286 *Id.* at § 633.02.
287 720 ILL. COMP. STAT. ANN. § 5/14-3(h), (h-10), (o) (West 2020).
288 725 ILL. COMP. STAT. ANN. § 5/108A-6 (West 2020).
289 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(2) (West 2020).
290 MASS. GEN. LAWS ANN. ch. 272, § 99D.1.e. (West 2020).
291 NEV. REV. STAT. ANN. § 179.463 (West 2019).
292 *Id.* at § 200.620.

transmitter when investigating any of the following offenses or a conspiracy to commit any of the following offenses: homicide, kidnapping, gambling, theft, corrupt practices, child sexual abuse images, computer pornography and child exploitation, criminal conduct in violation of the securities law, criminal conduct in violation of the security takeover disclosure laws, robbery, hindering apprehension or prosecution, tampering with witnesses and informants, aggravated felonious sexual assault, felonious sexual assault, escape, bail jumping, insurance fraud, dealing in narcotic drugs, marijuana, or other dangerous drugs, or hazardous waste violations.[293]

Oregon limits its color of law exception to an officer investigating a felony involving controlled substances; manufacture or delivery of certain drugs, or delivery of a controlled substance to a minor; or a misdemeanor involving prostitution or commercial sexual solicitation; a felony involving exigent circumstances under which it is not reasonable to be able to obtain a court order;[294] or an officer recording an incident using a police vehicle, a body camera, or an audio-equipped taser.[295]

Pennsylvania limits its color of law exception to an officer wearing a recording device or radio transmitter meeting with a suspect to investigate harm done to an officer, or to an officer investigating a barricade or hostage situation.[296]

Washington limits its color of law exception to an officer investigating threats of extortion, blackmail, bodily harm, or other unlawful requests or demands or a barricade or hostage situation when one party to the conversation consents.[297] In addition, a conversation concerning controlled substances or sexual abuse of a minor may be secretly taped on consent of one party to protect the safety of the consenting party.[298]

The color of law exception in West Virginia is limited to exigent circumstances concerning taping in a home with a court order required within three business days thereafter.[299]

IV. ALL-PARTY CONSENT

At first blush, one would think that it would be better for a state to provide more privacy protection by requiring all-party consent rather than one-party

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293 N.H. REV. STAT. ANN. §§ 570-A:2 II.(c), -A:7 (2020); *see also* State v. Kilgus, 519 A.2d 231, 239 (N.H. 1986).

294 OR. REV. STAT. ANN. § 133.726(7) (West 2020).

295 *Id.* at § 165.540(5)(d), (e).

296 18 PA. STAT. AND CONS. STAT. ANN. § 5704(2), (12) (West 2020).

297 WASH. REV. CODE ANN. § 9.73.030(2) (West 2020).

298 *Id.* § 9.73.210(1) (West 2020).

299 W. VA. CODE ANN. § 62-1F-9 (West 2020).

consent. As alluded to earlier, there may be good reasons for secretly taping a conversation to gather evidence. One who does so in an all-party consent state can be subject to serious criminal penalties.[300] With the endless availability of recording capability on one's cell phone, someone may innocently capture a conversation without knowing that secret taping is a crime in the particular state. One is well aware of certain actions that are criminal in nature; however, taping a conversation without asking for all parties to consent may not obviously be illegal to most people, especially because only a minority of states make the action criminal.[301] States are inconsistent in requiring one-party or all-party consent, and one who travels may be subject to varying requirements as one passes from state to state. In addition, the location of a party speaking on a cell phone may be unclear or unknown, and a question may arise as to what state's law should apply if the cell phone conversation is interstate between one party in a one-party consent state and the other party in an all-party consent state.

The potential problems with requiring all-party consent have caused all-party states to interpret their statutes in a variety of ways, with a lack of consistency from state to state.

A. California

California's protections against wiretapping requires all-party consent for cellular telephone conversations.[302] California permits one-party consent to secretly tape a conversation where the conversation is related to certain enumerated crimes such as extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking, or domestic violence.[303] Statutory protection for face-to-face and other types of telephone conversations has seriously been cut back by the repeal of certain statutes and courts holding other statutes unconstitutional.[304]

B. Florida

Florida is an all-party consent state, meaning that it is illegal for a party to a face-to-face conversation or a telephone conversation to secretly tape the

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300 CAL. PENAL CODE § 632 (West 2020).
301 N.Y. C.P.L.R. § 4506 (MCKINNEY 2020).
302 CAL. PENAL CODE §§ 630, 632(a), 632.5, 637.2.
303 CAL. PENAL CODE § 633.5 (West 2020).
304 *See id. at* §§ 630a, 630b, 631a-631e, 632a-632(4) (repealed); *See also id. at* §§ 631, 632 (held unconstitutional); People v. Guzman, 453 P.3d 1130 (Cal. 2019) (holding § 632(d) unconstitutional); *see also* People v. Algire, 165 Cal.Rptr.3d 650 (Cal. Ct. App. 2013) (holding § 631(c) unconstitutional).

conversation.[305] The distinction between a face-to-face conversation protected against being taped and a telephone conversation being protected against being taped is that the face-to-face conversation must be one in which the participants expect privacy and the expectation of privacy is reasonable.[306] A telephone conversation is protected without any requirement of reasonableness.[307]

In *State v. Inciarrano*,[308] the Florida Supreme Court had difficulty deciding the case because the murder victim secretly taped a face-to-face conversation with the murderer in the victim's office, a secluded location, and the conversation was the best and only evidence of the crime.[309] In *Inciarrano*, the murder victim had a tape recorder hidden in his desk that was secretly taping the meeting between the victim and Inciarrano.[310] The tape captured the sounds of Inciarrano allegedly shooting and killing the victim.[311] The issue before the Florida court was "whether the tape recording made by a victim of his own murder must be excluded from evidence pursuant to chapter 934."[312]

The Florida court held "that because Inciarrano had no reasonable expectation of privacy, the exclusionary rule of section 934.06 does not apply."[313] The reasoning of the court was that Inciarrano's expectation of privacy was not reasonable because "Inciarrano went to the victim's office with the intent to do him harm."[314] The trial court perhaps provided clearer reasoning: "[T]he Court considered, among other factors, 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. . . ."[315]

The Florida Supreme Court decided *McDade v. State* in 2014.[316] *McDade* was an extremely difficult case, in that the defendant allegedly sexually abused his

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305 Alex B. Lipton, *Privacy Protections for Secondary Users of Communication-Capturing Technologies*, 91 N.Y.U. L. REV. 396, 411 (2016).

306 FLA. STAT. ANN. § 934.02(2) (West 2019) ("'Oral 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 . . . ").

307 "'Wire 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. . . ." § 934.02(1) ("'Wire 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. . . .").

308 State v. Inciarrano, 473 So. 2d 1272 (Fla. 1985).

309 *Id.* at 1273–74.

310 *Id.* at 1274.

311 *Id.*

312 *Id.* at 1273–74.

313 *Id.* at 1276.

314 *Id.* at 1275–76.

315 *Id.* at 1274.

316 McDade v. State, 154 So. 3d 292 (Fla. 2014).

sixteen-year-old stepdaughter for six years, and she secretly taped two conversations when they were in his bedroom.[317] The police arrested McDade after the stepdaughter turned the secretly taped conversations over to the police.[318] The trial court denied McDade's motion to suppress, and he was convicted; the intermediate appellate court affirmed.[319]

The Florida court stated the issue as: "[does] a recording of a solicitation and confirmation of child sexual abuse [secretly] made by the child victim in the accused's bedroom fall within. . . [§] 934 [of the 2010] Florida statutes?"[320] The Florida court concluded that the secretly taped conversations qualified as oral communication, which was protected against being secretly taped, and the conversations were inadmissible.[321] The court factually distinguished *Inciarrano* and *McDade* on the facts.[322] The location in *Inciarrano* was the murder victim's place of business, which was open to the public:[323] "Conversely, the recordings at issue in this case were made in McDade's bedroom, the recording device was hidden under the stepdaughter's shirt, and the recordings contain conversations between McDade and his stepdaughter."[324]

In *McDade*, the Florida Supreme Court invited the Florida legislature to permit secret taping by one of the parties to a conversation to provide evidence of a crime.[325] The Florida legislature accepted the invitation and added an extremely narrow exception to the all-party consent requirement.[326] Florida now permits one-party consent for a minor to secretly tape a face-to-face conversation where the conversation is related to an unlawful sexual act or violence.[327]

Florida does have a color of law exception that would permit a party to a conversation to secretly tape the conversation, but only if "under the direction of an investigative or law enforcement officer" and only if "the purpose of such interception is to obtain evidence of a criminal act."[328] In 2017, in *Tundidor v. State*, the Florida Supreme Court had occasion to determine whether the exception applied.[329] In *Tundidor*, the police were investigating Randy Tundidor

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317 *Id.* at 294.
318 *Id.*
319 *Id.* at 294–96.
320 *Id.* at 294 (all capitals in original quotation).
321 *Id.* at 297–99.
322 *Id.* at 298–99.
323 *Id.* at 298.
324 *Id.*
325 *Id.* at 299.
326 FLA. STAT. ANN. § 934.03(2)(k) (West 2019).
327 *Id.*
328 *Id.* § 934.03(2)(c).
329 Tundidor v. State, 221 So. 3d 587, 600 (Fla. 2017).

and his son, Junior, for murder and several other crimes that they allegedly committed.[330] The police contacted Tundidor's other son, Shawn.[331] Shawn, who was afraid that he might be implicated, asked the police to let him secretly tape a conversation with his father.[332] Shawn did so using recording equipment the police provided and captured his father incriminating himself.[333] The Florida court concluded that the requirements of the color of law exception were met:[334] The court found that "because the police agreed to Shawn's suggestion of recording his conversation with his father and helped him to do so by providing the recording equipment and transportation, the recording was made under the direction of the police . . . "[335]

C. Illinois

Illinois makes it legal to tape a private conversation with all-party consent.[336] Illinois permits one-party consent to secretly tape a conversation where the conversation is related to a crime against the person or immediate household.[337]

D. Maryland

Maryland makes it legal to tape a conversation with all-party consent unless the taping is a crime or tort.[338]

In 2000, in *Deibler v. State*, Deibler had allegedly used a hidden camera with audio capability to secretly record his friend's aunt taking a shower.[339] The Maryland Wiretap Law makes it illegal to willfully tape a conversation.[340] The Court of Appeals of Maryland was tasked with statutory interpretation:[341]"[t]he question is whether willfulness, for purposes of § 10–402(a)(1), requires knowledge on the part of the defendant that his or her action is unlawful—that it is prohibited by the statute."[342] The Maryland court held that, for purposes of

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330 *Id.* at 592–96.
331 *Id.* at 600.
332 *Id.* at 597, 600.
333 *Id.*
334 *Id.* at 600.
335 *Id.*
336 720 ILL. COMP. STAT. ANN. § 5/14-2(a)(1)–(2) (West 2020).
337 § 5/14-3(i).
338 MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2020).
339 Deibler v. State, 776 A.2d 657, 658–59 (Md. 2000).
340 § 10-402(a)(1) (West 2020).
341 *Deibler*, 776 A.2d at 658–59.
342 *Id.* at 659 (The question arose in part because in 1995 the Maryland intermediate court had interpreted the statute to require the suspect's knowledge that the secret taping was illegal.); *see also* Hawes v. Carberry, 653 A.2d 479, 483 (Md. Ct. Spec. App. 1995), *abrogated by* Deibler v. State, 776 A.2d 657, 658 (Md. 2000).

the Maryland Wiretap Law, "an interception that is not otherwise specifically authorized is done willfully if it is done intentionally-purposely."[343] The dissent would have interpreted the Maryland Wiretap Law to require the suspect to know that the suspect's action was illegal,[344] stating "although Deibler's conduct was morally reprehensible, the record of his trial fails to provide evidence of the degree of willfulness required under Maryland's wiretap statute. . . ."[345]

In 2018, in *Agnew v. State*, Agnew tried to make offensive use of the all-party consent statute, claiming that the cell phone conversation he secretly taped could not be used as evidence against him because the other party to the telephone conversation did not consent to the taping.[346] The Court of Appeals of Maryland concluded that the telephone conversation was properly admitted because his claimed expectation of privacy was not reasonable.[347] The Maryland court reasoned: "It would be . . . ludicrous to conclude that the purpose of the Wiretap Act extended to protect a party who records their own conversation without the consent of the other party, and then seeks to block its admission due to the intentional failure to obtain the other person's consent."[348]

E. Massachusetts

By its terms, the Massachusetts eavesdropping statute would apply to criminalize the recording if it were made secretly, perhaps with the recording device hidden, without all-party consent.[349]

On occasion, a private citizen has taken to recording police officers performing their official duties.[350] In 2018, in *Martin v. Gross*, individuals seeking to make such secret recordings challenged the Massachusetts statute as being in violation of their First Amendment rights.[351] The court agreed with the challenge, holding "that Section 99 [the Massachusetts eavesdropping statute] may not constitutionally prohibit the secret audio recording of government officials, including law enforcement officials, performing their duties in public spaces, subject to reasonable time, manner, and place restrictions."[352]

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343 *Deibler*, 776 A.2d at 665.
344 *Id.* at 667–68 (Harrell, J., dissenting).
345 *Id.* at 668.
346 Agnew v. State, 197 A.3d 27, 28–30 (Md. 2018).
347 *Id.* at 35.
348 *Id.* at 34.
349 MASS. GEN. LAWS. ANN. ch. 272 § 99(B)(4), (C)(1) (West 2020).
350 Martin v. Gross, 340 F. Supp. 3d 87, 94 (D. Mass. 2018).
351 *Id.* at 93.
352 *Id.* at 109.

F. Michigan

Michigan protects a private conversation from being taped without all-party consent.[353]

In 1982, in *Sullivan v. Gray*, the Court of Appeals of Michigan provided a unique interpretation of the state's eavesdropping and wiretapping statutes. [354] The Michigan intermediate appellate court considered "whether participant recording is forbidden" even though the Michigan statutes require all-party consent to tape a conversation.[355] The court stated: "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.'"[356] The court acknowledged that the interpretation produces an anomalous result in that a participant may freely and secretly tape a conversation, but a non-participant may not tape the same conversation without consent of all parties.[357] The court explained that a participant may always take notes regarding the conversation, putting the participant in the best position to evaluate what another participant may reveal to others about the private:[358] "The individual may gauge his expectations according to his own evaluation of the person to whom he speaks. He has the ability to limit what he says based upon that expectation."[359] In contrast, not all of the participants may be acquainted with an outsider: "When a third party is unilaterally given permission to listen in upon a conversation, unknown to other participants, those other participants are no longer able to evaluate and form accurate expectations since they are without knowledge of the third party."[360]

The *Sullivan* dissent disagreed with the statutory interpretation provided in the majority opinion and then provided reasons why all-party consent should be required in Michigan:[361] "There is obviously more credence given to a tape

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353 MICH. COMP. LAWS. ANN. § 750.539c (West 2020).

354 Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982). It is interesting to note that the Supreme Court of Michigan has not cited to *Sullivan* even though the intermediate appellate interpretation of the Michigan statutes is unique in interpreting the consent requirement in the eavesdropping and wiretapping statutes to apply to non-participant, rather than to participant taping. The Supreme Court of Michigan did state that it was leaving open the question of whether the intermediate appellate court correctly interpreted the Michigan eavesdropping statute. Dickerson v. Raphael, 461 Mich. 851, 851 (1999). Although not unheard of, *Sullivan* was decided almost forty years ago and the Supreme Court of Michigan has yet to provide a different interpretation of the statute.

355 *Sullivan*, 324 N.W.2d at 59.

356 *Id.*

357 *Id.* at 60.

358 *Id.*

359 *Id.*

360 *Id.*

361 *Id.* at 61–62 (Brennan, J., dissenting).

recording than a verbal recollection. . . . Violations of these restrictive statutes should carry strict and serious penalties so as to discourage future use."[362] The dissent added: "I cannot repeat enough for emphasis that there has been a deluge of sophisticated electronic listening equipment within the last two decades that threatens all privacy."[363]

In 1999, in *Dickerson v. Raphael*, the Supreme Court of Michigan considered the correct measure to be used when determining if a conversation is private under the Michigan eavesdropping statutes.[364] The facts were described in the opinion of the intermediate appellate court.[365] Dickerson's daughter contacted the Sally Jessy Raphael television show about her desire to have a conversation with her mother, regarding her mother's membership in the Church of Scientology, to later be rebroadcasted on national television.[366] The show producer had the daughter fitted with a device that could transmit audio and video of the conversation to be secretly taped in a nearby van.[367] The daughter, the daughter's husband, and Dickerson's son spoke with Dickerson in a public park while the conversation was secretly videotaped.[368] Portions of the conversation were later broadcast on national television.[369] Dickerson sued claiming that the secret taping violated the Michigan eavesdropping statutes.[370] The Supreme Court of Michigan found that the trial court's jury instruction to determine if the conversation qualified as a private conversation under the Michigan eavesdropping statutes was not correct.[371] The Court stated that, "[t]he proper question is whether plaintiff intended and reasonably expected that the *conversation* was private, not whether the subject matter was intended to be private."[372]

In 2001, the Supreme Court of Michigan decided *People v. Stone*, in which an estranged husband was charged with using a scanner to eavesdrop on his wife's cordless telephone conversations.[373] The issue before the court was whether the wife's conversations qualified as "private conversation" protected against being secretly taped.[374] The court held "that, although current technology

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362 *Id.* at 62.
363 *Id.*
364 Dickerson v. Raphael, 461 Mich. 851, 851 (Mich. 1999).
365 *Id.*, *reversing in part* Dickerson v. Raphael, 654 N.W.2d 85 (Mich. Ct. App. 1997).
366 Dickerson, 564 N.W.2d at 87, *rev'd in part*, 461 Mich. 851 (Mich. 1999).
367 *Id.* at 87–88
368 *Id.*
369 *Id.* at 88.
370 *Id.*
371 *Dickerson*, 461 Mich. at 851 (Mich. 1999).
372 *Id.*
373 People v. Stone, 621 N.W.2d 702, 703 (Mich. 2001).
374 *Id.*

may allow cordless telephone conversations to be intercepted, such conversations nonetheless can be private conversations under the eavesdropping statutes."[375] The court reasoned that "although the victim may have known that her cordless telephone conversations could be willfully intercepted with a device, she also could presume that others would not eavesdrop on her cordless telephone conversations using any device because doing so is a felony under the eavesdropping statutes."[376]

In 2011, in *Bowens v. Ary, Inc.*, the Supreme Court of Michigan had to determine whether plaintiffs' conversation with defendants that defendants taped qualified as a private conversation under the Michigan eavesdropping statute.[377] The Michigan court concluded that the plaintiffs' claimed expectation of privacy was not reasonable based on the circumstances.[378]

> The following evidence compels this conclusion: (1) the general locale of the meeting was the backstage of the Joe Louis arena during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes; (2) the concert-promoter defendants were not receptive to the public-official plaintiffs' requests and, by all accounts, the parties' relationship was antagonistic; (3) the room in which plaintiffs chose to converse served as defendants' operational headquarters with security personnel connected to defendants controlling the open doors; (4) there were at least nine identified people in the room, plus unidentified others who were free to come and go from the room, and listen to the conversation, as they pleased; (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including a crew from MTV and a crew specifically hired by defendants to record backstage matters of interest; (6) and video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present, thereby establishing that at least one cameraman was openly and obviously filming during the course of what plaintiffs have characterized as a "private conversation."[379]

The dissent opined that the facts were not as clear as the majority made them out to be, of which several of the six factors listed by the majority are not determinative as to whether the plaintiffs' expectation of privacy was reasonable, and that the majority should not have decided a factual question as a question of law.[380]

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375 *Id.*
376 *Id.* at 705–06.
377 Bowens v. Ary, Inc., 794 N.W.2d 842, 843–44 (Mich. 2011).
378 *Id.* at 844.
379 *Id.* at 843–44.
380 *Id.* at 845–46 (Kelly, J., dissenting).

G. Montana

The Montana all-party consent statute is comparatively brief and contains no one-party consent exception.[381]

H. Nevada

Nevada, through case-law interpretation of the Nevada statutes, protects a telephone conversation from being taped without all-party consent and requires one-party consent to secretly tape a private conversation.[382] The Nevada statute permits one-party consent to secretly tape a telephone conversation in the extremely limited circumstance when there is an emergency and a court order cannot be obtained, although the court order must be applied for within seventy-two hours.[383]

In 1998, in *Lane v. Allstate Insurance Co.*, a plurality of the Supreme Court of Nevada interpreted the statute to mean that secretly taping a telephone conversation based on only one-party consent is illegal.[384] Another opinion concurring in part and dissenting in part agreed that the statute should be interpreted to mean that secretly taping a telephone conversation on one-party consent is illegal.[385] One dissenting opinion argued that Lane did not do anything unlawful in taping telephone conversations in which he was a participant.[386] A second dissenting opinion pointed out that the state statutes were ambiguous as judged by the varying interpretation of the statutes by the judges and justices that considered *Lane*.[387] The author of that opinion would interpret § 200.620 to apply only to law enforcement, making Lane's secret taping of the telephone conversations legal.[388]

The wording of § 200.620 remained unchanged, and the Supreme Court of Nevada did not have occasion to reconsider the statute until nineteen years later.[389] In 2017, at the beginning of the opinion in *Ditech Financial LLC v. Buckles*, the Supreme Court of Nevada stated, "NRS 200.620 prohibits a person from recording a telephone call unless both parties participating in the call

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381 *See* MONT. CODE. ANN. § 45-8-213 (West 2019) (legislating expectations of privacy in communication).
382 NEV. REV. STAT. ANN. § 200.620 (West 2019).
383 § 200.620 (1)(b), (3).
384 Lane v. Allstate Ins. Co., 969 P.2d 938, 941 (Nev. 1998).
385 *Id.* at 941–42 (Shearing, J., concurring in part and dissenting in part).
386 *Id.* at 942 (Springer, C.J., concurring and dissenting).
387 *Id.* at 945 (Rose, J., dissenting).
388 *Id.*
389 Ditech Fin. LLC v. Buckles, 401 P.3d 215, 216 (Nev. 2017).

consent to the recording."[390] The Nevada court then quickly moved on to decide that the statute did not apply in *Ditech* because the location of the taping was outside Nevada.[391]

I. Oregon

Oregon requires all party consent to tape a face-to-face conversation, permits secret taping of a telephone conversation on one-party consent, and has a limited color of law exception.[392] In case law, the eavesdropping and wiretapping statutes have been applied fairly strictly.

In 1996, in *State v. Carston*,[393] a private citizen used a scanner to overhear a cordless telephone conversation discussing an illegal drug transaction. The citizen called the local police department and provided information from the overheard conversation that the police used to locate the suspects.[394] The trial court agreed with the suspects that all of the information should be suppressed because it was derivative of the illegally heard conversation.[395] The Supreme Court of Oregon agreed with the trial court because the private citizen's access to the cordless telephone conversation was illegal.[396]

In 2000, in *State v. Fleetwood*, an informant was wearing a transmitter that permitted a detective to record conversations in Fleetwood's home; these conversations included Fleetwood's side of a telephone conversation, a conversation between Fleetwood and his mother, and Fleetwood's conversation with the informant.[397] The Supreme Court of Oregon determined that the secretly taped suspect's side of the conversation was inadmissible because the informant was not a party to the telephone conversation and neither party to the conversation consented to the conversation being taped.[398] The Oregon court decided that the conversation between Fleetwood and his mother was inadmissible because the informant was not a party to the conversation.[399] The secretly taped conversation was also inadmissible because the taping did not comply with the color of law exception.[400] Since *Fleetwood*, the color of law

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390 *Id.*
391 *Id.* at 217.
392 *See* Appendix B.
393 State v. Carston, 913 P.2d 709, 710 (Or. 1996).
394 *Id.* at 710–11.
395 *Id.* at 711.
396 *Id.* at 714.
397 State v. Fleetwood, 16 P.3d 503, 506 (Or. 2000).
398 *Id.* at 510.
399 *Id.* at 511.
400 *Id.* at 514. In a similar case decided the same year, the Supreme Court of Oregon ruled that face-to-face conversations overheard by the police through a body wire hidden on the informant were inadmissible following the *Fleetwood* reasoning. State v. Cleveland, 16

statutory exception was amended.

In 2012, in *State v. Miskell*, the Supreme Court of Oregon interpreted the exigency provision in the statutory color of law exception that would have permitted police officers to secretly tape a conversation between an informant and the suspects in the informant's hotel room. [401] The Oregon court decided that the exigency provision did not cover the taping situation and the taped conversation was inadmissible.[402] The court reasoned that the available four-hour window between finalization of the plan to secretly tape the hotel room conversation and the secret taping was sufficient for the police officer to obtain a court order.[403]

J. Pennsylvania

Pennsylvania protection against eavesdropping and wiretapping requires all-party consent for face-to-face and telephone conversations.[404] Pennsylvania permits one-party consent to secretly tape a conversation where the person taping has reasonable suspicion of a crime of violence and where there is reason to believe that the secret taping will yield evidence of the crime.[405]

On September 10, 2019, in *Commonwealth v. Mason*, the Supreme Court of Pennsylvania granted an appeal limited to the following two issues:

> (1) Whether a babysitter has a reasonable expectation of privacy in the bedroom of a child she is caring for?
>
> (2) Whether the sounds resulting from a child being forcibly thrown into a crib and being beaten by [Mason] constitute "oral communications" or "evidence derived therefrom" under the Pennsylvania wiretap statute?[406]

In *Mason*, the father had hired Mason to serve as a nanny for his children.[407] Suspecting child abuse, the father questioned Mason, but she denied any problem.[408] The father installed a hidden nanny camera with video-and-audio capabilities in the children's bedroom; Mason was unaware of the device.[409] The

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P.3d 514, 515 (Or. 2000).

401 State v. Miskell, 277 P.3d 522, 523, 525 (Or. 2012).

402 *Id.* at 526, 28, 31–34.

403 *Id.* at 533.

404 18 PA. STAT. AND CONS. STAT. ANN. § 5704(4) (West 2020).

405 § 5704(17).

406 Commonwealth v. Mason, 217 A.3d 802, 803 (Pa. 2019).

407 Commonwealth v. Mason, No. 1091 MDA 2018, 2019 WL 1084210, at *1 (Pa. Super. Ct. Mar. 7, 2019).

408 *Id.*

409 *Id.*

hidden device secretly taped Mason allegedly yelling at one of the children, shoving the child into a crib, and hitting the child several times.[410] After the father turned over the secretly taped information to the police, Mason was charged with several crimes.[411] Mason claimed that the secretly taped information was collected in violation of the Pennsylvania eavesdropping statutes.[412] The trial court granted Mason's motion to suppress.[413]

On interlocutory appeal to consider the admissibility of the secretly taped information, the intermediate appellate court made several findings.[414] First, the court found that the trial court was correct in ruling that the captured words and sounds were inadmissible, and the sounds should not be treated differently than the words.[415] Second, at the Commonwealth's urging, the court considered whether the secretly taped Wiretap Act exception of non-interception should apply.[416] The court found that Mason's expectation of privacy was reasonable because the secret taping was done in a bedroom and Mason had no reason to suspect that she would be secretly taped.[417] Therefore, the audio words and sounds were protected against being secretly taped.[418] Lastly, the Commonwealth argued that the secretly taped information was admissible under the "crime exception" to the Wiretap Act.[419] The court noted that the father had waited two months after suspecting Mason of engaging in child abuse to install the nanny camera. [420] The court found that the facts provided failed to support the father's reason to believe that the secret taping would produce evidence of a crime of violence.[421] The court did find that the trial court wrongly excluded the video portion of the secretly taped information, as the video is not protected against secret taping under the Pennsylvania eavesdropping statutes.[422]

K. Washington

Washington's protections against eavesdropping and wiretapping requires all-party consent for face-to-face and telephone conversations.[423] Washington

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410 *Id.*
411 *Id.*
412 *Id.*
413 *Id.*
414 *Id.* at *1–2.
415 *Id.* at *3.
416 *Id.* at *3–4.
417 *Id.*
418 *Id.* at *4.
419 *Id.*
420 *Id.* at *5.
421 *Id.*
422 *Id.* at *5–6.
423 WASH. REV. CODE ANN. § 9.73.030(1)(a)–(b) (West 2020).

permits one-party consent to secretly tape a conversation where the conversation is of emergency nature, anonymous, repeated, or made at inconvenient times or is related to threats of extortion, blackmail, bodily harm, other unlawful requests or demands, or a hostage or barricade situation.[424]

In 1996, in *State v. Clark*, an informant in a vehicle equipped with a hidden camera posed as an illegal drug purchaser.[425] The undercover operation resulted in sixteen arrests, with all suspects claiming that the secretly taped conversations should be suppressed, but all the suppression motions were denied.[426] The secret taping was court authorized, but the court authorization was not dealt with in the majority opinion of the Supreme Court of Washington.[427] The Washington court focused on whether the secretly taped conversations qualified as a private conversation protected against being secretly taped under the state eavesdropping statutes.[428] The court stated, "[t]he conversations here were not private because they were routine conversations between strangers on the street concerning routine illegal drug sales."[429] The court concluded that the lower courts had been correct in ruling the secretly taped conversations admissible.[430]

One justice concurred in part and dissented in part.[431] The justice opined that the four suspects whose transactions occurred in the informant's vehicle did engage in private conversation and the almost-blanket court authorization was insufficient.[432]

In 2004, in *State v. Christensen*, Christensen, who allegedly had information about a purse-snatching, telephoned his girlfriend. [433] The girlfriend's mother answered and, after her daughter left the room, used the speakerphone on the cordless telephone to secretly listen in to the conversation between Christensen and her daughter.[434] The mother testified at Christensen's trial.[435] The Supreme Court of Washington considered whether the trial court was correct in permitting the mother to testify.[436] The Washington court found that Christensen's expectation of privacy was reasonable and there was no exception that would

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424 § 9.73.030(2).
425 State v. Clark, 916 P.2d 384, 388 (Wash. 1996).
426 *Id.* at 390.
427 *See id.* at 388 (failing to address the issue of court authorization which emphasizes the significance of the source).
428 *Id.* at 390–91.
429 *Id.* at 393.
430 *Id.* at 396.
431 *Id.*
432 *Id.* (Alexander, J., concurring in part and dissenting in part).
433 State v. Christensen, 102 P.3d 789, 790–91 (Wash. 2004).
434 *See id.* at 791 (highlighting the court's failure to address the issue because it is not disputed that the act of listening was an intercept within the meaning of the statute).
435 *Id.*
436 *Id.*

permit a parent to listen in to a minor's telephone conversation.[437] The court found that the cordless phone-base unit was a device designed to transmit within the meaning of the state wiretapping statutes.[438] The court decided that the trial court had erred in permitting the mother to testify and the error was sufficiently serious to entitle Christensen to a new trial.[439]

In 2014, in *State v. Kipp*, Kipp's brother-in-law secretly taped a conversation with Kipp that took place in a private home in which the brother-in-law accused Kipp of allegedly sexually assaulting two of the brother-in-law's daughters.[440] The Supreme Court of Washington held that Kipp's expectation of privacy was reasonable and the trial court was incorrect in denying Kipp's motion to suppress the secretly taped conversation.[441] The Washington court found that Kipp's expectation of privacy was reasonable because of both the fairly short duration and the sensitive nature of the conversation and the location of the conversation in a private home exclusively between two family members.[442]

In 2017, in *State v. Smith*, the Smiths were engaging in a domestic dispute that resulted in the wife being seriously injured.[443] During the episode, the suspect tried to find his cell phone by calling the cell phone from the home phone.[444] Voicemail recorded part of the incident while the home phone remained active.[445] After Smith was arrested, he filed a motion to have the voicemail audio suppressed.[446] The Supreme Court of Washington first found that the voicemail audio was not a conversation under the state eavesdropping statutes because the content was primarily sound.[447] In addition, the Washington court found that the taping fell within the one-party consent threat exception to the statutes because Smith was the one who called his cell phone and, because of Smith's familiarity with the cell phone's voicemail taping capability, Smith consented to the taping.[448] The court reinstated Smith's conviction.[449]

There were two concurring opinions.[450] The first concurring opinion pointed out that Smith had no standing because he was the one who made the

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437 *Id.* at 792.
438 *Id.* at 793–94.
439 *Id.* at 796.
440 State v. Kipp, 317 P.3d 1029, 1031 (Wash. 2014).
441 *Id.* at 1035–36.
442 *Id.* at 1034–35.
443 State v. Smith, 405 P.3d 997, 999 (Wash. 2017).
444 *Id.*
445 *Id.*
446 *Id.* at 1000.
447 *Id.* at 1002.
448 *Id.* at 1003.
449 *Id.*
450 *See id.* at 1004–05.

recording.[451] The second concurring opinion would have found that the information recorded was a conversation and found that Smith did have an expectation of privacy that was reasonable, given that the couple was alone in their home.[452] However, the information taped with one-party consent was admissible under the threat exception; Smith consented to the taping, given his familiarity with the capability of his cell phone.[453]

V. ONE-PARTY CONSENT

As explained above, the majority of the states permit a conversation to be secretly taped with one party's consent. This section includes cases from several states that involved one-party consent.

A. South Dakota

In 1985, in *State v. Woods*, a paid law enforcement agent was wearing a hidden device that permitted the sheriff to monitor and secretly tape the agent's alleged purchase of illegal drugs from Woods. [454] Woods claimed that the secretly taped conversation was inadmissible because there was no court order.[455] The Supreme Court of South Dakota distinguished the facts in *Woods* from a situation in which a non-participant secretly eavesdrops on a conversation.[456] The South Dakota court referenced several similar U.S. Supreme Court cases in which an informant secretly transmitted or recorded a conversation and the suspect assumed the risk that the substance of the conversation might be disclosed.[457] In arriving at this interpretation, the South Dakota court was strongly influenced by decisions of federal courts interpreting similar language in the federal statutes.[458]

In 1990, in *State v. Braddock*, an acquaintance of Braddock called Braddock, and police officers secretly taped the telephone conversation with the acquaintance's permission.[459] Braddock claimed that the secretly taped telephone conversation was inadmissible because one-person consent was inapplicable to the secret taping of a telephone conversation and secret taping

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451 *Id.* at 1004 (Gonzalez, J., concurring).
452 *Id.* at 1005–07 (McCloud, J., concurring).
453 *Id.* at 1007.
454 State v. Woods, 361 N.W.2d 620, 621 (S.D. 1985).
455 *Id.*
456 *Id.*
457 *Id.*
458 *Id.*
459 State v. Braddock, 452 N.W.2d 785, 787 (S.D. 1990).

required prior court authorization.[460] The Supreme Court of South Dakota concluded that one-party consent applied to permit secret taping of a telephone conversation and no prior court approval was necessary.[461]

B. Texas

In 2017, in *Long v. State*, Long was convicted for allegedly encouraging her daughter, C.L., to secretly tape Coach Townsend's half-time and after-game speeches.[462] Long was an Argyle school board member, and C.L. was a student at Argyle High School.[463] The Argyle High School girls' basketball team was playing an away game at Sanger High School, a rival high school whose girls' basketball team was one game ahead of Argyle in the standings.[464] C.L., claiming to be a team manager, gained access to the visitor's locker room and set up her phone to make a secret audio-and-video taping of the coach's half-time speech.[465] C.L. was also able to make an audio taping of the coach's after-game speech.[466] An edited version of the two tapings was emailed to the school board members so they would have the information prior to deciding whether to grant Coach Townsend a term contract.[467] Long showed an assistant principal part of the secretly taped information.[468] The police investigation turned up Long's written statement that contained criticism of the coach's harsh treatment of players.[469]

Long claimed that Coach Townsend did not have a reasonable expectation of privacy in the locker room, and therefore Long had not done anything illegal.[470] The Court of Criminal Appeals of Texas noted that the Texas definition of oral communication was very similar to the federal statute, which led the court to use the *Katz* two-step test in deciding *Long*.[471] The Texas court found that Coach Townsend had an expectation of privacy and the expectation was reasonable.[472] The locker room was limited to coaches and team players, and there were two sets of doors at the locker-room entrance.[473]

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460 *Id.* at 787–88.
461 *Id.* at 788.
462 Long v. State, 535 S.W.3d 511, 514, 519–20 (Tex. Crim. App. 2017).
463 *Id.* at 514–15.
464 *Id.* at 515.
465 *Id.*
466 *Id.*
467 *Id.*
468 *Id.* at 516.
469 *Id.*
470 *Id.* at 518.
471 *Id.* at 523–24.
472 *Id.* at 525.
473 *Id.* at 515.

The dissent likened the locker room to a classroom. It pointed out that the locker-room door was open, there were three other coaches in the room, and Coach Townsend was speaking in a loud voice about player performance and did not discuss game strategy.[474]

In 2018, in *White v. State*,[475] a roofing company owner received a telephone call from Brandon, who sent the owner a recorded audio conversation in which Brandon, White, and Robey were discussing some of their activities involving the roofing company. After the owner contacted the police, White and Robey were charged with engaging in organized criminal activity and money laundering.[476] The Court of Criminal Appeals of Texas agreed with the two lower courts that the audio-recorded conversation was admissible.[477]

C. Wisconsin

In 2008, in *State v. Duchow*, the allegedly threatening statements that public school bus driver Duchow made to a disabled child on Duchow's bus were secretly taped by a voice-activated device the child's parents hid in the child's backpack.[478] The Supreme Court of Wisconsin held that the secretly taped statements were not protected as oral communication under the state statutes; because Duchow's claimed expectation of privacy was not reasonable, the statements would be admissible.[479] The Wisconsin court explained, "because Duchow's statements were made on a public school bus, being used for the public purpose of transporting school children; because they were threats to harm Jacob for which Duchow assumed the risk that Jacob would report, Duchow had no reasonable expectation of privacy in his statements."[480]

VI. THE REASONABLE EXPECTATION OF PRIVACY STANDARD AS BASED ON DISCRETION

The key to interpreting and applying many all-party consent statutes is whether a conversation is private, which is often gauged by whether the suspect

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474 *Id.* at 540–41 (Richardson, J., dissenting).
475 White v. State, 549 S.W.3d 146, 148–49 (Tex. Crim. App. 2018).
476 *Id.* at 149.
477 *Id.* at 148. The majority opinion contained little discussion of the Texas eavesdropping and wiretapping statutes. White v. State, 549 S.W.3d 146 (Tex. Crim. App. 2018). The concurring opinion briefly suggests that one-party consent made the secret taping legal. White v. State, 549 S.W.3d 146, 162 (Tex. Crim. App. 2018) (Keller, P.J., concurring).
478 State v. Duchow, 749 N.W.2d 913, 915 (Wis. 2008).
479 *Id.* at 925.
480 *Id.*

has an expectation of privacy that is reasonable.[481] Determining whether there is a reasonable expectation of privacy also comes into play in a one-party consent jurisdiction when a non-participant secretly tapes a conversation.[482] A reasonable expectation of privacy is a standard that must be applied by the judge on a case-by-case basis.[483] A standard is clearly divorced from the facts and may provide little certainty in guiding the judge in decision-making, as the standard is somewhat vague. A suspect's expectation of privacy is dependent on the facts and, more particularly, on the judge's view of the facts. In most cases, the result is not clear-cut, or predictable, and different judges draw a variety of disparate inferences from the same facts. An indication of this imprecision is that the standard is applied differently by different levels of judges as a case is appealed, perhaps with an intermediate appellate court reversing the trial court decision and the intermediate appellate court decision being reversed by the court of last resort. Other indications of the imprecision in applying the standard of reasonableness are justices authoring concurring or dissenting opinions and a case being overruled fairly soon after having been decided. There are various steps throughout the adjudicative process at which judges can correct decisions made at earlier steps. However, correction with excess frequency creates a sense of instability.

One may be wondering why judges differ so greatly in their views of a case. Perhaps one reason lies in the nature of a standard: a standard permits a judge to exercise considerable discretion.[484] A suspect typically claims an expectation of privacy. A judge has leeway in the way in which they characterize the facts and in identifying which facts are the most significant.[485] A judge may be guided, at least in part, by the judge's emotions in making this factual determination.[486] The judge's view of the facts provides the judge discretion in determining whether the suspect's expectation of privacy was reasonable under the circumstances.[487] The perception is that a standard permits the judge some

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481 *See* Long v. State, 535 S.W.3d at 511, 524–25 (Tex. Crim. App. 2017); *see also Duchow*, 749 N.W.2d at 920 (both cases explaining the two-prong test for determining whether an individual has a reasonable expectation of privacy).

482 *See* State v. Braddock, 452 N.W.2d 785, 788 (S.D. 1990) (explaining the court's reliance on the reasonable expectation of privacy standard in one-party consent cases).

483 *See Long*, 535 S.W.3d at 524–25; *see also Duchow*, 749 N.W.2d at 920.

484 *See* James Bopp, Jr. & Richard E. Coleson, *Judicial Standard of Review and Webster*, 15 AM. J. L. & MED. 211, 211 (1989) (describing judicial standards of review).

485 *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. Legal Stud. 129, 131 (1980) (explaining the amount of discretion given to judges).

486 Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 898–900 (2015). One study showed that a judge may be guided by emotion in applying a standard.

487 *Id.* at 900.

discretion.[488] Great minds can differ on which facts are salient and how the standard of reasonableness applies to the significant facts. Judicial discretion is not unfettered because the judge's final decision must be substantiated with reasoning. A judge's interpretation of reasonableness based on the facts of the case often can be accomplished without the necessity of the judge carving out a judicial exception to the application of the statute.

In all-party consent states, the judge's determination whether the suspect's expectation of privacy is reasonable is pivotal. The judge's conclusion is pivotal because it is the basis for finding the secretly taped conversation admissible or inadmissible.[489] The determination of reasonableness is crucial where the secretly taped conversation is the sole piece of incriminating evidence against the suspect. Typically, whether the suspect's expectation of privacy is reasonable is hotly contested because the decision may end the litigation. The trial judge bases the judge's finding that the suspect's expectation of privacy was or was not reasonable on the judge's inferences drawn from the facts.

Previously, this paper reviewed case law interpreting eavesdropping and wiretapping statutes. The following sections briefly review some of those cases again with a focus on each court's interpretation of whether the suspect's expectation of privacy was reasonable. In some of those cases, the court seems to stretch in its interpretation of the reasonableness of the suspect's expectation of privacy to produce the desired result.

VII. THE REASONABLE EXPECTATION STANDARD AND INTERPRETATION OF A STATE CONSTITUTION

The reasonable expectation standard is commonly used in interpreting a state constitution, with location of the secret taping often being the key in applying the standard.[490] Many state courts have been guided by the reasoning of Justice Harlan's dissent in *United States v. White* when the secret taping occurred in a home.[491] This holds true in Alaska, Massachusetts, Montana, Pennsylvania, Vermont, and West Virginia.

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488 *Id.*

489 *See Admissibility*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining admissibility as "the quality, state, or condition of being allowed to be entered into evidence in a hearing, trial, or other official proceeding").

490 *See infra* text accompanying notes 528–95.

491 United States v. White, 401 U.S. 745, 786–87 (1971) (Harlan, J., dissenting).

A. Alaska

The Supreme Court of Alaska has drawn the parameters of protection against taping under the privacy provision of the Alaska Constitution.[492] According to the Alaska court, one's home is a protected location while the roadside and an office open to the public are not protected locations.[493]

In 1978, in *State v. Glass*, the Supreme Court of Alaska found that the privacy provision in the Alaska Constitution did protect a suspect in his own home being taped by the police, through an informant meeting with the suspect wearing a radio transmitter, because the dual requirement of an expectation of privacy that was reasonable was satisfied.[494] In 1984, in *City and Borough of Juneau v. Quinto*, the Supreme Court of Alaska found that the privacy provision in the Alaska Constitution did not protect a motorist pulled over by a police officer on suspicion of drunk driving from being secretly taped by the officer because the motorist's expectation of privacy under the circumstances was not reasonable.[495] In 2001, in *Cowles v. State*, the Supreme Court of Alaska found that the privacy provision in the Alaska Constitution did not protect the manager of a university box office suspected of stealing from being secretly videotaped by a video camera installed above her desk because the suspect's claimed expectation of privacy was not reasonable given that the alleged theft occurred in an area visible to the public.[496] The dissenting opinion stated that the manager's expectation of privacy was reasonable and the overhead video camera "exceeded her reasonably expected public observation in its duration, proximity, focus, and vantage point."[497]

B. Connecticut

The Supreme Court of Connecticut found that the search-and-seizure provision of the Connecticut Constitution did not protect against secret taping of a telephone conversation with only one party's consent.[498]

In 2015, in *State v. Skok*, the Supreme Court of Connecticut concluded that Skok's expectation of privacy in her telephone conversations with Becker was not reasonable because Skok reminded Becker a number of times that Becker

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492 ALASKA CONST. art. I, § 22.

493 *See* Cowles v. State, 23 P.3d 1168, 1171 (Alaska 2001); *see also* Juneau v. Quinto, 684 P.2d 127, 129 (Alaska 1984); *see also* State v. Glass, 583 P.2d 872, 875, 879–80. (Alaska 1978).

494 *Glass*, 583 P.2d at 880–82.

495 *Quinto*, 684 P.2d at 129.

496 *Cowles*, 23 P.3d at 1175.

497 *Id.* at 1175–76 (Fabe, J., dissenting).

498 State v. Skok, 122 A.3d 608, 621 (Conn. 2015).

should not permit family to overhear their conversation, indicating that Skok believed in the possibility that Becker's family would overhear the conversations.[499]

C. Massachusetts

The Supreme Judicial Court of Massachusetts has found protection against secret taping under the search-and-seizure provision of the Massachusetts Constitution for a conversation occurring in a suspect's home or overheard from a crawl space underneath the suspect's home, but not for a conversation transpiring in a motel room of another or over the telephone.[500]

In 1987, in *Commonwealth v. Blood*, the Supreme Judicial Court of Massachusetts found that the search-and-seizure provision in the Massachusetts Constitution did protect a suspect in a home being taped by the police through an informant wearing a radio transmitter while meeting with the suspect because the suspect's expectation of privacy was reasonable.[501] The dissenting opinion evaluated the suspect's expectation of privacy, stating that it is "no longer reasonable when the home becomes a site for planning criminal activity."[502] In 1989, in *Commonwealth v. Panetti*, the Supreme Judicial Court of Massachusetts extended the location in which a suspect had a reasonable expectation of privacy protected against secret taping to a crawl space underneath the suspect's apartment because "the police officer was positioned where neither neighbors nor the public would ordinarily be expected to be."[503] The dissenting opinion evaluated the suspect's expectation as not reasonable: the police officer was lawfully in the crawl space in which the suspect had no legal interest.[504] In 1990, in *Commonwealth v. Price*, the Massachusetts court ruled that the suspect's expectation of privacy did not extend to a motel room where the suspect was not the one to whom the motel room was registered.[505] In 1998, in *Commonwealth v. Eason*, the court found that a suspect speaking on the telephone did not have an expectation of privacy that was reasonable. [506]

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499 *Id.*

500 Commonwealth v. Eason, 694 N.E.2d 1264, 1267–68 (Mass. 1998); *see also* Commonwealth v. Price, 562 N.E.2d 1355, 1358 (Mass. 1990); *see* Commonwealth v. Panetti, 547 N.E.2d 46, 48 (Mass. 1989); *see also* Commonwealth v. Blood, 507 N.E.2d 1029, 1034–34, 1037, 1039 (Mass. 1987).

501 *Blood*, 507 N.E.2d at 1029–30, 1034, 1037, 1040.

502 *Id.* at 1039–40 (Nolan, J., dissenting).

503 *Panetti*, 547 N.E.2d at 46–48.

504 *Id.* at 48–49 (Nolan, J., dissenting).

505 *Price*, 562 N.E.2d at 1358.

506 *Eason*, 694 N.E.2d at 1264, 1268 (Mass. 1998).

D. Montana

Although the Supreme Court of Montana now interprets the Montana Constitution as providing significant protection against a conversation being secretly taped,[507] the court has seesawed back-and-forth in the past thirty-five years: *State v. Goetz*[508] in 2008 overruled *State v. Brown*,[509] a 1988 case, which in turn had overruled *State v. Brackman*,[510] a 1978 case.

In *State v. Goetz*, police officers monitored and secretly taped the suspect's conversation through the use of an informant. In 2008, the Supreme Court of Montana decided that the suspect's conversations that occurred either in the suspect's home or in the informant's vehicle should be protected against transmission because the expectation of privacy was reasonable in a private setting.[511] There did not seem to be a consensus among the seven members of the court.[512] Besides the majority opinion, there were two concurring opinions, two dissenting opinions, and an opinion concurring in part and dissenting in part.[513]

The different *Goetz* opinions varied in reasoning.[514] One concurring opinion would not have limited protection against secret taping to a home or vehicle, stating that "Montanans do not have to anticipate that a conversation, no matter what setting, is being secretly recorded by agents of the state acting without the benefit of a search warrant."[515] An opinion concurring in part and dissenting in part agreed with the reasonable privacy expectation that the majority applied to the home setting, but would not have recognized a similar reasonable expectation of privacy for a vehicle because the suspect who conducted his conversation "did not know the informant, and presumably he would not know whether the informant owned or controlled the vehicle in which the conversation took place."[516] The dissenting opinion focused on the commercial nature of a business transaction with strangers as foreclosing a professed expectation of privacy as being reasonable no matter the location.[517]

In 2010, in *State v. Allen*, the Supreme Court of Montana extended the

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507 State v. Goetz, 191 P.3d 489, 498, 504 (Mont. 2008); *see also* State v. Brown, 755 P.2d 1364, 1369 (Mont. 1988); *see also* State v. Brackman, 582 P.2d 1216, 1220, 1222 (Mont. 1978).

508 *Goetz*, 191 P.3d at 504.

509 *Brown*, 755 P.2d at 1368–69, 1371, *overruled by Goetz*, 191 P.3d at 489.

510 *Brackman*, 582 P.2d at 1220, 1222, *overruled by Brown*, 755 P.2d at 1364.

511 *Goetz*, 191 P.3d at 498, 504.

512 *Id.* at 504–05, 507–08, 512, 516.

513 *Id.*

514 *Id.*

515 *Id.* at 504 (Leaphardt, J., concurring); *see also id.* at 506, 518 (Cotter, J., concurring).

516 *Id.* at 507–08 (Morris, J., concurring and dissenting).

517 *Id.* at 512–13, 519 (Rice, J., dissenting) (Warner, J., dissenting).

protection against secret taping under the Montana Constitution to an informant secretly taping cell-phone conversations between the suspect and the informant. The court held that the suspect's expectation of privacy when speaking on a cell phone that the conversation is not being monitored by the government is one that society would recognize as reasonable.[518] The concurring opinion would have extended the Montana Constitution's protection to the informant's testimony about the secretly taped cell-phone conversation because both the verbal and taped conversations would have required a search warrant.[519] An opinion concurring in part and dissenting in part would have affirmed the trial court's denial of the suspect's motion to suppress the secretly taped conversation between the suspect and the informant, noting that the suspect's expectation of privacy was not reasonable because the suspect was speaking with others during his cell-phone conversations with the informant.[520]

In 2012, in *State v. Stewart*, the Supreme Court of Montana was tasked with applying *Allen* to a case in which a daughter permitted the police to secretly tape four telephone conversations with her father to gather evidence that the father had been sexually abusing her for the past eleven years.[521] The Montana court ruled that admission of the secretly taped telephone calls was a harmless error because of all the evidence against the suspect admitted at trial.[522]

The case law of the Supreme Court of Montana protecting conversations from being secretly taped has had something of a rocky trajectory from 1978 to 2008. The Supreme Court of Montana now interprets the Montana Constitution as protecting face-to-face conversations occurring in homes and vehicles and telephone conversations from being secretly taped.[523] The extension of protection to telephone conversations under the state constitution is significantly broader than that provided under the Fourth Amendment.[524] The protection provided for telephone conversations narrows the judge's discretion to decide whether or not to suppress a telephone conversation.[525] One could imagine that *Stewart* was somewhat of a difficult case for the Supreme Court of Montana to decide. The court had recently decided *Allen* and so might have been loath to create some type of exception that would have permitted the secretly taped telephone conversations in *Stewart* to be suppressed. The alleged crime in

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518 State v. Allen, 241 P.3d 1045, 1058 (Mont. 2010).
519 *Id.* at 1049, 1080, 1082 (Nelson, J., concurring).
520 *Id.* at 1082, 1084–85 (Rice, J., concurring in part and dissenting in part).
521 *See* State v. Stewart, 291 P.3d 1187, 1191, 92 (Mont. 2012) (explaining that the Court examination of expectation of privacy in the home and taped telephone conversations).
522 *Id.* at 1203.
523 *Id.* at 1198, 1200–01.
524 *Id.* at 1198; *see also* Apps. A, B, and C.
525 *See Stewart*, 291 P.3d at 1198.

Stewart was extremely serious: a father was accused by his daughter of sexually abusing her for eleven years.[526] *Stewart* would have been even more difficult to decide if the telephone conversations were the only evidence in the case. Perhaps the Montana court was relieved that the harmless error ruling was available to it.

E. North Dakota

North Dakota is a one-party consent state.[527] In 2010, in *State v. Loh*, the Supreme Court of North Dakota declined to accept the suspect's suggestion that the court follow *Goetz* in interpreting the North Dakota Constitution to protect the suspect's conversation with an informant in the informant's car.[528] Thus, North Dakota provides no additional protection under the state constitution against a conversation being secretly taped.[529]

F. Pennsylvania

The Supreme Court of Pennsylvania has interpreted the search-and-seizure provision to protect a suspect from being secretly taped when a suspect is speaking with an informant in the suspect's home when the police sent the informant into the suspect's home, but not when the suspect is speaking on the telephone even if the suspect is in the suspect's home.[530]

In 1994, in *Commonwealth v. Brion*, the Supreme Court of Pennsylvania reasoned that the key to finding the suspect's expectation of privacy to be reasonable was that the secretly taped conversation occurred in the suspect's home.[531] In 2001, in *Commonwealth v. Rekasie*, the secretly taped conversation was over the telephone and the Supreme Court of Pennsylvania concluded that this mode of communication meant that the suspect's expectation of privacy was not reasonable.[532] Two dissenting opinions would have found the suspect's expectation of privacy reasonable because, similar to *Brion*, the suspect was in his home speaking on the telephone.[533] In 2014, in *Commonwealth v. Dunnavent*, the lower court decision suppressing the secretly taped conversation

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526 *Id.* at 1191.
527 *See* App. B.
528 State v. Loh, 780 N.W.2d 719, 723 (N.D. 2010).
529 *Id.* at 724.
530 Commonwealth v. Brion, 652 A.2d 287, 289 (Pa. 1994); *see also* Commonwealth v. Dunnavent, 107 A.3d 29, 31 (Pa. 2014); *see also* Commonwealth v. Rekasie, 778 A.2d 624, 625, 631, 633 (Pa. 2001).
531 *Brion*, 652 A.2d at 289–90.
532 *Rekasie*, 778 A.2d at 625, 631, 633.
533 *Id.* at 637–38 (Zappala, J., dissenting) (Nigro, J., dissenting).

was affirmed; the justices in *Dunnavent* were evenly split three to three as to whether a suspect who first met the informant on the street corner and then invited the informant into the suspect's home had a reasonable expectation of privacy that their conversation in his home would not be secretly taped.[534] The crucial fact distinguishing *Dunnavent* from *Brion* for some of the justices was that the suspect invited the informant into the suspect's home.[535]

G. Vermont

The Supreme Court of Vermont has interpreted the search-and-seizure provision of the Vermont Constitution to protect a suspect from being secretly taped in the suspect's home either by an informant or by a police officer, but the court ruled that the protection does not extend to a conversation secretly taped in a shopping-center parking lot while the suspect and the informant each spoke from their respective vehicles.[536]

In 1991, in *State v. Blow*, the Supreme Court of Vermont found that the suspect's expectation of privacy was reasonable when an informant secretly taped the suspect in the suspect's home.[537] In 1991, in *State v. Brooks*, the Supreme Court of Vermont found that the suspect's expectation of privacy was not reasonable when an informant secretly taped the suspect in a shopping-center parking lot even though the informant and the suspect remained in their respective vehicles.[538] The lengthy dissent was suspicious that *Brooks* might permit the police to hatch a plan to induce the suspect to leave his or her home to travel to a location in which the police could secretly tape the informant's conversation with the suspect.[539] In 2002, in *State v. Geraw*, the Supreme Court of Vermont decided that the suspect's expectation of privacy was still reasonable in the suspect's home even if the suspect knew he was speaking with police officers.[540] A lengthy dissent opined that the suspect's expectation of privacy was not reasonable because the suspect knew that the individuals he invited into the suspect's home were police officers who were investigating the suspect's involvement in child sexual molestation.[541]

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534 *Dunnavent*, 107 A.3d at 30–31; *see also Rekasie*, 778 A.2d at 632–33 (Castille, C.J., in support of reversal).

535 *Dunnavent*, 107 A.3d at 31 (Saylor, J., in support of affirmance); *see also id.* at 31 (Todd, J., in support of affirmance) (Castille, C.J., in support of reversal); *see also id.* at 52 (Stevens, J., in support of reversal).

536 State v. Blow, 602 A.2d 552, 555, 556 (Vt. 1991).

537 *Id.*

538 State v. Brooks, 601 A.2d 963, 964 (Vt. 1991).

539 *Id.* at 965 (Morse, J., dissenting).

540 State v. Geraw, 795 A.2d 1219, 1224 (Vt. 2002).

541 *Id.* at 1233 (Skoglund, J., dissenting).

H. West Virginia

The Supreme Court of Appeals of West Virginia interpreted the search-and-seizure provision of the West Virginia Constitution to protect a suspect's conversation from being secretly taped in the suspect's home.[542]

In 2007, in *State v. Mullens*, the Supreme Court of Appeals of West Virginia found that the suspect's expectation of privacy was reasonable when an informant secretly taped the suspect and the suspect's wife in their home.[543] The first dissenting opinion questioned the court overruling its decision from twenty-one years previously without providing better reasoning.[544] The second dissenting opinion criticized the majority's protection against secretly taping a conversation occurring in the suspect's home when the informant can freely take notes of what transpired during the conversation in the home.[545]

VIII. THE REASONABLE EXPECTATION STANDARD AND INTERPRETATION OF ALL-PARTY CONSENT STATUTES

A number of all-party consent states protect face-to-face conversations only if the conversations are private. Some states gauge whether a face-to-face conversation is private by determining whether the complaining party has an expectation of privacy that is reasonable. In some of the difficult cases, a court has carefully characterized the facts when determining whether the suspect's expectation of privacy is reasonable, perhaps to permit the court to reach a desired result.

A. Florida

The Florida Supreme Court has had difficulty in two cases in which a victim secretly taped a conversation in a secluded location. In one case in which the secret taping occurred in an office open to the public, the court found that the suspect's expectation of privacy was not reasonable. In another case in which the secret taping occurred in the suspect's bedroom, the court found that the suspect's expectation of privacy was reasonable.[546]

In the first case, *State v. Inciarrano*, the court interpreted the facts in what might be seen as a judicial exception to conclude that the murderer's expectation of privacy was not reasonable.[547] In *Inciarrano*, the murder victim apparently

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542 State v. Mullens, 650 S.E.2d 169, 171, 187–188, 190 (W. Va. 2007).
543 *Id.* at 171, 190.
544 *Id.* at 171, 191–92 (Benjamin, J., dissenting).
545 *Id.* at 171, 214 (Maynard, J., dissenting).
546 McDade v. State, 154 So. 3d 292, 298, 300 (Fla. 2014).
547 State v. Inciarrano, 473 So. 2d 1272, 1275–76 (Fla. 1985).

had a feeling that his meeting with the suspect was not going to go well and began secretly taping his meeting with Inciarrano prior to Inciarrano allegedly murdering the victim.[548] Although another tenant in the building heard faint gunshots, and Inciarrano admitted that it was his voice on the tape, the secretly taped information was the only evidence against Inciarrano.[549] The Florida court concluded that Inciarrano's expectation of privacy was not reasonable because Inciarrano had criminal intent when Inciarrano visited the victim in the victim's office.[550] The trial court perhaps provided better reasoning, noting that the victim's office was open to the public and that the microphone would have been visible to the suspect.[551] The first concurring opinion reasoned that someone in another person's home or office does not have an expectation of privacy that is reasonable, but that person's expectation of privacy might be reasonable if the person was located in his or her own home or office.[552] The second concurring opinion stated that the victim, who was a party to the conversation, could not intercept the information.[553] The concurrence added that the suspect's expectation of privacy was not reasonable because the suspect was not in the suspect's own home.[554] The concurrence also showed the fallacy in the majority's reasoning: "To 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."[555]

The facts of another relevant case, *McDade v. State* were discussed above in section IVB.[556]

Perhaps one distinction between *Inciarrano* and *McDade* was that the secretly taped conversation was the sole piece of evidence in *Inciarrano*, while in *McDade* there was other evidence, such as testimony, available.[557] Without the secretly taped conversation in *Inciarrano*, a cold-blooded murderer would have gone free. It is extremely unfortunate that McDade was acquitted at his second trial.

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548 *Id*. The victim's premonition about the meeting was confirmed by the tone of the conversation being that of "a business deal gone sour." Inciarrano v. State, 447 So. 2d 386, 387 (Fla. Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272 (Fla. 1985).

549 *Inciarrano*, 447 So. 2d at 387–88, *quashed*, 473 So. 2d 1272 (Fla. 1985).

550 *Inciarrano*, 473 So. 2d at 1275–76.

551 *Id.* at 1274.

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

553 *Id.* (Ehrlich, J., concurring in result only).

554 *Id.*

555 *Id.* at 1277.

556 *See infra* text accompanying notes 328–39.

557 McDade v. State, 154 So. 3d 292, 295 (Fla. 2014); *see also Inciarrano*, 473 So. 2d at 1272.

B. Maryland

Even though Maryland is an all-party consent state, a suspect cannot make offensive use of the all-party consent state where the suspect is the one who secretly taped a conversation.[558]

In 2018, in *Agnew v. State*, the police, pursuant to a warrant, recovered the suspect's cell phone, which contained a conversation between the suspect and an unidentified person.[559] The suspect claimed that the taped cell-phone conversation should not have been used as evidence against him because it had been made with only one-party consent.[560] The Court of Appeals of Maryland found that the suspect's expectation of privacy was not reasonable because he was the one who did the taping and concluded that the suspect's secretly taped telephone conversation was properly admitted.[561]

C. Michigan

In Michigan, the Supreme Court of Michigan decided that someone speaking on a cordless telephone had a reasonable expectation of privacy that the conversation would not be overheard through a scanner. The court also found that an expectation of privacy was not reasonable in the backstage of an arena where there were a number of people and camera crews in the area.[562]

In 2001, *People v. Stone*, the Supreme Court of Michigan decided whether the estranged husband had illegally used a scanner to eavesdrop on and secretly tape his wife's private cordless telephone conversations.[563] The court concluded that the wife's expectation of privacy was reasonable because secretly accessing her cordless telephone conversations is a felony, even if current technology makes it possible to do so.[564] In 2011, in *Bowens v. Ary, Inc.* the Supreme Court of Michigan considered whether the plaintiffs had a reasonable expectation of privacy during their backstage meeting with the defendants at the Joe Louis Arena when at least nine people were present, a number of individuals had backstage passes, there were multiple camera crews nearby, and there was a person filming in the room.[565] Based on the facts, the Michigan court agreed with the trial court and decided as a matter of law that the plaintiffs' claimed

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558 Agnew v. State, 197 A.3d 27, 33 (Md. 2018).
559 *Id.* at 30.
560 *Id.*
561 *Id.* at 34–35.
562 People v. Stone, 621 N.W.2d 702, 706 (Mich. 2001); Bowens v. Ary, Inc., 794 N.W.2d 842, 843–44 (Mich. 2011).
563 *Stone*, 621 N.W.2d at 706.
564 *Id.*
565 *Bowens*, 794 N.W.2d at 843–44.

expectation of privacy was not reasonable.[566] The dissent's major disagreement was with the Michigan court of last resort deciding that there was no reasonable expectation of privacy as a matter of law; the dissent viewed the facts in a way that was not as clearly cut as the majority.[567]

D. Pennsylvania

The Supreme Court of Pennsylvania has yet to weigh in on an interesting case involving whether a nanny's expectation of privacy in the children's bedroom of the employer's home is reasonable.[568]

In *Commonwealth v. Mason*, the father suspected Mason, the children's nanny, of child abuse about a month after he hired her.[569] About two months after she denied any problem, the father installed a hidden nanny camera with video-and-audio capabilities in the children's bedroom.[570] The hidden nanny camera secretly taped Mason yelling at one of the children, shoving the child into a crib, and hitting the child several times.[571] Mason was arrested and several charges were filed against her after the father turned over the secretly taped information to the police.[572] The intermediate appellate court found that Mason's expectation of privacy was reasonable because the secret taping was done in a bedroom, and Mason had no reason to suspect that she would be secretly taped.[573] The court affirmed the trial court's decision to suppress the audio portion of the recording, but it reversed as to the video portion.[574] Although the court agreed that the audio portion of the recording should be suppressed, the language of the decision suggests that the court was judgmental about the two-month lapse of time between the father's suspicion of child abuse and the installation of the nanny camera.[575] One judge, who authored an opinion concurring in part and dissenting in part, would not have found the nanny's expectation of privacy to be reasonable because the children's home was a workplace and the nanny was an adult not in her own home who was responsible for young children.[576] On September 10, 2019, in *Commonwealth v. Mason*, the

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566 *Id.* at 844.
567 *Id.* at 845–46 (Kelly, J., dissenting).
568 Commonwealth v. Mason, No. 1091 MDA 2018, 2019 WL 1084210, at *3 (Pa. Super. Ct. Mar. 7, 2019).
569 *Id.* at *1.
570 *Id.*
571 *Id.*
572 *Id.*
573 *Id.* at *3.
574 *Id.* at *5.
575 *Id.*
576 *Id.* at *7.

Supreme Court of Pennsylvania granted an appeal limited to the following two issues:

> (1) Whether a babysitter has a reasonable expectation of privacy in the bedroom of a child she is caring for?
>
> (2) Whether the sounds resulting from a child being forcibly thrown into a crib and being beaten by [Mason] constitute "oral communications" or "evidence derived therefrom" under the Pennsylvania wiretap statute?[577]

E. Washington

In Washington, the Supreme Court of Washington decided that a suspect's expectation of privacy on a street and in the informant's vehicle was not reasonable, while a suspect speaking on a cordless telephone and in an upstairs room of a private home did have a reasonable expectation of privacy.[578]

In 1996, in *State v. Clark*, the Supreme Court of Washington determined that individuals selling illegal drugs to strangers on the street did not have a reasonable expectation of privacy that a government informant was not secretly taping their conversations.[579] One justice who concurred in part and dissented in part believed that four of the sixteen suspects who sold illegal drugs to the informant while in the informant's vehicle were engaging in private conversations protected under the eavesdropping statutes.[580]

In 2004, in *State v. Christensen*, when the suspect telephoned his girlfriend, the girlfriend's mother secretly listened in on the cordless telephone conversation using the speakerphone function.[581] The Supreme Court of Washington court found that Christensen's expectation of privacy was reasonable and no exception would permit a parent to listen in on a minor's telephone conversation.[582]

In 2014, in *State v. Kipp*, the Supreme Court of Washington found that the suspect's expectation of privacy was reasonable because of the fairly short ten-minute duration, the sensitive nature of the conversation concerning the sexual assault of the accuser's daughters, and the location of the conversation upstairs in a private home between two family members and without anyone else being present.[583] Despite the Washington Supreme Court's holding, the facts

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577 Commonwealth v. Mason, 217 A.3d 802, 803 (Pa. 2019).

578 State v. Clark, 916 P.2d 384, 387, 395 (Wash. 1996).

579 *Id.* at 396 (holding that brief conversations "involving strangers on a public street and concerned the term of routine drug transactions" were not private).

580 *Id.* (Alexander, J., concurring in part and dissenting in part).

581 State v. Christensen, 102 P.3d 789, 790–91 (Wash. 2004).

582 *Id.* at 792.

583 *See* State v. Kipp, 317 P.3d 1029, 1035–36 (Wash. 2014) (holding the "recording

determining whether the suspect's expectation of privacy was reasonable is disputable.[584] Both the trial court and the intermediate appellate court found that the suspect's expectation of privacy was not reasonable based on the fact that the subject matter of the conversation was child molestation, the suspect confessing something to the victims' father that is not the sort to remain private, the meeting occurring in a common area of the home, and the suspect's offering to later meet with the father in private.[585] Perhaps the two lower courts viewed the facts differently because the secretly taped conversation, although not the only evidence, was a significant piece of evidence.[586]

IX. THE REASONABLE EXPECTATION STANDARD AND INTERPRETATION OF ONE-PARTY CONSENT STATUTES

In one-party consent jurisdictions, the reasonable expectation of privacy standard comes into play when a non-participant secretly tapes a conversation.[587] In several of the cases below, the court's characterization of the facts might lead one to believe that the court was reaching for a desired result.

A. Texas

In *Long v. State*, the Court of Criminal Appeals of Texas could have found that the expectation of privacy was not reasonable because of the number of people present when the coach's speech was secretly taped.[588]

In 2017, in *Long v. State*, was one case in which the suspect allegedly encouraged her high school student daughter to secretly tape the girl basketball Coach Townsend's half-time and after-game speeches that took place in the visitor's locker-room. [589] The Court of Criminal Appeals of Texas found that Coach Townsend had an expectation of privacy, and the expectation was reasonable because the locker-room was being put to a private use, the entrance was limited to coaches and team players, and there were two sets of doors at the locker-room entrance.[590] It seems that the Texas court was comfortable with the

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violated the privacy act and should be suppressed" because, "Kipp had both a subjective and reasonable expectation of privacy as he was speaking in private with his brother-in-law about a very sensitive matter").

584 *Id.* at 1031.

585 State v. Kipp, 286 P.3d at 68, 75, *rev'd*, 317 P.3d 1029 (Wash. 2014).

586 *Kipp*, 286 P.3d at 71.

587 Long v. State, 535 S.W.3d at 511, 518 (Tex. Crim. App. 2017); State v. Duchow, 749 N.W.2d 913, 919–21 (Wis. 2008).

588 *Long*, 535 S.W.3d at 540 (Richardson, J., dissenting).

589 *Id.* at 515–17.

590 *Id.* at 530.

suspect mother's conviction for secretly taping the coach's speeches, which she used to inform the school board about Coach Townsend's meanness toward his players.[591] The dissent likened the locker-room to a classroom and pointed out that the locker-room door was open, there were three other coaches in the room, Coach Townsend was speaking in a loud voice about player performance, and he did not discuss game strategy.[592] Another fact noted by the dissent was that there were a fair number of people in the locker-room, including the team members and the various coaches, any of whom could have been secretly taping the conversation.[593]

B. Wisconsin

In *State v. Duchow*, the Supreme Court of Wisconsin seemed determined to find that the school bus driver's expectation of privacy was not reasonable because there was no other evidence of the driver's threats against a disabled child.[594]

In 2008, in *Duchow*, the Supreme Court of Wisconsin found that the public school bus driver's expectation of privacy was not reasonable when the suspect allegedly made threatening statements to a disabled child on the suspect's bus when these statements were secretly taped by a voice-activated device hidden by the child's parents in the child's backpack.[595] The reasoning was that the location of the secret taping was a public school bus, the suspect and the child could be seen through the school bus windows, and the alleged threats were likely to be reported.[596] The Wisconsin court explained, "because Duchow's statements were made on a public school bus, being used for the public purpose of transporting school children; because they were threats to harm Jacob for which Duchow assumed the risk that Jacob would report, Duchow had no reasonable expectation of privacy in his statements."[597]

There would have been several potential problems in presenting evidence of Duchow's allegedly threatening statements, had the Supreme Court of Wisconsin ruled that the secretly taped statements were oral communication.[598] Wisconsin does permit secret taping of a private conversation with one-party's

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591 *Id.* at 516–17.

592 *Id.* at 540–41 (Richardson, J., dissenting).

593 *Id.*

594 State v. Duchow, 749 N.W.2d 913, 915 (Wis. 2008).

595 *Id.* at 925 (holding that Duchow's statements did not "constitute 'oral communication' as defined by the Electronic Surveillance Control Law" because they were made on a public-school bus and Duchow "assumed the risk that Jacob would report," therefore, Duchow had "no reasonable expectation of privacy in his statements.").

596 *Id.* at 923.

597 *Id.* at 925.

598 *Id.* at 915.

consent.[599] However, it appears from the facts that the child's parents placed the voice-activated device in the child's backpack, perhaps without the child's consent.[600] Had the court decided that the conversation was private, the court would have had to address whether the parents could have consented on behalf of the child.[601] Although the Wisconsin statutes permit secret taping with one party's consent, the statutes limit disclosure, in most instances, to testimony about the taped information rather than disclosure of the taped information itself.[602] In addition, the testimony must be related to a felony, and the one who consented must be available to testify, or a witness must be available to authenticate the taping.[603] Duchow and the child were the only ones on the school bus when Duchow made the statements,[604] so there was no one else besides the child who could provide testimony. The child was nine and suffered from Down syndrome and attention-deficit/hyperactivity disorder; for those reasons, the child may have been incapable of testifying.[605]

X. CONCLUSION

In the mid-twentieth century, what legislators perceived to be the problem was secret taping of conversations. One-party consent statutes and all-party consent statutes were two broad pathways for legislation to deal with the problem of secret taping. At the time, legislators may not have been cognizant of the social consequences of the chosen legislative path. In addition, six state courts of last resort have interpreted their state constitutions to require all-party consent in certain circumstances, primarily when an informant or police officer secretly tapes a suspect's conversation in the suspect's home.

If a state legislature had a clean slate to write on and it wanted to adopt eavesdropping and wiretapping statutes, what type of statutes would be the most appropriate? Vermont is the only state that does not have eavesdropping and wiretapping statutes. If Vermont were to adopt eavesdropping and wiretapping statutes,[606] should the state go down the all-party consent path or the one-party consent path? The Vermont legislature would do well to review eavesdropping and wiretapping statutes in other states along with case-law interpretation of those statutes to determine how the new statutes should be structured and what

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599 WIS. STAT. ANN. § 968.29(1) (West 2019).
600 *Duchow*, 749 N.W.2d at 916.
601 *Id.* at 925 n.4.
602 WIS. STAT. ANN. § 968.29(3)(a) (West 2019).
603 § 968.29(3)(b).
604 *Duchow*, 749 N.W.2d at 925.
605 *Id.* at 915.
606 *See* Clarisse, *supra* note 260, at 369.

exceptions would be advisable to include.

With the prevalence of technology all around us, it might be best for a state to adopt one-party consent statutes. If the statutes were to contain wording similar to the federal statutes, federal case-law might help in interpreting state statutes. All-party consent statutes do provide more protection to the parties having an intimate conversation, but there are serious costs involved, such as criminalizing otherwise innocent behavior and not permitting secret taping to gather evidence that would be socially acceptable to secure. If desired, all-party consent can be required for conversations taking place in a home.

As one can see by the case-law examples provided in this paper, neither all-party consent nor one-party consent statutes are trouble-free. Judges in both all-party consent and one-party consent jurisdictions have had to use their leeway under the reasonable expectation of privacy standard to arrive at what at the time seemed to be the most appropriate solution, perhaps in doing so creating a case-law exception. The following two paragraphs provide some information on a case-law exception from an all-party consent state and a case-law exception from a one-party consent state.

State v. Inciarrano is the prime case applying the reasonable expectation standard in an all-party consent state because had Inciarrano's expectation of privacy have been found to be reasonable, the sole piece of evidence of the murder would have had to be excluded. [607] It would have been logical to find that Inciarrano's expectation of privacy was reasonable, given that the murder victim worked as a psychologist and marriage counselor whose office was set up to be fairly secluded to ensure the client's confidences were private and, presumably, no one saw Inciarrano enter or leave the victim's office.[608] The Supreme Court of Florida fashioned what amounted to a case-law exception when the court found that Inciarrano's expectation of privacy was not reasonable.

State v. Duchow[609] is the prime case applying the reasonable expectation standard in a one-party consent state because, had Duchow's expectation of privacy have been found to be reasonable, the sole piece of evidence of the bus driver's threats against the disabled child would have had to be excluded.[610] It would have been logical to find that Duchow's expectation of privacy was reasonable, given that the bus driver and the child were the only people on the bus and there was no one else in the vicinity who could have overheard the threats. The Supreme Court of Wisconsin fashioned what amounted to a case-

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607 State v. Inciarrano, 473 So. 2d 1272, 1275–76 (Fla. 1985).

608 *Inciarrano*, 447 So. 2d at 386, 387 (Fla. Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272 (Fla. 1985).

609 State v. Duchow, 749 N.W.2d 913, 925 (Wis. 2008).

610 *Id.*

law exception when the court found Duchow's expectation of privacy was not reasonable.

All-party consent statutes assume that secret taping done by a party to the conversation is as intrusive as that done by a non-party. All-party consent statutes also assume that the person secretly taping is doing so with malicious intentions. However, a party to a conversation is free to divulge the substance of the conversation to others or testify about what transpired in the conversation. Perhaps one aim of all-party consent statutes was to preserve a trusting relationship between the parties to the conversation. The aim is not achieved by all-party consent statutes because there is always a danger that the conversation is subject to disclosure by one party by that party telling others about the conversation. All-party statutes are a type of legislation adopted with the best of intentions but as applied, produce results the legislature would not have imagined. The misguided result of legislation is only apparent when a judge is faced with applying the statute to a live controversy before the judge that forces the judge to deal with the hard case. All-party consent statutes are anachronistic in light of each cell-phone owner being able to easily secretly tape an otherwise private conversation and other taping devices in wide use. With the prevalence of surveillance devices and cell phones, one may have reason to think that it is more likely than not that one's conversation is being secretly taped.

The person desiring privacy may be engaging in unsavory or illegal behavior. All-party consent statutes value privacy over an individual's attempt to gather information, even in a circumstance in which the nefarious actions of the person desiring privacy would be difficult to prove without secretly taping the exchange. The action of secretly taping a conversation may be socially beneficial because it may provide evidence not easily refutable of domestic violence, abuse, discrimination, or criminal activity. The victim of criminal activity may not be sufficiently knowledgeable to seek law-enforcement involvement, which, in most all-party consent states, would make the secret taping legal. All-party consent statutes also penalize the secret gathering of such information by criminalizing the activity of the person performing the secret taping. All-party consent statutes can be used by a suspect to prevent incriminating evidence from being disclosed. If the secretly taped information is the only evidence against the suspect, the non-disclosure may prevent a guilty suspect from being convicted of a horrendous crime. Some view all-party consent so problematic that they have opined that states requiring all-party consent should replace their statutes with one-party consent statutes.[611] One's home has long been regarded differently than other locations, and one may feel another order of violation

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611 Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 HARV. L. & POL'Y REV. 177 (2018).

should the person's conversation be secretly taped in one's home. Given the long-standing privacy protection provided when one is in one's home, all-party consent may be most acceptably required for the home.

As described in this article, privacy in communication is protected by statutory and constitutional provisions. Although the necessity for this protection is widely recognized, the protection is far from uniform throughout the country. One difficulty in implementing this safeguard is posed by statutes designed to protect privacy but which judges have discretion in applying in interpreting whether a speaker's expectation of privacy is reasonable. Another difficulty in safeguarding the privacy of communication is the constant advances in technology that make it easier as time goes on to invade one's communication privacy. Communication privacy deserves continued protection and the way in which the law provides this protection will continue to evolve.

APPENDIX A

State Constitutional Provisions and State Statutes

Alabama

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

ALA. CODE §§ 13A-11-30 to -37 (2020).

Alaska

ALASKA CONST. art. I, § 14. Searches and Seizures.

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.*

Cowles v. State, 23 P.3d 1168 (Alaska. 2001) The Alaska Supreme Court did not extend *Glass* protection to the box office of a movie theater in a theft investigation. See long dissent.

State v. Glass, 583 P.2d 872, 881 (Alaska 1978) ("Alaska's Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations.").

ALASKA STAT. ANN. §§ 12.37.010-.130, 42.20.300-.390 (West 2020).

Arizona

ARIZ. CONST. art. II, § 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. ANN. §§ 12-731, 13-3005 to -3016 (2020).

Arkansas

ARK. CONST. art. 2, § 15. Searches and seizures.

ARK. CODE ANN. §§ 5-60-120, 23-17-107 (West 2020).

California

CAL. CONST. art. I, § 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."

CAL. CONST. art. I, § 13. Searches and seizures; warrant.

CAL. PENAL CODE §§ 630, 632.1, 632.5-637.2 (West 2020); CAL. PENAL CODE §§ 630a, 630b, 631a-631e, 632a, 632(4) (West 2020) (repealed); CAL. PENAL CODE §§ 631, 632 (West 2020) (held unconstitutional).

People v. Guzman, 453 P.3d 1130 (Cal. 2019) (holding § 632(d) unconstitutional).

People v. Algire, 165 Cal.Rptr.3d 650 (Cal. Ct. App. 2013) (holding § 631(c) unconstitutional).

Colorado

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

COLO. REV. STAT. ANN. §§ 16-15-101 to -104, 18-9-301 to -305 (West 2020).

Connecticut

CONN. CONST. art. 1, § 7. Security from searches and seizures.

CONN. GEN. STAT. ANN. §§ 52-184a, 52-570d, 53a-187 to -189, 54-41a to -41u (West 2020).

Delaware

DEL. CONST. art. I, § 6. Searches and seizures.

DEL. CODE ANN. tit. 11, §§ 2401-2412 (West 2020).

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.

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. §§ 934.01-.10 (2019).

Georgia

GA. CONST. art. 1, § 1, ¶ XIII. Searches, seizures, and warrants.

GA. CODE ANN. §§ 16-11-60 to -69 (West 2020).

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."

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.

HAW. REV. STAT. ANN. §§ 711-1111, 803-41 to -49 (West 2019).

Idaho

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

IDAHO CODE ANN. §§ 18-6701 to -6709 (West 2020).

Illinois

ILL. CONST. art. I, § 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.

ILL. CONST. art. I, § 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."

720 ILL. COMP. STAT. ANN. §§ 5/14-1 to -9, 725 ILL. COMP. STAT. ANN. §§ 5/108A-5/108B (West 2020).

Indiana

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

IND. CODE ANN. §§ 35-31.5-2-110, 35-31.5-2-176, 35-33.5-2-1. to -5-6. (West 2020).

Iowa

IOWA CONST. art. I, § 8. Personal security--search and seizures.

IOWA CODE ANN. §§ 808B.1.-.8. (West 2020).

Kansas

KAN. CONST. BILL OF RIGHTS § 15. Search and seizure.

KAN. STAT. ANN. §§ 21-6101, 22-2514 to -2519 (West 2020) .

Kentucky

KY. CONST. BILL OF RIGHTS § 10. Security from search and seizure; conditions of issuance of warrant.

KY. REV. STAT. ANN. §§ 526.010-.080 (West 2020).

Louisiana

> LA. CONST. art. I, § 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.

LA. STAT. ANN. §§ 15:1302-:1312.1 (2019).

Maine

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

ME. REV. STAT. ANN. tit. 15, §§ 709-713, tit. 17-A, § 511 (2019).

Maryland

MD. CONST. DECLARATION OF RIGHTS art. XXVI. Warrants for search and seizure

MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -414 (West 2020).

Massachusetts

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

MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2020).

Michigan

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

MICH. COMP. LAWS ANN. §§ 750.539a-.539i (West 2020).

Minnesota

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

MINN. STAT. ANN. §§ 626A.01-.20, 626A.25 (West 2020).

Mississippi

MISS. CONST. art. 3, § 23. Searches and seizures.

MISS. CODE ANN. §§ 41-29-501 to -536 (West 2020).

Missouri

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

MO. ANN. STAT. §§ 542.400-.422 (West 2019).

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. CONST. art. II, § 11. Searched and seizures:
> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

MONT. CODE ANN. § 45-8-213 (West 2019).

Nebraska

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

NEB. REV. STAT. ANN. §§ 86-271 to -297 (West 2020).

Nevada

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

NEV. REV. STAT. ANN. §§ 179.410-.515, 200.610-.690, 209.419, 704.195 (West 2019).

New Hampshire

N.H. CONST. pt. 1, art. 2-b. Right to Privacy: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

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

N.H. REV. STAT. ANN. §§ 570-A:1-:11, 644:9 (2020).

New Jersey

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

N.J. REV. STAT. ANN. §§ 2A:156A-1 to -26 (West 2020).

New Mexico

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

N.M. STAT. ANN. §§ 30-12-1 to -11 (West 2020).

New York

N.Y. CONST. art. I, § 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.

N.Y. C.P.L.R. 4506 (McKinney 2019); N.Y. CRIM. PROC. §§ 700.05-.70, 710.10 (McKinney 2019); N.Y. PENAL LAW §§ 250.00-.35 (McKinney 2019).

North Carolina

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

N.C. GEN. STAT. ANN. §§ 15A-286 to -298 (West 2019).

North Dakota

N.D. CONST. art. I, § 8.

N.D. CENT. CODE ANN. §§ 12.1-15-02 to -04, 29.29.2-01 to -05 (West 2020).

Ohio

OHIO CONST. art. I, § 14. Search and seizure.

OHIO REV. CODE ANN. §§ 2933.51-.66 (West 2020).

Oklahoma

OKLA. CONST. art. II, § 30. Unreasonable searches or seizures--Warrants, issuance of.

OKLA. STAT. ANN. tit. 13, §§ 176.1-.14 (West 2020).

Oregon

OR. CONST. art. I, § 9. Unreasonable searches or seizures.

OR. REV. STAT. ANN. §§ 133.721-.739, 165.535-.549 (West 2020).

Pennsylvania

PA. CONST. art. I, § 8. Security from searches and seizures.

18 PA. STAT. AND CONS. STAT. ANN. §§ 5703-5728 (West 2020).

Rhode Island

R.I. CONST. art. I, § 6. Search and seizure.

R.I. GEN. LAWS ANN. §§ 11-35-21 to -25, 12-5.1-1 to -16 (West 2020).

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.

S.C. CODE ANN. §§ 17-30-10 to -145 (2020).

South Dakota

S.D. CONST. art. VI, § 11. Search and seizure.

S.D. CODIFIED LAWS §§ 23A-35A-1 to -21 (2020).

Tennessee

TENN. CONST. art. I, § 7. Searches and seizures; warrants.

TENN. CODE ANN. §§ 39-13-601 to -604, 40-6-301 to -310 (West 2020).

Texas

TEX. CONST. art. 1, § 9. Searches and seizures.

TEX. CODE CRIM. PRO. ANN. art. 18A-.001 to -.553 (West 2019); TEX. PENAL CODE ANN. § 16.02 (West 2019).

Utah

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

UTAH CODE ANN. §§ 76-9-401 to -406, 77-23a-1 to -12 (West 2020).

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 -70 (West 2019).

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 ANN. §§ 9.73.030-.240 (West 2020).

West Virginia

W. VA. CONST. art. III, § 6. Unreasonable searches and seizures prohibited.

W. VA. CODE ANN. §§ 62-1D-1 to -16, 62-1F-1 to -9 (West 2020).

Wisconsin

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

WIS. STAT. ANN. §§ 885.365, 968.27-968.33 (West 2019).

Wyoming

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

WYO. STAT. ANN. §§ 7-3-701 to -712 (West 2020).

APPENDIX B

Jurisdiction	Constutional Privacy	Eavesdropping Statute	Two-Party Consent	Color of Law-One	One-Party Consent	Case Law Exception	Words Similar to Federal Act	Crime	Civil Action	Statutory Damages	Punitive Damages	Attorney Fees	Costs	Injunction	Declarative Relief
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 or B misdemeanor							
Alaska	X see *Glass*	X		X see *Glass*				class A misdemeanor							
Arizona	X	X		X	X			class 5 felony	X	$100 to $10,000	X	X	X	X	X
Arkansas		X		X	X			class A misdemeanor							
California	X	unconst. except	unconst. except	limited	crime			1 year/$2,500 (cellphone)	X	$5,000					
Colorado		X		X	X			class 1 misdemeanor, class 6 felony	X					X	
Connecticut		X	telephone conversation	X	conversation			class D felony	X	$100 to $1,000	X	X	X		
Delaware		X		X	X		partially parallel	class E felony,$10,000 fine	X	$100 to $1,000	X	X	X		
Florida	2 provisions	X	X	X		*Inciarrano*	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	2 provisions	X		X	X		X	class C felony	X	$100 to $10,000	X	X	X	X	X
Missouri		X		X	X		X	5 years / $5,000 fine	X	$100 to $1,000	X	X	X		
Illinois	2 provisions	X	X	X				class 4 felony / second offense class 3 felony	X	actual damages	X			X	
Indiana					X			level 5 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			class A nonperson misdemeanor	X	$100 to $1,000	X	X	X		
Kentucky		X			X			class D felony to intercept							
Louisiana	X	X		X	X		X	$10,000 fine & 2 to 10 years hard labor	X	$100 to $1,000	X	X	X		
Maine		X		X	X			class C crime	X	$100		X	X		
Maryland		X	X	limited			partially parallel	5 years / $10,000 fine	X	$100 to $1,000	X	X	X		
Massachusetts	see *Blood*	X	X	limited to certain offenses			partially parallel	5 years / $10,000 fine	X	$100 to $1,000	X	X	X		
Michigan		X	X	X		*Sullivan*		2 years / $2,000	X	actual	X			X	

Appendix B (continued)

Jurisdiction	Constutional Privacy Provision	Eavesdropping Statute	Two-Party Consent	Color of Law-One Party	One-Party Consent	Case Law Exception	Words Similar to Federal Act	Crime	Civil Action	Statutory Damages	Punitive Damages	Attorney Fees	Costs	Injunction	Declarative Relief
Minnesota		X		X	X		X	5 years / $20,000	X	treble damages/ $100 to $10,000	X	X	X	X	X
Mississippi		X		X	X		partially parallels	1 year/$10,000; 5years/$10,000	X	$100 to $1,000	X	X	X		
Missouri		X		X	X		partially parallels	Class E Felony,$10,000 fine	X	$100 to $10,000	X	X	X	atty gen	
Montana	X	X	X	X				6 mos./$500 1st violation							
Nebraska		X		X	X		X	Class IV Felony	X	$100 to $10,000		X	X	X	X
Nevada		X	telephone conversation	limited to certain offenses	conversation			Category D Felony	X	$100 to $1,000	X	X	X		
New Hampshire	X	X	X	limited to certain offenses			partially para	Class B Felony	X	$100 to $1,000	X	X	X		
New Jersey		X		X	X		partially para	Crime of 3rd Degree	X	$100 to $1,000	X	X	X		
New Mexico		X		X	X			Misdemeanor	X	$100 to $1,000	X	X	X		
New York	telephone int	X			X			Class E Felony							
North Carolina		X		Conforms to Fed. Law	X		partially para	Class H Felony	X	$100 to $1,000	X	X	X		
North Dakota		X		X	X			Class C Felony							

Appendix B (continued)

Jurisdiction	Constitutional Privacy Provision	Eavesdropping Statute	Two-Party Consent	Color of Law-One Party	One-Party Consent	Case Law Exception	Words Similar to Federal Act	Crime	Civil Action	Statutory Damages	Punitive Damages	Attorney Fees	Costs	Injunction	Declarative Relief
Ohio		X		X	X		partially parallels	4th degree felony	X	$200 to $10,000	X	X	X	X	X
Oklahoma		X		X	X			5 years/$5,000							
Oregon		X	conversation	limited	telephone conversation			class A misdemeanor	X	$100 to $1,000	X	X			
Pennsylvania	*Brion*	X	X	limited				3rd degree felony	X	$100 to $1,000	X	X	X	atty gen	
Rhode Island		X		X	X			5 years	X	$100 to $1,000	X	X	X		
South Carolina	X	X		X	X		X	5 years/$5,000	X	$500 to $25,000	X	X	X	X	X
South Dakota		X			X			class 5 felony							
Tennessee		X		X	X			class D felony	X	$100 to $10,000	X	X	X	X	
Texas		X		X	X			2nd degree felony	X	$100 to $1,000	X	X	X		
Utah		X		X	X		partially parallels	3rd degree felony	X	$100 to $10,000	X	X	X	X	X
Vermont	see *Geraw*														
Virginia		X			X		X	class 6 felony	X	$400 to $4,000	X	X	X		
Washington	X	X	X	limited to ill	emergency or crime			class C felony (drugs); gross misdemeanor	X	$100 to $1,000		X	X		
West Virginia	see *Mallory*	X		exigent circ	X		X	5 years/$10,000	X	$100	X	X	X		
Wisconsin		X		X	X	*Duchow*	X	class H felony	X	$100 to $1,000	X	X	X		
Wyoming		X			X		X	5 years/$1,000		$1,000	X	X	X		

APPENDIX C

Applicable Provisions of State Wiretapping and Eavesdropping Statutes

California

California Penal Code section 632.5 provides in pertinent part:

> (a) Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), by imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment.

CAL. PENAL CODE § 632.5 (West 2020).

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 or agent of any such official who in the lawful performance of such official or agent's duties, or at the request or direction of such official or agent in the performance of such official or agent's duties, records telephonic communications; [and] (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 2020).

Florida

Florida Statutes section 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 this section and §§ 934.04-934.09 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 this section and §§ 934.04-934.09 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 wire, oral, or electronic communication for the purpose of committing any criminal act.

FLA. STAT. § 934.03 (2019).

Illinois

720 Illinois Compiled Statutes section 5/14-1 provides in pertinent part:

> (d) Private conversation.
> For the purposes of this Article, "private conversation" means any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation. A reasonable expectation shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution.

720 Illinois Compiled Statutes section 5/14-2 provides in pertinent part:

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

720 Illinois Compiled Statutes section 5/14-3 provides in pertinent part:

> 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 offense of involuntary servitude, involuntary sexual servitude of a minor, or trafficking in persons under Section 10-9 of this Code, an offense involving prostitution, solicitation of a sexual act, or pandering, a felony violation of the Illinois Controlled Substances Act, a felony

violation of the Cannabis Control Act, a felony violation of the Methamphetamine Control and Community Protection Act, any "streetgang related" or "gang-related" felony as those terms are defined in the Illinois Streetgang Terrorism Omnibus Prevention Act, or any felony offense involving any weapon listed in paragraphs (1) through (11) of subsection (a) of Section 24-1 of this Code. 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; . . .

(g-6) With approval of 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 in the course of an investigation of child pornography, aggravated child pornography, indecent solicitation of a child, luring of a minor, sexual exploitation of a child, aggravated criminal sexual abuse in which the victim of the offense was at the time of the commission of the offense under 18 years of age, or criminal sexual abuse by force or threat of force in which the victim of the offense was at the time of the commission of the offense under 18 years of age. In all such cases, an application for an order approving the previous or continuing use of an eavesdropping device must be made within 48 hours of the commencement of such use. In the absence of such an order, or upon its denial, any continuing use shall immediately terminate. The Director of State Police shall issue rules as are necessary concerning the use of devices, retention of recordings, and reports regarding their use. Any recording or evidence obtained or derived in the course of an investigation of child pornography, aggravated child pornography, indecent solicitation of a child, luring of a minor, sexual exploitation of a child, aggravated criminal sexual abuse in which the victim of the offense was at the time of the commission of the offense under 18 years of age, or criminal sexual abuse by force or threat of force in which the victim of the offense was at the time of the commission of the offense under 18 years of age shall, upon motion of the State's Attorney or Attorney General prosecuting any case involving child pornography, aggravated child pornography, indecent solicitation of a child, luring of a minor, sexual exploitation of a child, aggravated criminal sexual abuse in which the victim of the offense was at the time

of the commission of the offense under 18 years of age, or criminal sexual abuse by force or threat of force in which the victim of the offense was at the time of the commission of the offense under 18 years of age be reviewed in camera with notice to all parties present by the court presiding over the criminal case, and, if ruled by the court to be relevant and otherwise admissible, it shall be admissible at the trial of the criminal case. Absent such a ruling, any such recording or evidence shall not be admissible at the trial of the criminal case;

(h) Recordings made simultaneously with the use of an in-car video camera recording of an oral conversation between a uniformed peace officer, who has identified his or her office, and a person in the presence of the peace officer whenever (i) an officer assigned a patrol vehicle is conducting an enforcement stop; or (ii) patrol vehicle emergency lights are activated or would otherwise be activated if not for the need to conceal the presence of law enforcement.

For the purposes of this subsection (h), "enforcement stop" means an action by a law enforcement officer in relation to enforcement and investigation duties, including but not limited to, traffic stops, pedestrian stops, abandoned vehicle contacts, motorist assists, commercial motor vehicle stops, roadside safety checks, requests for identification, or responses to requests for emergency assistance;

(h-5) Recordings of utterances made by a person while in the presence of a uniformed peace officer and while an occupant of a police vehicle including, but not limited to, (i) recordings made simultaneously with the use of an in-car video camera and (ii) recordings made in the presence of the peace officer utilizing video or audio systems, or both, authorized by the law enforcement agency;

(h-10) Recordings made simultaneously with a video camera recording during the use of a taser or similar weapon or device by a peace officer if the weapon or device is equipped with such camera;

(h-15) Recordings made under subsection (h), (h-5), or (h-10) shall be retained by the law enforcement agency that employs the peace officer who made the recordings for a storage period of 90 days, unless the recordings are made as a part of an arrest or the recordings are deemed evidence in any criminal, civil, or administrative proceeding and then the recordings must only be destroyed upon a final disposition and an order from the court. Under no circumstances shall any recording be altered or erased prior to the expiration of the designated storage period. Upon completion of the storage period, the recording medium may be erased and reissued for operational 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; . . .

(k) Electronic recordings, including but not limited to, a motion picture, videotape, digital, or other visual or audio recording, made of a custodial interrogation of an individual at a police station or other place of detention by a law enforcement officer under Section 5-401.5 of the Juvenile Court Act of 1987 or Section 103-2.1 of the Code of Criminal Procedure of 1963;

(l) Recording the interview or statement of any person when the person knows that the interview is being conducted by a law enforcement officer or prosecutor and the interview takes place at a police station that is currently participating in the Custodial Interview Pilot Program established under the Illinois Criminal Justice Information Act; . . .

(n) Recording or listening to an audio transmission from a microphone placed by a person under the authority of a law enforcement agency inside a bait car surveillance vehicle while simultaneously capturing a photographic or video image;

(o) The use of an eavesdropping camera or audio device during an ongoing hostage or barricade situation by a law enforcement officer or individual acting on behalf of a law enforcement officer when the use of such device is necessary to protect the safety of the general public, hostages, or law enforcement officers or anyone acting on their behalf; . . .

(q)(1) With prior request to and written or verbal approval of the State's Attorney of the county in which the conversation is anticipated to occur, recording or listening with the aid of an eavesdropping device to a conversation in which a law enforcement officer, or any person acting at the direction of a law enforcement officer, is a party to the conversation and has consented to the conversation being intercepted or recorded in the course of an investigation of a qualified offense. The State's Attorney may grant this approval only after determining that reasonable cause exists to believe that inculpatory conversations concerning a qualified offense will occur with a specified individual or individuals within a designated period of time.

(2) Request for approval. To invoke the exception contained in this subsection (q), a law enforcement officer shall make a request for approval to the appropriate State's Attorney. The request may be written or verbal; however, a written memorialization of the request must be made by the State's Attorney. This request for approval shall include whatever information is deemed necessary by the State's Attorney but shall include, at a minimum, the following information about each

specified individual whom the law enforcement officer believes will commit a qualified offense:
(A) his or her full or partial name, nickname or alias;
(B) a physical description; or
(C) failing either (A) or (B) of this paragraph (2), any other supporting information known to the law enforcement officer at the time of the request that gives rise to reasonable cause to believe that the specified individual will participate in an inculpatory conversation concerning a qualified offense.
(3) Limitations on approval. Each written approval by the State's Attorney under this subsection (q) shall be limited to:
(A) a recording or interception conducted by a specified law enforcement officer or person acting at the direction of a law enforcement officer;
(B) recording or intercepting conversations with the individuals specified in the request for approval, provided that the verbal approval shall be deemed to include the recording or intercepting of conversations with other individuals, unknown to the law enforcement officer at the time of the request for approval, who are acting in conjunction with or as co-conspirators with the individuals specified in the request for approval in the commission of a qualified offense;
(C) a reasonable period of time but in no event longer than 24 consecutive hours;
(D) the written request for approval, if applicable, or the written memorialization must be filed, along with the written approval, with the circuit clerk of the jurisdiction on the next business day following the expiration of the authorized period of time, and shall be subject to review by the Chief Judge or his or her designee as deemed appropriate by the court.
(3.5) The written memorialization of the request for approval and the written approval by the State's Attorney may be in any format, including via facsimile, email, or otherwise, so long as it is capable of being filed with the circuit clerk.
(3.10) Beginning March 1, 2015, each State's Attorney shall annually submit a report to the General Assembly disclosing:
(A) the number of requests for each qualified offense for approval under this subsection; and
(B) the number of approvals for each qualified offense given by the State's Attorney.
(4) Admissibility of evidence. No part of the contents of any wire, electronic, or oral communication that has been recorded or intercepted as a result of this exception may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or

other authority of this State, or a political subdivision of the State, other than in a prosecution of:

(A) the qualified offense for which approval was given to record or intercept a conversation under this subsection (q);

(B) a forcible felony committed directly in the course of the investigation of the qualified offense for which approval was given to record or intercept a conversation under this subsection (q); or

(C) any other forcible felony committed while the recording or interception was approved in accordance with this subsection (q), but for this specific category of prosecutions, only if the law enforcement officer or person acting at the direction of a law enforcement officer who has consented to the conversation being intercepted or recorded suffers great bodily injury or is killed during the commission of the charged forcible felony.

(5) Compliance with the provisions of this subsection is a prerequisite to the admissibility in evidence of any part of the contents of any wire, electronic or oral communication that has been intercepted as a result of this exception, but nothing in this subsection shall be deemed to prevent a court from otherwise excluding the evidence on any other ground recognized by State or federal law, nor shall anything in this subsection be deemed to prevent a court from independently reviewing the admissibility of the evidence for compliance with the Fourth Amendment to the U.S. Constitution or with Article I, Section 6 of the Illinois Constitution.

(6) Use of recordings or intercepts unrelated to qualified offenses. Whenever any private conversation or private electronic communication has been recorded or intercepted as a result of this exception that is not related to an offense for which the recording or intercept is admissible under paragraph (4) of this subsection (q), no part of the contents of the communication and evidence derived from the communication may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision of the State, nor may it be publicly disclosed in any way.

(6.5) The Department of State Police shall adopt rules as are necessary concerning the use of devices, retention of recordings, and reports regarding their use under this subsection (q).

(7) Definitions. For the purposes of this subsection (q) only:

"Forcible felony" includes and is limited to those offenses contained in Section 2-8 of the Criminal Code of 1961 as of the effective date of this amendatory Act of the 97th General Assembly, and only as those

offenses have been defined by law or judicial interpretation as of that date.
"Qualified offense" means and is limited to:
(A) a felony violation of the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, except for violations of:
(i) Section 4 of the Cannabis Control Act;
(ii) Section 402 of the Illinois Controlled Substances Act; and
(iii) Section 60 of the Methamphetamine Control and Community Protection Act; and
(B) first degree murder, solicitation of murder for hire, predatory criminal sexual assault of a child, criminal sexual assault, aggravated criminal sexual assault, aggravated arson, kidnapping, aggravated kidnapping, child abduction, trafficking in persons, involuntary servitude, involuntary sexual servitude of a minor, or gunrunning.
"State's Attorney" includes and is limited to the State's Attorney or an assistant State's Attorney designated by the State's Attorney to provide verbal approval to record or intercept conversations under this subsection (q). . . .

720 ILL. COMP. STAT. ANN. §§ 5/14-1 to -3 (West 2020)(footnotes omitted).

Maryland

Maryland Code Annotated, Courts & Judicial Procedure section 10-402 provides in pertinent part:

In general

(a) Except as otherwise specifically provided in this subtitle it is unlawful for any person to:
(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]
(2) Willfully 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 . . . .

Authorized interceptions, procurements, disclosures, or use of communications

(c). . .

(2)(i) This paragraph applies to an interception in which:

1. The investigative or law enforcement officer or other person is a party to the communication; or

2. One of the parties to the communication has given prior consent to the interception.

(ii) 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:

1. Of the commission of:

A. Murder;

B. Kidnapping;

C. Rape;

D. A sexual offense in the first or second degree;

E. Child abuse in the first or second degree;

F. Child pornography under § 11-207, § 11-208, or § 11-208.1 of the Criminal Law Article;

G. Gambling;

H. Robbery under § 3-402 or § 3-403 of the Criminal Law Article;

I. A felony under Title 6, Subtitle 1 of the Criminal Law Article;

J. Bribery;

K. Extortion;

L. Dealing in a controlled dangerous substance, including a violation of § 5-617 or § 5-619 of the Criminal Law Article;

M. A fraudulent insurance act, as defined in Title 27, Subtitle 4 of the Insurance Article;

N. An offense relating to destructive devices under § 4-503 of the Criminal Law Article;

O. A human trafficking offense under Title 3, Subtitle 11 of the Criminal Law Article;

P. Sexual solicitation of a minor under § 3-324 of the Criminal Law Article;

Q. An offense relating to obstructing justice under § 9-302, § 9-303, or § 9-305 of the Criminal Law Article;

R. Sexual abuse of a minor under § 3-602 of the Criminal Law Article;

S. A theft scheme or continuing course of conduct under § 7-103(f) of the Criminal Law Article involving an aggregate value of property or services of at least $10,000;

T. Abuse or neglect of a vulnerable adult under § 3-604 or § 3-605 of the Criminal Law Article;

U. An offense relating to Medicaid fraud under §§ 8-509 through 8-515 of the Criminal Law Article;

V. An offense involving a firearm under § 5-134, § 5-136, § 5-138, § 5-140, § 5-141, or § 5-144 of the Public Safety Article; or

W. A conspiracy or solicitation to commit an offense listed in items A through V of this item; or

2. If:

A. A person has created a barricade situation; and

B. Probable cause exists for the investigative or law enforcement officer to believe a hostage or hostages may be involved.

(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)(i) 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:

1. The law enforcement officer initially lawfully detained a vehicle during a criminal investigation or for a traffic violation;

2. The law enforcement officer is a party to the oral communication;

3. The law enforcement officer has been identified as a law enforcement officer to the other parties to the oral communication prior to any interception;

4. The law enforcement officer informs all other parties to the communication of the interception at the beginning of the communication; and

5. The oral interception is being made as part of a video tape recording.

(ii) If all of the requirements of subparagraph (i) of this paragraph are met, an interception is lawful even if a person becomes a party to the communication following:

1. The identification required under subparagraph (i)3 of this paragraph; or

2. The informing of the parties required under subparagraph (i)4 of this paragraph.

(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.

. . . .

(9) It is lawful under this subtitle for a person to intercept a wire or electronic communication in the course of a law enforcement investigation of possible telephone solicitation theft if:

(i) The person is an investigative or law enforcement officer or is acting under the direction of an investigative or law enforcement officer; and

(ii) The person is a party to the communication and participates in the communication through the use of a telephone instrument.

(10) It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication in the course of a law enforcement investigation in order to provide evidence of the commission of vehicle theft if:

(i) The person is an investigative or law enforcement officer or is acting under the direction of an investigative or law enforcement officer; and

(ii) The device through which the interception is made has been placed within a vehicle by or at the direction of law enforcement personnel under circumstances in which it is thought that vehicle theft may occur.

(11)(i) 1. In this paragraph the following words have the meanings indicated.

2. "Body-worn digital recording device" means a device worn on the person of a law enforcement officer that is capable of recording video and intercepting oral communications.

3. "Electronic control device" has the meaning stated in § 4-109 of the Criminal Law Article.

(ii) 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 with a body-worn digital recording device or an electronic control device capable of recording video and oral communications if:

1. The law enforcement officer is in uniform or prominently displaying the officer's badge or other insignia;

2. The law enforcement officer is making reasonable efforts to conform to standards in accordance with § 3-511 of the Public Safety Article for the use of body-worn digital recording devices or electronic control devices capable of recording video and oral communications;

3. The law enforcement officer is a party to the oral communication;

4. Law enforcement notifies, as soon as is practicable, the individual that the individual is being recorded, unless it is unsafe, impractical, or impossible to do so; and

> 5. The oral interception is being made as part of a videotape or digital recording.
>
> (iii) Failure to notify under subparagraph (ii)4 of this paragraph does not affect the admissibility in court of the recording if the failure to notify involved an individual who joined a discussion in progress for which proper notification was previously given.

MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2020).

Massachusetts

Massachusetts General Laws Annotated 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 ANN. ch. 272, § 99 (West 2020).

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 recording 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 ANN. § 750.539a, 750.539c, 750.539g (West 2020).

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.
> (2)(a) Subsection (1)(c) does not apply to:
> (i) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty . . . .

MONT. CODE ANN. § 45-8-213 (West 2019).

Nevada

Nevada Revised Statutes Annotated section 200.620 provides in pertinent part:

> 1. Except as otherwise provided in NRS 179.410 to 179.515, inclusive, 209.419 and 704.195, it is unlawful for any person to intercept or attempt to intercept any wire communication unless:
>
> (a) The interception or attempted interception is made with the prior consent of one of the parties to the communication; and

> (b) An emergency situation exists and it is impractical to obtain a court order as required by NRS 179.410 to 179.515, inclusive, before the interception, in which event the interception is subject to the requirements of subsection 3. If the application for ratification is denied, any use or disclosure of the information so intercepted is unlawful, and the person who made the interception shall notify the sender and the receiver of the communication that:
>
> (1) The communication was intercepted; and
>
> (2) Upon application to the court, ratification of the interception was denied.
>
> . . . .
>
> 3. Any person who has made an interception in an emergency situation as provided in paragraph (b) of subsection 1 shall, within 72 hours of the interception, make a written application to a justice of the Supreme Court or district judge for ratification of the interception. The interception must not be ratified unless the applicant shows that:
>
> (a) An emergency situation existed and it was impractical to obtain a court order before the interception; and
>
> (b) Except for the absence of a court order, the interception met the requirements of NRS 179.410 to 179.515, inclusive.

NEV. REV. STAT. ANN. § 200.620 (West 2019).

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, the person:
>
> (a) Wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any telecommunication or oral communication;
>
> (b) Wilfully 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 telecommunication, or

(2) Such device transmits communications by radio, or interferes with the transmission of such communication, or

(3) Such use or endeavor to use (A) takes place on premises of any business or other commercial establishment, or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment; or

(c) Wilfully discloses, or endeavors to disclose, to any other person the contents of any telecommunication or oral communication, knowing or having reason to know that the information was obtained through the interception of a telecommunication or oral communication in violation of this paragraph; or

(d) Willfully uses, or endeavors to use, the contents of any telecommunication or oral communication, knowing or having reason to know that the information was obtained through the interception of a telecommunication 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 on the 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 the officer's duties pertaining to the conducting of investigations of organized crime, offenses enumerated in this chapter, solid waste violations under RSA 149-M:9, I and II, 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. Oral authorization for the interception may be given and a written memorandum of said determination and its basis shall be made within 72 hours thereafter.

> The memorandum shall be kept on file in the office of the attorney general. . . .
> (g) Any law enforcement officer, when conducting investigations of or making arrests for offenses enumerated in this chapter, to carry on the 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 133.726 or subsections (2) to (7) of this section, a person may not:
> (a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which the 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. . . .
> (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 not all participants in the conversation are specifically informed that their conversation is being obtained. . . .
> (5) The prohibitions in subsection (1)(c) of this section do not apply to:
> (a) A person who records a conversation during a felony that endangers human life;
> (b) A person who records a conversation in which a law enforcement officer is a participant, if:
> (A) The recording is made while the officer is performing official duties;
> (B) The recording is made openly and in plain view of the participants in the conversation;
> (C) The conversation being recorded is audible to the person by normal unaided hearing; and
> (D) The person is in a place where the person lawfully may be . . . .

Or. Rev. Stat. Ann. § 165.540 (West 2020).

Pennsylvania

Pennsylvania Consolidated Statutes title 18, section 5703 provides:

> 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.

18 PA. STAT. AND CONS. STAT. ANN. § 5703 (West 2020).

Pennsylvania Consolidated Statutes title 18, section 5704 provides in pertinent part:

> It shall not be unlawful and no prior court approval shall be required 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, including, but not limited to, the crimes enumerated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), where:
> (i) Deleted.
> (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 initiated, 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;
> (iii) the investigative or law enforcement officer meets in person with a suspected felon and wears a concealed electronic or mechanical device capable of intercepting or recording oral communications. However, no interception under this subparagraph may be used in any criminal prosecution except for a prosecution involving harm done to the investigative or law enforcement officer. This subparagraph shall not be construed to limit the interception and disclosure authority provided for in this subchapter; or
> (iv) the requirements of this subparagraph are met. If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of a nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception. . . .
> (4) A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception.

18 PA. STAT. AND CONS. STAT. ANN. § 5703 (West 2020).

Washington

Revised Code of Washington section 9.73.030 provides in pertinent part:

> (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.

Revised Code of Washington section 9.73.110 provides:

> 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.

Revised Code of Washington section 9.73.200 provides:

> The legislature finds that the unlawful manufacturing, selling, and distributing of controlled substances is becoming increasingly prevalent and violent. Attempts by law enforcement officers to prevent the manufacture, sale, and distribution of drugs is resulting in numerous life-threatening situations since drug dealers are using sophisticated weapons and modern technological devices to deter the efforts of law enforcement officials to enforce the controlled substance statutes. Dealers of unlawful drugs are employing a wide variety of violent methods to realize the enormous profits of the drug trade.
> Therefore, the legislature finds that conversations regarding illegal drug operations should be intercepted, transmitted, and recorded in certain circumstances without prior judicial approval in order to protect the life and safety of law enforcement personnel and to enhance prosecution of drug offenses, and that that interception and transmission can be done without violating the constitutional guarantees of privacy.

Revised Code of Washington section 9.73.210 provides in pertinent part:

> (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:
> (a) 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; or
> (b) Person(s) engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.
> (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 authorization 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. . . .
> (7) Nothing in this section authorizes the interception, recording, or transmission of a telephonic communication or conversation.

Revised Code of Washington section 9.73.230 provides in pertinent part:

> (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:
> (i) 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; or

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and
(c) A written report has been completed as required by subsection (2) of this section.

WASH. REV. CODE ANN. §§ 9.73.030, .110, .200, .210, .230 (West 2020).