THE CLASH BETWEEN TECHNOLOGY AND COMMUNICATION PRIVACY

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I. INTRODUCTION

Communication is vital to one's existence, health, and wellbeing, whether it is transmitting everyday wants and needs, establishing a personal connection, newsgathering, interacting and networking with others, making small talk, or telling a close friend about intimate information. If a communication is meant to be private, one often chooses a secluded location, such as a home, in which to have the conversation.

There are many good reasons for recording a conversation, including making a record, memorializing an important conversation, promoting safety and security, monitoring activities, or preventing false accusations. A recording captures the speaker's exact words and intonation. However, the capture of one's private communication has the potential for harming the reputation and image of the person taped if the secretly taped conversation is later disclosed. The person with whom one is communicating may not turn out to be as trustworthy as one had thought, and once close relationships can sour over time.

With rapid advances in technology that one could characterize as almost a revolution, society struggles to maintain a balance between privacy and publicity. The dividing line between privacy and free disclosure varies according to the persons involved, the topic of conversation, and the location of the communication. This balancing act continues to evolve over time, with the media encouraging the revelation of intimate details of one's existence that society would have once considered inappropriate to reveal in public. Children born in this century are accustomed to tracking their existence since birth on social media sites where their everyday milestones, captured visually and in sound, have been uploaded by family and friends.

The clash between technology and communication privacy continues to grow, given the ubiquity of cellular telephones and the ease with which they can be used to tape otherwise private conversations. Advances in technology make it very easy to record conversations, and people are accustomed to frequently recording events in their everyday lives. The newest advances in technology include wearable devices, such as sunglasses and necklaces, and devices such as televisions and electronic personal assistants with voice recognition software, all capable of secretly recording

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conversations. It may come as a surprise that secretly taping communication has historically been penalized, making one civilly and criminally liable.

This clash between technology and communication most clearly resonates in the minority of states that require all parties to consent to the taping of a conversation, but can also arise in one-party consent jurisdictions where an eavesdropper who is not a party to the conversation taped the conversation. The case law focus of this article is Florida; however, the article provides an overview of the eavesdropping statutes of other states for comparison.

Eavesdropping statutes necessarily carve a bright line between permissible and impermissible taping of communication. A civic-minded citizen who secretly tapes a conversation to gather evidence of criminal activity may run afoul of eavesdropping statutes. Even though statutory exceptions to the ban on secret taping create some leeway, the hard cases with the potential to make bad law still arise. "Great cases, like hard cases, make bad law."[1] Justice Oliver Wendell Holmes explained:

> [G]reat cases are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[2]

The Florida Supreme Court has had occasion to decide two such hard cases discussed later in this article.

Section II provides an overview of eavesdropping statutes of various jurisdictions. Section III discusses eavesdropping statutes in one-party consent jurisdictions. Section IV reviews information on the eavesdropping statutes in a minority of jurisdictions that require all party consent to tape a conversation. Section V is devoted to the latest hard case concerning the Florida eavesdropping statutes, *McDade v. State*.[3] Section VI provides analysis and Section VII the conclusion. Appendix A provides additional information on one-party consent jurisdictions.

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[1] Northern Securities Company v. United States, 193 U.S. 197, 400 (1904)(Holmes, J., dissenting).

[2] *Id.* at 400-01.

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

II. EAVESDROPPING STATUTES

The term eavesdropping originated from someone positioned at the perimeter of a home where the water drops to secretly listen in on an otherwise private conversation. Because the eavesdropper gained information intended to be private, this secret monitoring of conversation was long considered unethical.

The federal government[4] and all but one United States jurisdiction prohibit secret taping of certain types of conversation. Vermont, the lone hold-out from statutory protection for communication, does protect against eavesdropping under court interpretation of the state constitution.[5]

Eavesdropping statutes are not uniform among the various jurisdictions, both in the requisite consent to legally tape a face-to-face conversation and the nature of the protected conversation. As far as consent is concerned, a far greater portion of the United States jurisdictions permit one party to the conversation to secretly tape the conversation. In contrast, secret taping by one party to the conversation generally would be illegal and would subject one to potential civil liability in a minority of jurisdictions.

Federal statutes and the statutes from a majority of the states[6] require one party to the conversation to consent to the taping.[7] The downside for someone engaged in shady activity is that a police officer has much more freedom than a private party to investigate and gather evidence of criminal activity. Because only one-party consent is typically required if a police officer is involved, a police officer who is a party to a conversation may secretly tape a conversation and, generally, an exemption permits a police officer to tape a conversation on the consent of one party to the conversation[8]; however, a police officer who is neither a party to the conversation nor has the consent of one of the parties to tape the conversation may be forced to obtain a court order before doing so.[9]

One-party consent puts the burden on one engaged in what appears to be a private conversation to gauge how likely that the other person is to tape the conversation. One-party consent correlates more closely with society's decreased observance of privacy and the pervasive availability of technology that make it more likely that conversations will be recorded. One-party consent also erases the civil and

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[4] *See* Appendix A under United States.

[5] *See* Appendix A under Vermont.

[6] *See infra* notes 22-42 and accompanying text.

[7] *See, e.g.*, 18 U.S.C.A. § 2511 (2)(d)(West, Westlaw through P.L. 115-46). The eavesdropping statutes of a number of states contain a similar exemption. *See infra* Appendix A.

[8] *See, e.g., id.* § 2511 (2)(c).

[9] *See, e.g., id.* § 2516.

criminal liability that one faces seeking to gather evidence of a crime in an all-party consent jurisdiction.

In contrast, eleven states require all parties to the conversation to consent to the taping.[10] All-party consent on its face appears to provide more protection for the privacy of communication and obviates the need for one desiring privacy to be accurate in reading the trustworthiness of the other party to the conversation to avoid taping the conversation. Whether this protection exists in reality is open to debate, as the provision may not deter secret taping and the person who was secretly taped may never learn of the taping. The downside of all-party consent is that imposing civil and criminal liability on someone taping with less than all-party consent may be a totally unexpected consequence for someone who has a good reason for taping. The all-party consent requirement overlays with serious consequences a seemingly innocent activity of pressing the record button.

Three all-party consent states require only one-party consent if the secretly taped conversation concerns a crime. The states are California,[11] Illinois,[12] and Washington.[13] The Illinois provision is the broadest, not specifying any particular

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[10] *See infra* notes 43-53 and accompanying text. *See, e.g.,* FLA. STAT. ANN. § 934.03(2)(d)(West, Westlaw through the 2017 First Regular Sess. and Spec. "A" Sess. of the 25th Leg.). The Florida statute provides: "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." *Id.*

[11] California permits one-party consent to secretly tape if the conversation concerns certain crimes. CAL. PENAL CODE § 633.5 (West, Westlaw through urgency legis. through Ch. 181 of 2017 Reg. Sess.). The statute provides:

> Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, including, but not limited to, human trafficking . . . .

Id.

[12] 720 ILL. COMP. STAT. ANN. 5/14-3(i)(West, Westlaw through P.A. 100-118 of the 2017 Reg. Sess.). The statute provides an exemption for:

> 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.

Id.

[13] WASH. REV. CODE ANN. § 9.73.030(2) (West through all laws from the 2017 Third Spec. Sess. of the Washington leg.). The Washington statute provides:

crime, but the crime must be "against the person or a member of his or her immediate household,"[14] while the provisions for California and Washington are limited to the crimes enumerated in the provisions. Even in these three states with exceptions for secretly taping criminal activity, the criminal activity secretly taped by the layperson may not squarely fit within an exception.

All-party consent creates a trap for the unwary person who is gathering evidence of a serious crime. This person might have accomplished the same objective by involving law enforcement in the investigation. Somewhat anomalously, many of the all-party consent states permit taping on one party consent if the police officer is a party to the conversation or the officer has the consent of one party to the conversation.[15] However, the person who desires to secretly tape a conversation may be reluctant to involve law enforcement for various reasons or may not be sufficiently knowledgeable of the benefits of obtaining law enforcement involvement. However, a police officer who is neither a party to the conversation nor has the consent of a party to the conversation generally must obtain a court order prior to taping a conversation.[16]

Other than the consent requisite to tape a face-to-face conversation, the other distinguishing factor among the eavesdropping statutes of the various jurisdictions is the nature of the conversation receiving statutory protection. The type of conversation receiving protection under many eavesdropping statutes is grounded in the 1967 landmark case *Katz v. United States*.[17] In that case, the United States Supreme Court

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> 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.

Id.

[14] 720 ILL. COMP. STAT. ANN. 5/14-3(i).

[15] *See, e.g., id.* § 934.03(2)(c). The Florida statute provides:

> 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.

Id.

[16] *See, e.g., id.* § 934.07.

[17] Katz v. United States, 389 U.S. 347 (1967).

held that a telephone conversation was protected by the Fourth Amendment against it being taped by law enforcement.[18] Justice Harlan's concurring opinion is fundamental in its relationship to the protection afforded face-to-face conversation by many eavesdropping statutes. Justice Harlan laid out a two-part test to determine whether the Fourth Amendment would insulate a conversation from secretly being taped by law enforcement.[19] The first part of the test is whether the speaker has a subjective expectation of privacy, and the second part of the test is whether the speaker's expectation of privacy is objectively reasonable.[20] The test is unrelated to the content of the conversation or to whether the speaker is engaging in criminal activity.

This two-pronged test is key to whether the federal eavesdropping statutes and the statutes of a number of other jurisdictions protect face-to-face conversations against recording as oral communication. Under the federal eavesdropping statutes, a face-to-face conversation qualifies as an oral communication if and only if both the speaker had a subjective expectation of privacy and society would consider the speaker's expectation of privacy objectively reasonable.[21] A number of state eavesdropping statutes use the term "oral communication" when referencing a face-to-face conversation protected against being secretly taped and define that term using the two-pronged test derived from *Katz*.

The following portion of this paper discusses relevant statutes and case-law interpretation of one-party consent states.

III. ONE-PARTY CONSENT STATES

Certain provisions of one-party consent eavesdropping statutes are discussed in this section. Additional provisions of the federal statutes and the statutes of the other states are reviewed in Appendix A.

The federal eavesdropping statutes prohibit taping a conversation that qualifies as an oral communication. In defining the term oral communication, the federal statutes incorporate the *Katz* two-pronged reasonable expectation of privacy test. Thus, an oral communication is a conversation in which the speaker has an expectation of privacy that society would consider to be reasonable. The first prong is the subjective component of the test and the second prong is the objective component of the test.[22] One of the exemptions from liability under the federal statutes allows a

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[18] *Id.* at 353.

[19] *Id.* at 361 (Harlan, J., concurring).

[20] *Id.*

[21] 18 U.S.C.A. § 2510(2) (West, Westlaw through P.L. 115-46). *See* Appendix A under United States.

[22] *See supra* notes 17-21 and accompanying text.

private individual to tape a conversation if the person is a party to the conversation or one of the parties to the conversation consents to the taping, unless the taping is for a criminal or tortious purpose.[23] This exemption makes the federal eavesdropping statutes one-party consent statutes.

Although the federal statutes allow a conversation to be taped upon one-party consent, it would be illegal for someone who is not a party to the conversation to tape the conversation so long as the participants expect privacy in the conversation and society would consider that expectation of privacy to be reasonable. Typically, people discussing confidential, sensitive, or intimate information expect privacy; therefore, the subjective component of the test is usually satisfied. The second prong of the test, the objective component, is usually fact-specific and is often tied to location and the possibility that the conversation might be overheard. A reasonable expectation of privacy is often recognized in a private home, but not in a public park or on a public street. However, there may not be a reasonable expectation of privacy in a private home if the doors or windows were open or the parties to the conversation were speaking loud enough to be heard outside the home[24] and there might be a reasonable expectation of privacy in a park if the conversation is being conducted in a low tone of voice and the parties to the conversation are far removed from others in the park.[25]

The federal eavesdropping statutes have been quite influential and serve as a model for many states adopting their own eavesdropping statutes. The eavesdropping statutes of a number of states track the above provisions of the federal eavesdropping statutes. The states that track the federal eavesdropping statutes fairly closely[26] are Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, Utah, West Virginia, and Wisconsin. Other states that are one-party consent states and use a two-pronged definition of oral communication but

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[23] *See* Appendix A under United States.

[24] *See, e.g.* Malpas v. State, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997); People v. Kirsh, 575 N.Y.S.2d 306, 307, 308 (N.Y. App. Div. 1991). The *Malpas* court found that Craigie did not have an expectation of privacy because, on his side of the telephone conversation, he was yelling loud enough to be heard in the next apartment. 695 A.2d at 591, 595. The *Kirsh* court found that "absent a reasonable expectation of privacy, the recording of conversations, *per se,* is not illegal" and the defendant had no reasonable expectation of privacy in "conversations . . . heard through a hole in the floor, and tape recorded." 575 N.Y.S.2d at 307, 308.

[25] *See, e.g.*, Dickerson v. Raphael, 564 N.W.2d 85, 87-88 (Mich. Ct. App. 1997), *rev'd in part*, 601 N.W.2d 108 (Mich. 1999). The conversation took place in a public park with one of the parties wearing a microphone that simultaneously broadcast the conversation to a TV van. On appeal the Michigan Supreme Court stated "the question whether plaintiff's conversation was private depends on whether she intended and reasonably expected it to be private at the time and under the circumstances involved." Dickerson v. Raphael, 601 N.W.2d 108, 108 (Mich. 1999).

[26] *See* Appendix A under Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, Utah, West Virginia, and Wisconsin. For Rhode Island, the term "oral communication" is defined in a criminal procedure statute, rather than in the eavesdropping statute. *See* Appendix A.

do not track the federal statutes[27] include Arizona, Colorado, Idaho, Missouri, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming.

Other states protect a face-to-face conversation using a term other than "oral communication" but define the term using subjective and objective components. The Alaska eavesdropping statutes[28] protect "private communication" and define the term using the two-pronged *Katz* test. The eavesdropping statutes of Georgia[29] and Kansas[30] protect "private conversation" made in a "private place" and define a private place as a location where one can be "reasonably safe" from "surveillance." The Maine eavesdropping statutes[31] protect the privacy of sounds made in a "private place" and define private place as a location where one can be "reasonably safe" from "surveillance." The New York eavesdropping statutes[32] protect "conversation" but the statutes do not define conversation; New York case law indicates that a conversation made with a reasonable expectation of privacy is protected against recording.[33]

Other states protect a face-to-face conversation against being secretly taped but do not provide a definition for the type of conversation protected.[34] The lack of a definition is problematic both for the person potentially subject to civil or criminal liability and for the accuser because the type of conversation protected may be wide open to interpretation. These states are Alabama, Arkansas, Kentucky, Tennessee, Connecticut, and Nevada. The Alabama eavesdropping statutes[35] protect "private communication"; the eavesdropping statutes of Arkansas, [36] Kentucky, [37] and Tennessee[38] protect "oral communication"; the Connecticut eavesdropping statutes[39]

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[27] *See* Appendix A under Arizona, Colorado, Idaho, Missouri, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming. For Missouri, Missouri eavesdropping statutes protect "oral communication" where the conversation is intercepted using a microphone transmitting the conversation elsewhere and define the term using the two-pronged *Katz* test. *See* Appendix A.

[28] *See* Appendix A under Alaska.

[29] *See* Appendix A under Georgia.

[30] *See* Appendix A under Kansas.

[31] *See* Appendix A under Maine.

[32] *See* Appendix A under New York.

[33] People v. Kirsh, 575 N.Y.S.2d 306, 307, 308 (N.Y. App. Div. 1991).

[34] *See* Appendix A under Alabama, Arkansas, Kentucky, Tennessee, Connecticut, and Nevada.

[35] *See* Appendix A under Alabama.

[36] *See* Appendix A under Arkansas.

[37] *See* Appendix A under Kentucky.

[38] *See* Appendix A under Tennessee.

[39] *See* Appendix A under Connecticut.

protect "conversation"; and the Nevada eavesdropping statutes[40] protect "private conversation."

Although all states but one protect certain types of conversation against being recorded, three states, Indiana, New Mexico, and Mississippi, appear not to make surreptitious taping of a face-to-face conversation a crime. Although the Indiana statutes contain procedures for obtaining a warrant to intercept a telephone communication and Mississippi statutes contain procedures for obtaining a court order to intercept an oral communication, research has failed to locate any statute or case law interpretation of any statute affirmatively prohibiting such taping.[41] The statutes of New Mexico[42] appear to prohibit taping of telephone conversations but not face-to-face conversations.

The following portion of this paper discusses relevant statutes and case-law interpretation of all-party consent states.

IV. ALL-PARTY CONSENT STATES

The eavesdropping statutes of the eleven all-party consent states provide the most protection for face-to-face conversation; however, state courts have found them the most troublesome to apply in the sometimes difficult cases coming before them. A starting point is to examine the nature of the face-to-face conversation protected under the eavesdropping statutes of the eleven all-party consent states.

Florida,[43] New Hampshire,[44] and Pennsylvania[45] are all-party consent states that use the term "oral communication" and protect a face-to-face conversation as long as there is an expectation of privacy that is reasonable; thus, other than requiring all-party consent to taping, the way in which the three states define the term "oral communication" is similar to the way in which it is defined in the federal statutes. However, as more fully discussed below, what constitutes a reasonable expectation of privacy has been interpreted differently by Florida and Pennsylvania.

The Massachusetts eavesdropping statute[46] protects "oral communication" but does not tie this to whether the speaker has a reasonable expectation of privacy. What is important in determining whether the face-to-face conversation is protected is

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[40] *See* Appendix A under Nevada.
[41] *See* Appendix A under Indiana and Mississippi.
[42] *See* Appendix A under New Mexico.
[43] *See infra* notes 54-73, 155-60, 187-218 and accompanying text.
[44] *See infra* notes 74-77 and accompanying text.
[45] *See infra* notes 78-93 and accompanying text.
[46] *See infra* notes 95-105 and accompanying text.

whether the conversation was secretly taped and whether the taping was done with all-party consent.

The eavesdropping statutes of Illinois,[47] Maryland,[48] Michigan,[49] and Washington[50] protect "private conversation," California eavesdropping statutes[51] protect "confidential communication," and the eavesdropping statutes of Montana[52] and Oregon[53] protect "conversation" against being recorded without all party consent. In those states and as more fully explained below, case law provides some guidance in determining the nature of the face-to-face conversation protected against eavesdropping.

A. A CONVERSATION MADE WITH A REASONABLE EXPECTATION OF PRIVACY

1. FLORIDA

Florida defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[54] Under Florida law, it is illegal to deliberately tape a private conversation without all-party consent.[55] One who illegally tapes a conversation is subject to up to five years imprisonment[56] and may, in addition, be subject to a fine of up to five thousand dollars.[57]

The Florida Supreme Court had occasion to determine whether there was a reasonable expectation of privacy in a private home, *McDade v. State*[58] and *State v. Walls*,[59] in a business office open to the public, *State v. Inciarrano*,[60] and in a police

[47] *See infra* notes 106-07 and accompanying text.
[48] *See infra* notes 108-10 and accompanying text.
[49] *See infra* notes 111-25 and accompanying text.
[50] *See infra* notes 126-33 and accompanying text.
[51] *See infra* notes 134-37 and accompanying text.
[52] *See infra* notes 138-47 and accompanying text.
[53] *See infra* notes 148-54 and accompanying text.
[54] FLA. STAT. ANN. § 934.02(2)(West, Westlaw through the 2017 First Reg. Sess. and Spec. "A" Sess. of the 25th Leg.).
[55] *Id.* § 934.03(1), (2)(d).
[56] *Id.* § 775.082(3)(e).
[57] *Id.* § 775.083(1).
[58] McDade v. State, 154 So.3d 292 (Fla. 2014). *See infra* notes 155-60 and accompanying text.
[59] State v. Walls, 356 So. 2d 294, 295 (Fla. 1978).
[60] State v. Inciarrano, 473 So. 2d 1272, 1274 (Fla. 1985).

car, *State v. Smith*.[61] *McDade* is discussed in Section IV. While the *Walls* and *Smith* decisions presented little difficulty in applying the concept of reasonable expectation of privacy, *McDade* and *Inciarrano* highlighted the difficulty faced by the courts in other states of interpreting the terms "oral communication" and "intercept."

In *Walls*, two individuals were allegedly extorting Antel in his home when Antel secretly taped the conversation. Even if the secretly taped conversation was excluded from evidence, Antel was alive and could testify in the extortion case against Walls and Gerstenfeld.[62] The Florida Supreme Court found that the conversation was an oral communication and no statutory exception would allow the taped conversation to be used as evidence.[63]

In *Inciarrano*, the victim was in his business office secretly taping the conversation between the victim and Inciarrano when Inciarrano shot and killed the victim. Because the taped information was the only evidence against Inciarrano, the Florida courts faced a tough situation.[64] The trial court did not suppress the taped information, considering "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."[65] Inciarrano pled nolo contendere but reserved the right to appeal the denial of his motion to suppress. The intermediate appellate court reversed, feeling duty-bound to follow *Walls*. However, even in reversing, the intermediate court expressed its uneasiness with the decision it felt it needed to make.[66]

When *Inciarrano* reached the Florida Supreme Court, the four-member court majority stated that Inciarrano's expectation of privacy was not reasonable, without offering any reasoning on which the court based this finding, and quashed the lower court's decision.[67]

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[61] State v. Smith, 641 So. 2d 849, 850 (Fla. 1994).

[62] 356 So. 2d at 295.

[63] *Id.* at 296. Although the court did not state its reasoning, presumably the parties had an expectation of privacy because there were only three people talking in a confined space and the expectation of privacy was reasonable because they were in a private home. The court explained that Antel, had he wished, could have obtained authorization to secretly tape the conversation. Even though Antel had not received the required authorization, the prosecution could use Antel's testimony as evidence. *Id.* at 297.

[64] Inciarrano v. State, 447 So. 2d 386, 388 (Fla. Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272, 1274 (Fla. 1985).

[65] 473 So. 2d at 1274.

[66] 447 So. 2d at 390.

[67] 473 So. 2d at 1276. In 2000, the intermediate appellate court relied on *Inciarrano* in deciding a case in which a part business owner of Balgres Distributing Company, Inc., Lamaletto, secretly taped a conversation in his office with Jatar who was allegedly attempting

State v. Smith[68] was a typical traffic stop case in which the driver consented to the officer's request to search the car in which Smith was a passenger. At the officer's suggestion, the driver and Smith sat in the back seat of the patrol car while their car was being searched. Unbeknownst to them, the officer secretly taped their conversation, which contained incriminating information. The suspects were not under arrest while their conversation was taped but were arrested after the officer found illegal drugs in the car.[69] The suspects did seem to have a subjective expectation of privacy while in the patrol car, as evidenced by their disclosure of incriminating information.[70] Even though this was a case of first impression for the Florida Supreme Court, the court had several cases of persuasive authority to rely on and, thus, the decision was a fairly easy one.[71] The court stated: "We agree with the Eleventh Circuit Court's reasoning and hold that a person does not have a reasonable expectation of privacy in a police car and that any statements intercepted therein may be admissible as evidence."[72] That means that the suspects' conversation did not fall within the definition of an oral communication and, therefore, the conversation was not protected against being secretly recorded.[73]

2. NEW HAMPSHIRE

The New Hampshire statutory prohibition against eavesdropping is similar to that of Florida in a number of respects. New Hampshire defines "oral communication" as "any verbal communication uttered by a person who has a reasonable expectation

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to extort Lamaletto. Jatar v. Lamaletto, 758 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 2000). Jatar sued Lamaletto and Balgres civilly asking for damages for the taping. The trial court granted Lamaletto and Balgres' motion for summary judgment and the appellate court affirmed. *Id.* The intermediate appellate court certified the following question to the Florida Supreme Court as one of great public importance:

> DOES *STATE v. WALLS*, 356 So.2d 294 (Fla.1978), HAVE CONTINUED VALIDITY AND BAR SUMMARY JUDGMENT IN THE VICTIM'S FAVOR, WHERE AN EXTORTION THREAT WAS DELIVERED IN THE VICTIM'S OFFICE AND ELECTRONICALLY RECORDED BY THE VICTIM BECAUSE HE FEARED THAT SUCH AN EXTORTION THREAT WAS IMMINENT, IN VIEW OF THE HOLDING IN *STATE v. INCIARRANO*, 473 So.2d 1272 (Fla. 1985)?

758 So. 2d at 1169-70. The Florida Supreme Court declined to hear the case. Jatar v. Lamaletto, 786 So. 2d 1186 (Fla. 2001)(Table).

[68] State v. Smith, 641 So. 2d 849, 850 (Fla. 1994).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 852.

[72] *Id.*

[73] *Id.* The court reasoned: "Because we find that there is no reasonable expectation of privacy in a police car, section 934.03 does not apply to conversations that take place in those vehicles. Consequently, the section 934.06 prohibition against the use of intercepted oral communications as evidence is inapplicable as well." 641 So. 2d at 852.

that the communication is not subject to interception, under circumstances justifying such expectation."[74] Under New Hampshire law, it is a class B felony if "without the consent of all parties to the communication, the person . . . [w]ilfully intercepts . . . any . . . oral communication;"[75] however, it is "a misdemeanor if, . . . without consent of all parties to the communication, the person knowingly intercepts a[n] . . . oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication."[76]

In contrast to Florida and Pennsylvania, research showed no case law interpreting the New Hampshire statutory term "oral communication."[77]

3. PENNSYLVANIA

The Pennsylvania statutory prohibition against eavesdropping is similar to that of Florida in certain respects. Pennsylvania defines "oral communication" as "[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation."[78] Under Pennsylvania law, it is a third degree felony if one "intentionally intercepts . . . any . . . oral communication;"[79] however, it is not illegal for "[a] person, to intercept a[n] . . . oral communication, where all parties to the communication have given prior consent to such interception."[80]

The Pennsylvania Supreme Court's case law interpretation of the term oral communication tracks the statutory definition in part, but with a layered approach. The statutory language directs the court to determine if the conversant had a reasonable expectation that the conversation would not be intercepted. Interception, in most instances, means that the conversation would not be recorded; however, according to the Pennsylvania Supreme Court in *Agnew v. Dupler*, [81] the non-interception

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[74] N.H. REV. STAT. ANN. § 570-A:1.II (West, Westlaw through Chapter 155 and Chapters 157 to 168, 172, 181, 189, 190, 192, and 193 of the 2017 Reg. Sess.).

[75] *Id.* § 570-A:2.I.

[76] *Id.* §§ 570-A:2.I-a, 625:9.IV.(c)("a misdemeanor without specification of the classification shall be presumed to be a class B misdemeanor").

[77] A New Hampshire statute provides an exemption making it lawful for a "law enforcement officer [performing certain investigations] . . . to intercept a telecommunication or oral communication, when . . . one of the parties to the communication has given prior consent to such interception [upon a prior determination of reasonable suspicion]." *Id.* § 570-A:2.II. The Supreme Court of New Hampshire has interpreted the consent requirement under that statute in the context of a face-to-face conversation, State v. Locke, 761 A.2d 376, 381 (N.H. 1999).

[78] 18 PA. CONS. STAT. ANN. § 5702 (West, Westlaw through 2017 Reg. Sess. Act 32).

[79] *Id.* § 5703.

[80] *Id.* § 5704(4).

[81] Agnew v. Dupler, 717 A.2d 519, 523 (Pa. 1998). As the court explained:

determination is dependent on a determination that the conversant had a reasonable expectation of privacy. This approach asks a court to first consider whether there was a reasonable expectation of privacy prior to considering whether the expectation that the conversation would not be recorded was reasonable. This two-step approach, unique to the state, may well be because the Pennsylvania Supreme Court has recognized an implicit right to privacy under Article I, section 8 of the Pennsylvania Constitution, the state's version of the Fourth Amendment to the United States Constitution.[82]

This interpretation asks a court to make two determinations, one about privacy and the other about non-interception, both of which have a subjective and an objective component. Case law focus is often on the reasonableness of the speaker's expectation of privacy because the reasonable expectation of non-interception finding is necessarily dependent on a reasonable expectation of privacy finding.[83] As for the subjective component, the conversant naturally claims an expectation of privacy and

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> in determining what constitutes an "oral communication" under the Wiretap Act, the proper inquiries are whether the speaker had a specific expectation that the contents of the discussion would not be intercepted, and whether that expectation was justifiable under the existing circumstances. In determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy. To determine the existence of an expectation of privacy in one's activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable.

Id.

[82] Commonwealth v. Blystone, 549 A.2d 81, 87 (Pa. 1988), *aff'd on other grounds*, 494 U.S. 299 (1990)(recognizing "that Article I, § 8 creates an implicit right to privacy in this Commonwealth" and stating that "[t]o determine whether one's activities fall within the right of privacy, we must examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable"). The concurring opinion of *Agnew* would have separated the finding of interception from the finding of privacy. "Contrary to the Majority's position, I believe that the expectation of non-interception and the expectation of privacy involve two distinct inquiries. Thus, a speaker, under certain circumstances, may possess a reasonable expectation of non-interception even in the absence of a reasonable expectation of privacy." *Agnew*, 717 A.2d at 525 (Nigro, J., concurring).

[83] In determining whether the speaker has a reasonable expectation of privacy, the subjective component is whether the speaker expects privacy and the objective component is whether society would consider this expectation reasonable. In determining whether there is a reasonable expectation of non-interception, the subjective component is whether the speaker expects that the conversation will not be recorded and the objective component is whether society would consider this expectation reasonable.

an expectation that the conversation was not being recorded. Thus, the key to the court's decision is the objective component of whether society would view the speaker's expectation of privacy as reasonable.[84]

The reasonableness objective component is often based on the location of the conversation and the identities or positions of the parties to the conversation. In 1998 in *Agnew v. Dupler*, the Pennsylvania Supreme Court found that a police officer did not have a reasonable expectation of privacy in a squad room in the police department where the police officer was talking to two other police officers and the chief of police was eavesdropping on the conversation via intercom.[85] The squad room was large and the door was open, allowing others outside the room to overhear conversations in the room without amplification, and the intercom on the room's four telephones, which could be activated at any time, permitted conversations in the room to be heard in other locations within the building.[86]

In the 1994 Pennsylvania Supreme Court case *Commonwealth v. Brion*,[87] a confidential informant with a body wire entered Brion's home to make an illegal drug purchase and the informant taped the conversation.[88] The court found that the recording violated Brion's right to privacy under the Pennsylvania Constitution and held 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."[89]

In a 1989 case *Commonwealth v. Henlen*,[90] a Pennsylvania state trooper was questioning a prison guard regarding the theft of an inmate's personal property. Unbeknownst to the trooper, the guard was secretly taping the conversation, which was being conducted at the county jail.[91] The Pennsylvania Supreme Court found that "the circumstances do not establish that Trooper Dibler possessed a justifiable expectation that his words would not be subject to interception."[92] Questioning of suspects is

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[84] 717 A.2d at 523. "Since the standard for such expectation of privacy is one that society is prepared to recognize as reasonable, the standard is necessarily an objective standard and not a subjective standard . . . ." *Id.* The determination of the reasonableness of the conversant's expectation of privacy is like a house of cards; with this objective component of reasonableness missing, the house of cards collapses.

[85] *Id.* at 521, 524.

[86] *Id.* at 524.

[87] Commonwealth v. Brion, 652 A.2d 287 (Pa. 1994).

[88] *Id.* at 287.

[89] *Id.* at 289.

[90] Commonwealth v. Henlen, 564 A.2d 905, 905 (Pa. 1989).

[91] *Id.*

[92] *Id.* at 907.

usually recorded, the trooper took notes of the questioning, which were to be made part of a report, and there was a third person present during part of the questioning. [93]

Thus, although the definition of "oral communication" in the statutes of the three states, Florida, New Hampshire, and Pennsylvania, is almost identical in wording, the case law interpretation of that term by two states differs significantly. Florida and Pennsylvania have each decided a number of cases interpreting the meaning of the term. New Hampshire has not had occasion to interpret the meaning of oral communication.

Under Florida case law, a court would first consider the threshold issue of whether the subject conversation qualifies as an oral communication. Florida has interpreted the two prongs of the definition as being given equal weight. Thus, if either the speaker did not have an expectation of privacy or if the expectation of privacy was not reasonable, then Florida would find no protected oral communication. In *McDade*[94] and *Walls*, the Florida Supreme Court easily found that each conversation qualified as an oral communication because the conversation took place in a private home. In both *Inciarrano* and *Smith*, the Florida Supreme Court found that the objective prong of the two-prong test lacking and, therefore, tape recording did not violate the Florida eavesdropping statute. Once it has been determined that the taped conversation qualifies as an oral communication, the court would move on to consider whether there was an eavesdropping violation because all parties to the conversation failed to consent.

In examining whether the taped conversation was private, Pennsylvania case law emphasizes the objective prong of the two-pronged test and assumes that the subjective prong of the test was met. Thus, it was reasonable for Brion to have an expectation of privacy in his home but it was not reasonable for there to be an expectation of privacy in a squad room, as in *Agnew*, or during an interview that took place in a county jail, as in *Henlen*.

B. A CONVERSATION THAT IS SECRETLY TAPED

1. MASSACHUSETTS

After reviewing the eavesdropping statutes of Florida, New Hampshire, and Pennsylvania, one should not necessarily expect the same two-pronged approach to apply to a state statute that protects a face-to-face conversation under the term "oral communication." As more fully explained below, the key to the Massachusetts eavesdropping statute is whether the person who recorded the conversation did so secretly.

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[93] *Id.* at 906.

[94] *See infra* notes 155-60 and accompanying text.

In Massachusetts,

> any person who--willfully commits an interception . . . of any . . . oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.[95]

Pursuant to the statute, "'interception' means to . . . secretly record . . . the contents of any . . . 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."[96] The statute further defines "oral communication" as "speech, except such speech as is transmitted over the public air waves by radio or other similar device."[97]

In a 2001 case, *Commonwealth v. Hyde*,[98] the Supreme Judicial Court of Massachusetts held that the Massachusetts eavesdropping statute "strictly prohibits the secret electronic recording by a private individual of any oral communication, and makes no exception for a motorist who, having been stopped by police officers, surreptitiously tape records the encounter." The four police officers involved did not discover that Hyde, the driver, had secretly taped the fifteen to twenty minute stop, which was "confrontational" until Hyde went to the police department to file a complaint.[99] The police department requested that Hyde be charged with four counts of eavesdropping and Hyde was convicted of the charges.[100]

On appeal, Hyde argued that he could not be convicted because the officers did not have an expectation of privacy, reasoning that the term "oral communication" should be interpreted to require an expectation of privacy.[101] The four-member majority of the court declined to so interpret the Massachusetts eavesdropping statute in light of the statute's "plain language and legislative history," explaining that Hyde could have recorded the encounter had he "simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight."[102]

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[95] MASS. GEN. LAWS ANN. Ch. 272, § 99 C.1. (West, Westlaw through Chapter 56 of the 2017 1st Annual Sess.).

[96] *Id.* § 99 B.4.

[97] *Id.* § 99 B.2.

[98] Commonwealth v. Hyde, 750 N.E.2d 963, 964 (Mass. 2001).

[99] *Id.* at 964-65.

[100] *Id.* at 965.

[101] *Id.* at 965-66.

[102] *Id.* at 971.

The two justices joining in the vigorous dissent would have read the Massachusetts statute to prohibit recording only of a conversation made with "a legitimate expectation of privacy."[103] The dissent emphasized the vital role that the public has in monitoring police activity. "To hold that the Legislature intended to allow police officers to conceal possible misconduct behind a cloak of privacy requires a more affirmative showing than this statute allows."[104] Finally, the dissent noted the flawed nature of the statute because it does not distinguish between a private individual and a reporter exercising the reporter's right under the First Amendment to Freedom of the Press and would subject both individuals to criminal liability.[105]

The dissenting opinion in *Hyde* makes it clear that not only face-to-face conversations made with a reasonable expectation of privacy are protected against being recorded. The Massachusetts interpretation of the state's eavesdropping statute focused on the autonomy of the individual in consenting or not consenting to being recorded. Still, a determination whether the taping was done secretly may be fact specific to a particular case and may be dependent on whether the speaker recognizes that a device in plain view has the capability of taping.

C. TAPING A PRIVATE CONVERSATION

Illinois, Maryland, Michigan, and Washington prohibit taping a "private conversation" without all-party consent.

1. ILLINOIS

Illinois law defines "private conversation" as "any oral communication between 2 or more persons . . . in person . . . when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation."[106] An individual commits "eavesdropping" when the individual:

> Knowingly and intentionally . . . [either] [u]ses 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 [or] [u]ses an

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[103] *Id.* at 975 (Marshall, C.J., dissenting).

[104] *Id.* at 976 (Marshall, C.J., dissenting). "It is the recognition of the potential for abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers." *Id.* at 977 (Marshall, C.J., dissenting).

[105] *Id.*

[106] 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West, Westlaw through P.A. 100-118 of the 2017 Reg. Sess.).

> eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation.[107]

2. MARYLAND

Maryland makes it illegal to "[w]illfully" tape "any person in private conversation" unless "the person is a party to the communication and where all of the parties to the communication have given prior consent."[108] The Maryland term "private conversation" is not defined by statute.

In 1997, a Maryland court analyzed whether a conversation qualified as an oral communication by determining whether the conversation was made with a reasonable expectation of privacy.[109] In so doing, the court employed the two-pronged *Katz* test of "whether Craigie exhibited an actual, subjective expectation of privacy with regard to his statements. If we answer that question in the affirmative, we then ask whether that expectation is "one that society is prepared to recognize as 'reasonable.'"[110]

3. MICHIGAN

Michigan statutes define "eavesdropping" as "to overhear, record, amplify or transmit" the "private discourse of others without the permission of all persons engaged in the discourse."[111] It is illegal for "[a]ny person who is present or who is not present" to eavesdrop on a "private conversation," with one who illegally eavesdrops subject to

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[107] *Id.* 5/14-2(a).

[108] MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401(13)(i), 10-402(a)(1), (c)(3) (West, Westlaw through legis. effective July 1, 2017, from the 2017 Reg. Sess. of the General Assembly). In Hawes v. Carberry, 653 A.2d 479 (Md. Ct. Spec. App. 1995), an intermediate appellate court had interpreted "willfully" to mean that the defendant knew that, when he secretly recorded a conversation, his action was illegal. *Id.* at 483. In 2001, the highest court in Maryland abrogated the *Hawes* decision. Deibler v. State, 776 A.2d 657, 659 (Md. 2001). The court stated: "The 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. Our answer is that it does not so require." *Id.*

[109] Malpas v. State, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997).

[110] *Id.* (quoting Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring)). The court found that Craigie did not have an expectation of privacy because, on his side of the telephone conversation, he was yelling loud enough to be heard in the next apartment. *Id.* at 591, 595.

[111] MICH. COMP. LAWS ANN. § 750.539a(2) (West, Westlaw through P.A. 2017, No. 117, of the 2017 Reg. Sess., 99th Leg.).

up to two years imprisonment, or a fine of up to two thousand dollars, or both.[112] In contrast to the eavesdropping and wiretapping statutes in most other states, the Michigan statutes do not distinguish between eavesdropping on a face-to-face conversation and wiretapping a telephone conversation, with the terms "private discourse of others" and "private conversation" applying to both types of conversations.

In 2001 in *People v. Stone*,[113] the Michigan Supreme Court interpreted a private conversation to be "a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance." Although *Stone* involved a cordless telephone conversation, the court's interpretation in *Stone* coincides with its decision in *Dickerson v. Raphael*, [114] which involved the recording of a face-to-face conversation.[115]

In *Dickerson*, the Michigan Court of Appeals had held that, where one of the participants in the conversation was wearing a concealed microphone, a non-participant who was taping the conversation could be liable for eavesdropping.[116] In reversing in part, the Michigan Supreme Court found that the intermediate appellate court had improperly granted a directed verdict in favor of the participant whose conversation had been secretly broadcast because the lower court had not first determined whether the conversation was private.[117] The Michigan Supreme Court stated, "the question whether plaintiff's conversation was private depends on whether she intended and reasonably expected it to be private at the time and under the circumstances involved."[118] The trial court had mistakenly focused on the substance of the conversation rather than the speaker's reasonable expectation of privacy. "The proper question is whether plaintiff intended and reasonably expected that the *conversation* was private, not whether the subject matter was intended to be private."[119]

In 2011 in *Bowens v. Ary, Inc.*,[120] the Michigan Supreme Court applied language from *Stone* when finding that the plaintiffs did not have a reasonable expectation of privacy based on the following facts:

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[112] *Id.* § 750.539c.

[113] People v. Stone, 621 N.W.2d 702, 705 (Mich. 2001).

[114] Dickerson v. Raphael, 601 N.W.2d 108 (Mich. 1999)(published table decision, court's one-page decision available on Westlaw).

[115] Dickerson v. Raphael, 564 N.W.2d 85, 87-88 (Mich. Ct. App. 1997), *rev'd in part*, 601 N.W.2d 108 (Mich. 1999).

[116] *Id.*

[117] 601 N.W.2d at 108.

[118] *Id.*

[119] *Id.*

[120] Bowens v. Ary, Inc., 794 N.W.2d 842, 843 (Mich. 2011).

> (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."[121]

An interesting question in Michigan is whether a participant can tape a conversation without running afoul of the prohibition against eavesdropping, even though the all-party consent requirement would be applicable if a bystander were to tape the conversation. In 1982 in *Sullivan v. Gray*,[122] the Michigan Court of Appeals interpreted that statute to allow taping by one of the parties to a telephone conversation. "The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on."[123] The Michigan Supreme Court did not weigh in on this interpretation, denying review in *Sullivan*,[124] nor in *Dickerson* did the Michigan Supreme Court comment on whether there was an exception for a participant recording the conversation.[125]

4. WASHINGTON

Washington makes it illegal to tape "any . . . [p]rivate conversation . . . without

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[121] *Id.* at 843-44.

[122] Sullivan v. Gray, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982).

[123] *Id.*

[124] *Id.* The history of the case in Westlaw shows that the Michigan Supreme Court denied appeal on June 30, 1983.

[125] 601 N.W.2d at 108.

first obtaining the consent of all the persons engaged in the conversation."[126] The term "private conversation" has no statutory definition; however, the term has been subject to case law interpretation.

The Washington Supreme Court has interpreted the term to first require that the parties to the conversation have a subjective expectation of privacy, and then the court considers three other factors in determining whether the taped conversation is a private conversation within the meaning of the statute.[127] In a 2006 case, *Lewis v. State, Dept. of Licensing*, the Washington Supreme Court stated that the three factors are: "(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party."[128]

In *Lewis*, the court considered four consolidated cases in which police officers had stopped drivers for alleged DUI offenses and the officers had taped the conversations.[129] In considering the three factors, the court easily concluded that the conversations were not private;[130] however, the court excluded the use of the taped

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[126] WASH. REV. CODE ANN. § 9.73.030(1) (West through all laws from the 2017 Third Spec. Sess. of the Washington leg.). The statute specifies how all party consent may be demonstrated:

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

Id. § 9.73.030(3).

[127] Lewis v. State, Dept. of Licensing, 139 P.3d 1078, 1083 (Wash. 2006).

[128] *Id.* The court first identified the three factors in 1996. State v. Clark, 916 P.2d 384, 392-93 (Wash. 1996). In that case, the court provides analysis, perhaps instructive, of whether the three factors apply in a number of situations. *Id.*

[129] 139 P.3d at 1079.

[130] *Id.* at 1084.

> Under the first factor, the recorded conversations in these cases were essentially brief business conversations with uniformed police officers. Under the second factor, the conversations between the police officers and the detainees occurred in public, in several cases along busy roads. Additionally, in the case of Lewis and Kelly, third parties were present for part or all of the conversations because the police officers called back-up, and in the case of Kelly, a passenger was in his car. Finally, under the third factor, it is not persuasive that the nonconsenting parties to these conversations, the drivers, would expect the officers to keep their conversations secret, when the drivers would reasonably expect that the officers would file reports and potentially would testify at hearings about the incidents.

conversation in each of the three cases in which the police officer failed to inform the driver that the conversation was being taped.[131]

In the 2014 case, *State v. Kipp*,[132] the Washington Supreme Court considered the three factors in deciding that the conversation was private. Kipp engaged in a ten-minute conversation with his brother-in-law about a sensitive subject when they were alone in a private home.[133]

Thus, although Illinois, Maryland, Michigan, and Washington all protect face-to-face conversations under the term "private conversation," the case law interpretation of the term differs from state to state. In addition, Michigan may allow participant taping as an exception to all-party consent.

D. TAPING A CONFIDENTIAL COMMUNICATION

1. CALIFORNIA

In California, it is illegal to "intentionally" tape a "confidential communication" "without the consent of all parties."[134] A "confidential communication" is defined as:

> any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.[135]

The California Supreme Court found that "a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded."[136] One who

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Id. at 1083.

[131] *Id.* at 1090.

[132] State v. Kipp, 317 P.3d 1029, 1035-36 (Wash. 2014).

[133] *Id.* at 1034-35.

[134] CAL. PENAL CODE § 632(a) (West, Westlaw through urgency legis. through Ch. 181 of 2017 Reg. Sess.).

[135] *Id.* § 632(c).

[136] Flanagan v. Flanagan, 41 P.3d 575, 582 (Cal. 2002). *Flanagan* involved the secret taping of telephone conversations; however, pursuant to statutory language the term "confidential communication" is not limited to face-to-face conversation. As evidence of the inclusive nature of the term, in *Flanagan* the California Supreme Court cited with approval to a case involving a face-to-face conversation. 41 P.3d at 581 (citing Shulman v. Group W

illegally tapes a conversation is subject to up to one year imprisonment, or a fine of up to two thousand five hundred dollars, or both.[137]

Thus, California employs the *Katz* two-pronged test to determine if a face-to-face conversation qualifies for protection as a "confidential communication."

E. PROTECTION AGAINST TAPING A CONVERSATION

1. MONTANA

Montana makes it illegal to secretly record a conversation without all party consent.[138] Under the Montana statute, one "commits the offense of violating privacy in communications if the person knowingly or purposely . . . records . . . a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation."[139]

In addition to the eavesdropping statute, Article 2, § 10 of the Montana Constitution guarantees Montana citizens a right to 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."

Productions, Inc., 955 P.2d 469, 492 (Cal. 1998)(finding that the recording is illegal if one has "an objectively reasonable expectation of privacy" in the conversation)).

[137] § 632(a). Section 632(a) provides:

> A person who, intentionally and without the consent of all parties to a confidential communication uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) per violation, by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

[138] MONT. CODE ANN. § 45-8-213(1) (West, Westlaw through chapters effective, July 1, 2017 sess.).

[139] *Id.* The statute exempts from criminal sanction "elected or appointed public officials or . . . public employees when the . . . recording is done in the performance of official duty." *Id.* § 45-8-213(1)(c). In addition, secret recording is not illegal in circumstances in which either "persons [are] speaking at public meetings" or "persons [are] given warning of the . . . recording, and if one person provides the warning, either party may record." *Id.*

The eavesdropping statute does not define the term "conversation" and research fails to show that the term has been interpreted by the Montana state courts. However, two Supreme Court of Montana cases have interpreted the Montana Constitution privacy provision to protect certain conversations against being secretly taped.

In 2008 in *State v. Goetz*,[140] the court considered two consolidated cases in which police confidential informants had been fitted with body wires and secretly taped conversations with the two suspects, with two of the conversations taking place in the suspects' residences and one conversation taking place in the informant's vehicle located in a parking lot.[141] In determining if the suspect had a right to privacy, the court considered "1) whether the person challenging the state's action has an actual subjective expectation of privacy; [and] 2) whether society is willing to recognize that subjective expectation as objectively reasonable."[142] The court found that the suspects did have "actual subjective expectations of privacy" because of the "private settings"[143] and that "society is willing to recognize as reasonable the expectation that conversations held in a private setting are not surreptitiously being electronically monitored and recorded by government agents."[144]

In 2010 in *State v. Meredith*,[145] police officers secretly taped Meredith's allegedly incriminating statements while he sat alone in a police station interrogation room. The Supreme Court of Montana used the two-pronged test from *Goetz* and concluded that "while Meredith *may* have an expectation of privacy in his statements, it is not one that society would recognize as objectively reasonable."[146] The court reasoned that "[h]ad [Meredith] wanted to preserve his privacy, he would not have voiced his thoughts."[147]

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[140] State v. Goetz, 191 P.3d 489, 492-93 (Mont. 2008).

[141] *Id.*

[142] *Id.* at 497.

[143] *Id.* at 499. "The [suspects] did not conduct their conversations where other individuals were present or physically within range to overhear the conversations." *Id.* at 498.

[144] *Id.* at 500. An open question is whether the court would have reached the same two conclusions if the person secretly taping had been a private individual. The court stated:

> while we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.

Id.

[145] State v. Meredith, 226 P.3d 571, 474-74, 480 (Mont. 2010).

[146] *Id.* at 580.

[147] *Id.* "Police interrogation rooms are traditionally areas where people are watched and monitored in some form or fashion whether it be by two-way glass, videotaping or audio

2. OREGON

The Oregon statute provides that one "may not . . . [o]btain . . . 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."[148] The term "conversation" is defined as "the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication."[149] The Oregon eavesdropping statutes require all party consent and does not limit protected conversations to those made with an expectation of privacy considered to be reasonable.[150] Research of Oregon case law reveals no case that read a reasonable expectation of privacy requirement into a protected conversation.

Surprisingly enough, the words "specifically informed" were the focus of two Oregon Court of Appeals cases, one from 1990 and the second from 2011, decided en banc.[151] In the 1990 case, Bichsel's conviction for recording her in-person conversation with at least two officers and her companion was affirmed because she failed to tell the officers that she was recording the conversation.[152] In the 2011 case,

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recording. In addition, there was no reason for Meredith to make the incriminating statements out loud unless he wanted to be overheard." *Id.*

[148] OR. REV. STAT. § 165.540(1) (West, Westlaw through 2017 Reg. Sess. Legis. effective through Aug. 2, 2017).

[149] *Id.* § 165.535(1).

[150] The statute does except from the reach of the prohibition against recording, face-to-face conversations made in certain specified settings so long as the tape recorder is not hidden. *Id.* § 165.540(6). The statute provides:

> The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept or attempt to intercept with an unconcealed recording device the oral communications that are part of any of the following proceedings:
>
> (a) Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;
>
> (b) Regularly scheduled classes or similar educational activities in public or private institutions; or
>
> (c) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

Id.

[151] State v. Bichsel, 790 P.2d 1142 (Or. Ct. App. 1990)(en banc); State v. Neff, 265 P.3d 62 (Or. Ct. App. 2011)(en banc).

[152] 790 P.2d at 1143. Bichsel had been counseling young people at a local mall and was carrying a tape recorder that continued to record when she and a companion met up with at least two police officers in an alley of downtown Eugene. One of the officers arrested Bichsel

a police officer pulled over Neff for a traffic stop and told Neff that the officer was recording the conversation; the officer did not know that Neff was also recording the conversation from his driver's position with a recorder not in view of the officer.[153] The court held that officer "Ou's own act of informing defendant that their conversation was being recorded was sufficient to satisfy the requirement of ORS 165.540(1)(c) that all participants to the conversation be 'specifically informed' that the conversation was being obtained."[154]

Although the eavesdropping statutes of Montana and Oregon protect face-to-face conversations, the focus of the two states is quite different. Montana uses the *Katz* two-pronged test to gauge the speaker's privacy. Oregon is more akin to Massachusetts in Oregon's focus on the autonomy of the speaker in consenting or not consenting to being taped.

V. *MCDADE V. STATE*

The Florida Supreme Court had occasion to determine whether there was a reasonable expectation of privacy in a private home in *McDade v. State*.[155] In *McDade*, the stepdaughter surreptitiously taped two conversations with her stepfather that took place in his bedroom to support her allegations that he had been sexually abusing her for some six years. After the stepdaughter turned the recorded conversations over to law enforcement, McDade was arrested.[156] The trial court permitted the taped conversations to be used in McDade's trial and he was convicted; on appeal, the Florida intermediate appellate court affirmed concerning the trial court use of the recorded conversations.[157]

One of the intermediate appellate judges in *McDade* recognized the incongruity of the stepfather expecting his conversation not to be taped by a teenager. "Under the 'society is prepared to recognize' test, I conclude that in 2011 a person who regularly and consistently abused a teenager in a bedroom of their shared home had no

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when the officer discovered that their conversation had been recorded. *Id.* The court opined that, even if the recorder was in plain sight, as Bichsel claimed, the statute required her to tell the officers that she was taping the conversation. *Id.* at 1144-45.

[153] 265 P.3d at 63.

[154] *Id.* at 68. The court found that "the primary concern underlying ORS 165.540(1)(c) was the protection of participants in conversations from being recorded without their knowledge." 265 P.3d at 66. The court reasoned that "[w]here, as here, all participants in a conversation know that the conversation is being recorded, the legislature's primary concern has been satisfied." *Id.*

[155] McDade v. State, 154 So.3d 292 (Fla. 2014).

[156] *Id.* at 294.

[157] *Id.* at 295.

reasonable expectation that their conversations about the abuse would never be recorded."[158] The judge added: "In this modern digital world, any such adult should have expected that eventually a teenage victim would record such conversations in self-defense."[159]

On appeal, the Florida Supreme Court found that the two recorded conversations were oral communication and that no statutory exception permitted the stepdaughter to protect herself by secretly taping.[160]

VI. ANALYSIS

The legislative and judicial branches of government have the dominant roles in making law, with the legislative branch passing statutes and the judicial branch interpreting statutes.[161] Over two hundred years ago, Alexander Hamilton recognized this role of the judiciary in *The Federalist* No. 78. "The interpretation of the laws is the proper and peculiar province of the courts."[162] Although all would agree that the role of the judiciary is to interpret statutes, determining the limit of such interpretation, between "genuine and spurious interpretation," is open to debate.[163]

A. TRADITIONAL STATUTORY INTERPRETATION

As a single word can have different nuances in meaning, using a very literal, narrow meaning and strictly construing a statute would produce a different result than more broadly or liberally construing a statute. Commonly it is said that criminal statutes should be strictly construed.[164] Other frequently used terms are "judicial restraint," which is often contrasted with "judicial activism." A critic viewing a particular court opinion as the exercise of improper judicial activism instead of the court appropriately exercising judicial restraint, might accuse a court of making law rather that interpreting a statute.

Rather than emphasizing judicial restraint, Alexander Hamilton put great stock in the judiciary balancing the legislative branch. "[T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the

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[158] State v. McDade, 114 So.3d 465, 471 (Fla. Dist. Ct. App. 2013)(Altenbernd, J., concurring specially), *quashed*, 154 So.3d 292 (Fla. 2014).

[159] *Id.* at 271-72.

[160] *Id.* at 298.

[161] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 863 (1930).

[162] THE FEDERALIST NO. 78, at 404 (Alexander Hamilton)(Gideon ed., 2001).

[163] James Landis, *A Note on "Statutory Interpretation*," 43 HARV. L. REV. 886, 886 (1930).

[164] Radin, *supra* note 161, at 880.

society."[165] Hamilton knew that the legislative branch could produce "injury of the private rights of particular classes of citizens, by unjust and partial laws."[166] When this happened, "the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws."[167] Hamilton continued that the judiciary "not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them."[168] Hamilton added that "no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day."[169]

According to Hamilton, the judiciary is subject to a number of checks on its power. First of all, it is the weakest of the three branches, neither possessing the enforcement power, in other words the "sword," of the executive branch nor the money, in other words the "purse," of the legislative branch.[170] To counterbalance the other two branches, the judiciary is charged "to secure a steady, upright, and impartial administration of the laws."[171] This is a weighty responsibility that places boundaries on the way in which the judiciary decides cases. "To avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ."[172]

One may wonder what guidelines a court should follow in interpreting a statute. Traditionally, a court applies statutory language when the plain meaning of the statute is clear.[173] Other standard rules of construction include determining statutory meaning through legislative intent, legislative history, or legislative purpose.[174]

A court tasked with determining whether a particular statute applies to a case before the court rarely applies the plain meaning of the statute. The reason is that there is typically some latent ambiguity when comparing statutory language with the facts of a particular case. "[M]ost of our most specific statutes fall considerably short of this ready determinability, and consequently no great limitation is imposed by the self-

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[165] THE FEDERALIST NO. 78, *supra* note 162, at 406.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at 402.
[171] *Id.*
[172] *Id.* at 407.
[173] Radin, *supra* note 161, at 867.
[174] Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594, 595 (1995).

denying ordinance which renounces 'interpretation' when the statute is plain."[175] The judge interpreting a particular statute may be removed some distance in time from the legislature that enacted a statute. "The interpreter's role involves selection and creativity, which is influenced, often unconsciously, by the interpreter's own frame of reference—assumptions and beliefs about society, values, and the statute itself."[176]

As far as employing legislative intent as a tool in statutory interpretation is concerned, determining legislative intent may be difficult, as a legislative body is made up of several hundred persons who most probably did not have a single intention in passing a particular statute.[177] Even more problematic for a legislative body is to envision all the possible instances in which the statute might apply in the future and determine whether the statute applies to those future occurrences. "To say that the intent of the legislature decides the interpretation is to say that the legislature interprets in advance by undertaking the impossibility of examining a determinable to see whether it can cover a situation which does not exist."[178]

Some may accuse a court of dishonestly using legislative intent as a screen for arriving at a particular desired result. "[F]ictitious intents of legislatures have been derived by courts to conceal the fact that they, rather than the legislature, were in this instance the lawgivers . . . ."[179]

Another possible tool in statutory interpretation is using legislative history. One scholar is of the viewpoint that reviewing legislative history is often not very helpful in statutory interpretation, as different and successive versions of the statute were proposed by different legislators and the particular statutory wording may have been dependent on the particular person penning the statutory draft.[180] Another scholar takes the opposite view that legislative history can be helpful in statutory interpretation. "Changes made in the light of earlier statutes and their enforcement, acquiescence in a known administrative interpretation, the use of interpreted language borrowed from other sources, all give evidence of a real and not a fictitious intent, and should be deemed to govern questions of construction."[181]

The second scholar, while acknowledging the discoverability of legislative history, places the blame of overly liberal statutory interpretation on the power of the judiciary. "[S]trong judges prefer to override the intent of the legislature in order to

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[175] Radin, *supra* note 161, at 869.
[176] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 58 (1994).
[177] Radin, *supra* note 161, at 870.
[178] Radin, *supra* note 161, at 871-72.
[179] Landis, *supra* note 163, at 886.
[180] Radin, *supra* note 161, at 873.
[181] Landis, *supra* note 163, at 889-90 (footnotes omitted).

make law according to their own views . . . ."[182] He adds: "Strong judges are always with us; no science of interpretation can ever hope to curb their propensities. But the effort should be to restrain their tendencies, not to give them free rein in the name of scientific jurisprudence."[183]

A judge often considers the purpose behind a particular piece of legislation. "[T]he legislative purposes and aims are the important guideposts for statutory interpretation . . . ."[184] In examining legislative purpose, one can focus on the immediate purpose, a more distant purpose, or the result, each of which can lead to a different statutory interpretation. "[T]o interpret a law by its purposes requires the court to select one of a concatenated sequence of purposes, and this choice is to be determined by motives which are usually suppressed."[185] It is the power of the judiciary to make this determination, which determination might be strong-armed by the judge writing the opinion. "[T]here is a world of difference between an attitude of mind that honestly seeks to grasp [the legislative purposes and aims] and give them effect, and one that cavalierly throws them overboard and leaves us to the mercy of the judge's 'day before yesterday.'"[186]

B. *WALLS, INCIARRANO, AND MCDADE*

Walls, *Inciarrano*, and *McDade* illustrate the overlap and conflict between a statute criminalizing the secret taping of a conversation and another criminal statute for which the person secretly taping the conversation was attempting to collect evidence. In *Walls*, Antel was in his own home when he secretly taped Walls and Gerstenfeld attempting to extort him. In *Inciarrano*, Trimble was in his office when he secretly taped his own murder. In *McDade*, the stepdaughter was trying to obtain proof that her stepfather had been sexually molesting her when she secretly taped their conversation in his bedroom. Even if the two relevant statutes in each of the three cases are construed as strictly as possible, they still overlap.

Society would certainly welcome citizen involvement in gathering evidence of criminal activity, especially if it is to protect one's own person. Prohibiting secret taping is also an admirable goal because it protects one's privacy; however, the criminal penalty of a potential five-year prison term and a $5,000 fine is quite severe, especially if the reason for the taping is to gather evidence of a crime that the state may use in a criminal prosecution.

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[182] *Id.* at 890.
[183] *Id.* at 891.
[184] *Id.* at 892.
[185] Radin, *supra* note 161, at 878.
[186] Landis, *supra* note 163, at 892.

Only a little over twenty percent of the states protect conversations against being secretly taped by requiring all parties to the conversation to consent to the taping. This prohibition against secretly taping a conversation is perhaps an outgrowth of a common law prohibition against eavesdropping. However, the common law prohibition was that one who was not a party to the conversation could not surreptitiously overhear the conversation. Thus, the restriction was directed at an outsider rather than at a party to the conversation.

Perhaps common law eavesdropping concepts more closely coincide with a layperson's expectations. After all, a party to a conversation can repeat what was said in the conversation, so the layperson might also expect that a party to a conversation could tape a conversation. There are many reasons for taping a conversation, including taking notes of what was said, ensuring one's safety, and preserving a record. A tape of a conversation preserves the exact language of what was said, in context, and includes the speaker's inflection and tone of voice. Thus, it is much more accurate than one participant's recollection of what was said. The tape can be pivotal if one of the conversants later denies making a statement captured on tape.

The purpose of evidence rules is to limit what a court considers to be relevant and reliable information. A taped conversation, if relevant to a matter before court, can be the most reliable piece of information available. The anomaly is that, in an all-party consent state, the court may have to exclude from evidence the single most significant piece of information. Usually, exclusion of evidence is a prophylactic device designed to discourage law enforcement gathering of evidence that violates the suspect's constitutional rights. The exclusion of a conversation taped with less than all-party consent is directed at a private party, rather than a police officer, in the absence of a constitutional violation.

When the Florida eavesdropping statutes were originally passed in 1969, they tracked the federal statutes fairly closely and contained a one-party consent requirement. In 1974, the Florida statutes were amended to require all-party consent to tape a private conversation.[187] Seven years passed between the Florida Supreme Court's decision in *Walls* in 1978 and its decision in *Inciarrano* in 1985. In the 1970s and 1980s, there were no cell phones; although a conversation could be secretly taped, a tape recorder might not be readily available without advance planning. Then, almost twenty years passed until the Florida Supreme Court's decision in *McDade* in 2014. By 2014, a change had taken place and society had moved into the digital age. With the wide-spread use of cell phones and their instantly available recording capabilities, communication privacy is not a given any longer.

Walls was a fairly easy case for the Florida Supreme Court to decide because Antel, the homeowner who secretly taped the conversation, could testify at the trial of

[187] State v. Tsavaris, 394 So.2d 418, 422 (Fla. 1981).

the two alleged extortionists. The court suggested that another solution would have been to involve law enforcement in secretly taping the conversation.[188] *Walls* was a case in which it was easy for the Florida Supreme Court to apply the plain language of the eavesdropping statutes. The court stated: "The language of the statutes in question is clear and unambiguous, and no exception for the situation we have before us is provided. This Court cannot substitute its judgment for that of the Legislature and create an exception which would encompass the instant circumstances."[189] The court had no trouble in deferring to the Florida Legislature. "The function of this Court is to interpret the law and is neither to legislate nor determine the wisdom of the policy of the Legislature."[190]

Inciarrano was a much more difficult case for the Florida Supreme Court, both because the secretly taped conversation was the single piece of evidence and Trimble, the murder victim, was unavailable to testify.[191] At the intermediate appellate level, the court felt constrained to reverse the trial court's denial of Inciarrano's motion to suppress on the authority of *Walls*.[192] The court suggested that the Florida Supreme Court could take one of a number of routes of interpretation that would allow the information secretly taped by the victim to be used against Inciarrano. The intermediate appellant court suggested that the terms "intercept" and "oral communication" could be more closely examined for a possible alternative interpretation.[193] For example, the court could either i) interpret the term "intercept" to allow a conversant to secretly tape a conversation but preclude a third party not a party to the conversation from taping; or ii) find that Inciarrano's expectation of privacy was not reasonable considering the circumstances.[194] Another route would have been to read the legislative history to protect the privacy of an "innocent" individual.[195] The final route would be to limit application of the exclusionary rule to secret government taping of a conversation.[196]

The Florida Supreme Court took the invitation of the intermediate appellate court, re-examined the term "oral communication," and found that Inciarrano's expectation of privacy was not reasonable.[197] Unfortunately, the majority did not provide reasoning for its finding. Without offering more of an explanation why

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[188] State v. Walls, 356 So. 2d 294, 297 (Fla. 1978).
[189] *Id.* at 296.
[190] *Id.*
[191] Inciarrano v. State, 447 So. 2d 386, 387, 388 (Fla. Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272, 1274 (Fla. 1985).
[192] *Id.* at 390.
[193] *Id.* at 389.
[194] *Id.*
[195] *Id.* at 390.
[196] *Id.*
[197] State v. Inciarrano, 473 So. 2d 1272, 1276 (Fla. 1985).

Inciarrano's expectation of privacy was not reasonable, the court quoted from the intermediate appellate court decision:[198]

> One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises.

Perhaps in an indication of the difficulty in reaching a decision in *Inciarrano*, there were two concurring opinions, the first authored by one justice and the second, concurring in result only, joined in by two justices.[199] The reasoning of the first concurring opinion is that Inciarrano did not have an expectation of privacy, as he was not on his own property but he went, instead, into the victim's business. "[W]hen an individual enters someone else's home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply."[200]

The second concurring opinion characterized the majority opinion as a "tortuous misconstruction of the plain language of the statute."[201] The concurring opinion criticized the reasoning that the majority borrowed from the intermediate appellate court. "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."[202] The concurring opinion added, "If criminal acts waive privacy rights, as the majority implies, police have the right and duty to intrude without a warrant into a bedroom where the owner/resident is smoking marijuana, reasoning that the fourth amendment protection has 'gone up in smoke.'"[203] The author of the concurring opinion would have adopted one of the suggestions of the intermediate appellate court and would have interpreted the term "intercept" to allow a conversant to secretly tape a conversation but preclude a third party not a party to the conversation from secretly taping a conversation.[204] In addition, the opinion recognized the special status of being on one's own property, which gave Inciarrano's victim, who was in his own office, a "higher degree of

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[198] 447 So. 2d at 389.

[199] 473 So. 2d at 1276.

[200] *Id.* (Overton, J., concurring). Justice Overton also recommended that the Florida legislature consider amending chapter 934. *Id.*

[201] *Id.* at 1277 (Ehrlich, J., concurring).

[202] *Id.*

[203] *Id.*

[204] *Id.* at 1276 (Ehrlich, J., concurring).

privacy."[205] In contrast, any expectation of privacy that Inciarrano claimed was not reasonable.[206]

A close reading of the two concurring opinions may shed light on a plausible reasoning for the Florida Supreme Court's holding that Inciarrano's expectation of privacy was not reasonable. Both concurrences noted that society would more easily consider one's expectation of privacy in one's own home or office to be reasonable, whereas an expectation of privacy in another's home or office might not be considered reasonable. In addition, Trimble's office was open to the public, someone in the outside corridor could have heard what was transpiring inside the office, and the recorder may have been visible.

Although the Florida Supreme Court reached the right decision in *Inciarrano*, one judge was of the opinion that, had the Florida Supreme Court reached the opposite decision, the decision may very well have forced the Florida Legislature to amend the Florida eavesdropping statutes to require only one party consent to secret taping of communication.[207] In *Inciarrano*, the Florida Supreme Court pulled a sleight of hand and "relied on the 'objective' test within the definition of 'oral communication' to provide a societal-approval test that allows for case-by-case outcomes when statutory suppression of evidence seems unnecessary."[208]

One problem with this "escape valve" that the Florida Supreme Court inserted through *Inciarrano* was the unpredictability of the circumstances that would trigger the opening of the valve. "To some degree, the content of the recording is used to determine whether the party that opted to record the conversation is either a felon or a person free to record the conversation."[209] Another problem is that the Florida Supreme Court substituted a societal-approval test for the test that was designed to measure whether a subjective expectation of privacy coincides with society's objective gauge of privacy. "'[S]ociety's' opinion on the matter is a troubling test that leaves our rights in flux."[210]

It is fascinating that the Florida Supreme Court ruled as it did in *McDade* and refrained from making a case law exception to the Florida eavesdropping statutes as the court had done in *Inciarrano*. When the Florida Supreme Court granted review in *McDade*,[211] it was unclear what the Florida Supreme Court would do, given the

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[205] *Id.*

[206] *Id.*

[207] State v. McDade, 114 So.3d 465, 472-73 (Fla. Dist. Ct. App. 2013)(Altenbernd, J., concurring specially), *quashed*, 154 So.3d 292 (Fla. 2014).

[208] *Id.* at 473 (Altenbernd, J., concurring specially).

[209] *Id.*

[210] *Id.* at 474 (Altenbernd, J., concurring specially).

[211] McDade v. State, 121 So.3d 1037 (Fla. 2013).

horrendous, heart-wrenching facts of the case. On one hand, the trial and intermediate appellate courts had reached the right result, facilitating the conviction of the stepfather for alleged sexual abuse of a young girl. On the other hand, the courts should have decided, in line with *Walls*, that the taped conversation was an oral communication because it was taped in a bedroom of a home.

In *McDade*, the Florida Supreme Court could have ruled consistently with one of the three lines of reasoning suggested by the intermediate appellate court in *Inciarrano*.[212] One line of reasoning would have been to rule as the Michigan courts had done that "intercept" in the Florida Statutes was inapplicable to a party to the conversation. A second line of reasoning to rely on would have been to read the legislative history to protect the privacy of an "innocent" individual. A third line of reasoning would be to limit application of the exclusionary rule to secret government taping of a conversation. However, using any of these three lines of reasoning would have not been consistent with the Florida Supreme Court's prior interpretation of the Florida eavesdropping statutes.

Still another possibility for the Florida Supreme Court in *McDade* was to create some type of case law exception to the Florida eavesdropping statutes as the court had previously done in *Inciarrano*. The Florida intermediate appellate court had laid the groundwork for this in its opinion. It found that McDade's expectation of privacy was not reasonable because the place where the conversation was secretly taped was also the stepdaughter's home and the sexual victim was a minor. "[S]ociety has a special interest in protecting children from sexual abuse, and exceptional treatment of sex crimes in other areas of the law reflects these societal values."[213] The intermediate appellate court equated the circumstances of *McDade* with an exception to the all-party consent requirement that the Florida Legislature would have created, had the Florida Legislature envisioned the *McDade* facts. "[S]uppressing the recordings pursuant to chapter 934 under the circumstances of this case would produce an absurd result—a result we cannot fathom was intended by the legislature."[214]

In *McDade*, the Florida Supreme Court acknowledged that a societal recognition test has been used to gauge whether a person's subjective expectation of privacy coincides with the viewpoint of an objective observer. The court refused to broaden the societal recognition test to take into account the realities of the digital world, as was suggested by the lower court judge, nor to discount an objective expectation of privacy for one engaged in criminal activity.[215] The court made clear that *Inciarrano* had not created an exception that would permit a private person to

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[212] *See supra* notes 193-96 and accompanying text.

[213] State v. McDade, 114 So.3d 465, 470 (Fla. Dist. Ct. App. 2013), *quashed*, 154 So.3d 292 (Fla. 2014).

[214] *Id.* at 471.

[215] 154 So.3d at 299.

freely and secretly tape a conversation involving evidence of a crime. "*Inciarrano* therefore is not based on a general rule that utterances associated with criminal activity are by virtue of that association necessarily uttered in circumstances that make unjustified any expectation that the utterances will not be intercepted."[216]

McDade was a difficult case for the Florida state courts because of the delicate nature of an alleged sexual abuser being protected by the all-consent nature of Florida's protection against secretly taping conversations. The Florida Supreme Court invited the Florida Legislature to amend the Florida Statutes to carve out an exception for certain types of criminal activities: "It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusionary rule for recordings that provide evidence of criminal activity—or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature."[217]

The Florida Legislature provided the following exception, which protects minors faced with sex crimes or violence, in the next legislative session:

> It is lawful under this section and §§ 934.04-934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

Unfortunately for the stepdaughter, when McDade was retried he was acquitted.[218]

VII. CONCLUSION

The clash between technology and communication privacy is more jarring every day as we move further into a digital world. Although privacy is treasured and the law has safeguarded privacy to a certain extent, such safeguard may have to be re-examined in light of the reality that technology makes it easy to invade one's privacy without detection.

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[216] *Id.*

[217] *Id.*

[218] *Jurors acquit Richard McDade on sexual abuse charges, offering different verdict than earlier jury*, NAPLES DAILY NEWS (May 21, 2015), http://tarrant.tx.networkofcare.org/dv/news-article-detail.aspx?id=61162.

The requisite of all-party consent to tape a private conversation is present in a small minority of states and contrasts with the one-party consent requirement in a vast majority of states. All-party consent is a break from the common law concept of eavesdropping and is far outside the expectations of most laypersons. Even more problematic are the severe prison terms and fines available to one who secretly tapes a conversation in an all-party consent jurisdiction without the slightest idea of potential criminal and civil penalties for doing so.

Another problem with all-party consent, as illustrated in *Inciarrano* and *McDade*, is that communication information crucial in a criminal case can be excluded if gathered by a private individual. This problem comes clearer into focus with the greater severity of the crime captured in the secretly taped conversation and the absence of or paucity of other evidence of the crime. Given that this situation is very likely to arise again in the future, all-party consent statutes should be amended to permit a private individual to secretly tape evidence of a crime.

APPENDIX A

United States

Oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C.A. § 2510(2) (West, Westlaw through P.L. 115-46). One exception provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a[n] . . . oral . . . communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Id. § 2511(2)(c). Another exception provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a[n] oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Id. § 2511(2)(d).

Alabama

The state defines eavesdrop as "[t]o overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication, except as otherwise provided by law." ALA. CODE § 13A-11-30(1) (Westlaw through the end of the 2017 Reg. Sess.). A defense is that "[h]e was a peace officer engaged in the lawful performance of his duties." *Id.* § 13A-11-36(a).

Alaska

The state eavesdropping statute states that "[a] person may not . . . use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation." ALASKA STAT. ANN. § 42.20.310(a) (West, Westlaw through chapters from the 2017 First Reg. Sess. of the 30th Leg. in effect through July 29, 2017). There are several definitions that help understand what is prohibited. "'[O]ral communication' means human speech used to communicate information from one party to another." "'[I]ntercept' means the aural or other

acquisition of the contents of an oral . . . communication through the use of any electronic, mechanical, or other device, including the acquisition of the contents by simultaneous transmission or by recording." "'[C]ontents' includes information obtained from a private communication concerning the existence, substance, purport, or meaning of the communication, or the identity of a party of the communication." "'[P]rivate communication' means an oral . . . communication uttered or transmitted by a person who has a reasonable expectation that the communication is not subject to interception." *Id.* § 42.20.390(2), (7), (9), (11).

Article I, § 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed." In *State v. Glass*, 583 P2d 872, 879 (Alaska 1978), the Alaska Supreme Court held "that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant" where the informant was sent into the suspect's home wearing a body bug, which allowed officers located outside to record the conversation. *Id.* at 874. However, in later opinions, the Alaska Supreme Court found that a drunk driving suspect's expectation of privacy was not reasonable and, thus, the suspect's conversation was not protected under the Alaska Constitution from being secretly taped. *City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984)(finding that drunk driving suspect's expectation of privacy was not reasonable where uniformed officer was performing official duties and, therefore, taped information was not inadmissible). *Palmer v. State*, 604 P.2d 1106, 1108 (Alaska 1979)(finding that drunk driving suspect's expectation of privacy was not reasonable where the suspect was under arrest and in police headquarters undergoing breathalyzer and sobriety tests when he was secretly taped and, therefore, his right to privacy under the Alaska Constitution was not violated).

Arizona

The state statute provides: "a person is guilty of a class 5 felony who . . . [i]ntentionally intercepts a conversation or discussion at which he is not present, or aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion." ARIZ. REV. STAT. ANN. § 13-3005.A (Westlaw through the First Reg. Sess. of the Fifty-Third Leg. (2017)). "'Oral communication' means a spoken communication that is uttered by a person who exhibits an expectation that the communication is not subject to interception under circumstances justifying the expectation . . . ." *Id.* § 13-3001.8. The statutes exempt "[t]he interception of any . . . oral communication by any person, if the interception is effected with the consent of a party to the communication or a person who is present during the communication." *Id.* § 13-3012.9.

Arkansas

The state statute provides: "It is unlawful for a person to intercept a[n] . . . oral . . . communication, and to record or possess a recording of the communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording." ARK. CODE ANN. § 5-60-120(a) (West, Westlaw through the ends of the 2017 Reg. Sess. and the 2017 First Extraordinary Sess. of the 91st Arkansas General Assembly).

Colorado

The state statute provides: "Any person not visibly present during a conversation or discussion commits eavesdropping if he . . . [k]nowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto." COLO. REV. STAT. ANN. § 18-9-304(1) (West, Westlaw through Laws effective August 8, 2017 of the First Reg. Sess. of the 71st General Assembly (2017)). *See* People v. Lesslie, 24 P.3d 22, 28 (Colo. App. 2000)("recogniz[ing] that this criminal statute requires a case-by-case analysis as to whether the participants in the intercepted conversations have a justifiable expectation of privacy and, in turn, whether they believe that their conversation is subject to interception"). "'Oral communication' means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying such belief . . . ." *Id.* § 18-9-301(8). *See* People v. Lesslie, 939 P.2d 443, 446 (Colo. App. 1996)(finding "conversation" or "discussion" synonymous with "oral communication").

Connecticut

In Connecticut, eavesdropping, the "mechanical overhearing of a conversation," is a class D felony. CONN. GEN. STAT. ANN. § 53a-189 (West, Westlaw through enactments of the 2017 January Reg. Sess. effective on or before August 15, 2017). The Connecticut Statutes define "[m]echanical overhearing of a conversation" as "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." *Id.* § 53a-187(a)(2).

Delaware

The state statute provides that "no person shall . . . [i]ntentionally intercept . . . any . . . oral . . . communication" and specifies that someone who eavesdrops has committed a class E felony and is subject to a fine of not more than $10,000. DEL. CODE ANN. tit. 11, § 2402(a), (b) (West, Westlaw through 81 Laws 2017, chs. 1-120). Pursuant to § 2402:

> It is lawful . . . [f]or a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has 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 constitutions or laws of the United States, this State or any other state or any political subdivision of the United States or this or any other state.

Id. § 2402(c). "'Oral communication' means any oral communication uttered by a person made while exhibiting an expectation that such communication is not subject to interception and under circumstances justifying such expectation . . . ." *Id.* § 2401(13).

Georgia

The state statute provides: "It shall be unlawful for . . . [a]ny person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place." Ga. Code Ann. § 16-11-62 (West, Westlaw through the 2017 Sess. of the Georgia General Assembly). "'Private place' means a place where there is a reasonable expectation of privacy." *Id.* § 16-11-60(3). The eavesdropping statute "does not prohibit one party to a conversation from secretly recording or transmitting it without the knowledge or consent of the other party." State v. Birge, 241 S.E.2d 213, 213 (Ga. 1978).

Hawaii

The state statute provides that "any person who . . . [i]ntentionally intercepts . . . any . . . oral . . . communication . . . shall be guilty of a class C felony." HAW. REV. STAT. § 803-42(a) (West, Westlaw through Act 217 (End) of the 2017 Reg. Sess.). Pursuant to that statute:

> It shall not be unlawful under this part for a person not acting under color of law to intercept a[n] . . . oral . . . communication when the person is a party to the communication or when one of the parties to the communication has 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.

Id. § 803-42(b)(3)(A). "'Oral communication' means any utterance by a person exhibiting an expectation that the utterance is not subject to interception under circumstances justifying that expectation . . . ." *Id.* § 803-41.

Idaho

The state statute provides:

> any person shall be guilty of a felony and is punishable by imprisonment in the state prison for a term not to exceed five (5) years or by a fine not to exceed five thousand dollars ($5,000), or by both fine and imprisonment if that person . . . [w]illfully intercepts . . . any . . . oral communication.

IDAHO CODE ANN. § 18-6702(1) (West, Westlaw through the 2017 First Reg. Sess. of the 64th Idaho Leg.). Pursuant to that statute, "[i]t is lawful under this chapter for a person to intercept a[n] . . . oral communication when one (1) of the parties to the communication has given prior consent to such interception." *Id.* § 18-6702(2)(d). "'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 . . . ." *Id.* § 18-6701(2).

Indiana

Indiana appears not to make surreptitious taping of a face-to-face conversation a crime. Indiana statutes contain procedures for obtaining a warrant to intercept a telephone communication. IND. CODE ANN. §§ 35-33.5-2-1 - 35-33.5-5-6 (West, Westlaw through all legis. of the 2017 First Regular Sess. of the 120th General Assembly). However, research has failed to locate any statute or case law interpretation of any statute affirmatively prohibiting such taping. The title of article 33.5 is "Interception of Telephonic or Telegraphic Communications" and an Indiana statute, § 35-33.5-1-5 repealed effective July 1, 2012, contained the following definition:

> "Interception" means the intentional:
>
> (1) recording of; or
>
> (2) acquisition of the contents of;
>
> a telephonic or telegraphic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article.

Iowa

The state statute provides:

> Any person, having no right or authority to do so, . . . who by any electronic or mechanical means listens to, records, or otherwise intercepts a conversation or communication of any kind, commits a serious misdemeanor; provided, . . . one who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication . . . .

IOWA CODE ANN. § 727.8 (West, Westlaw through legis. from the 2017 Reg. Sess.). Another state statute provides: "a person who does any of the following commits a class 'D' felony . . . [w]illfully intercepts . . . a[n] . . . oral . . . communication." *Id.* § 808B.2.1. Pursuant to the statute:

> It is not unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Id. § 808B.2.2.c. "'Oral communication' means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception, under circumstances justifying that expectation." *Id.* § 808B.1.8.

Kansas

> The state statute provides:
>
> Breach of privacy is knowingly and without lawful authority:
>
> . . . .
>
> (3) entering with intent to listen surreptitiously to private conversations in a private place or to observe the personal conduct of any other person or persons entitled to privacy therein; [or]
>
> (4) installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the person or persons entitled to privacy therein.

KAN. STAT. ANN. § 21-6101(a) (West, Westlaw through laws enacted through laws effective on or before July 1, 2017, enacted during the 2017 Reg. Sess. of the Kansas Leg.). In addition, it defines "private place" as "a place where one may reasonably expect to be safe from uninvited intrusion or surveillance." *Id.* § 21-6101(f). The statute has been interpreted to allow taping upon consent of one party to the conversation. In a 1984 case, the Kansas Supreme Court found that "any party to a private conversation may waive the right of privacy and the non-consenting party has no Fourth Amendment or statutory right to challenge that waiver." State v. Roudybush, 686 P.2d 100, 108 (Kan. 1984). Further, the court held "that a face-to-face 'private conversation' between a police informer and a suspect is not an 'oral communication' as defined by K.S.A. 22-2514 and, thus, it is not necessary to obtain an ex parte court order to intercept such conversation if the informer knowingly consents to the interception." *Roudybush*, 686 P.2d at 108.

For the purpose of obtaining a court order to intercept a conversation, "'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." § 22-2514(2).

Kentucky

Pursuant to the state statute, "[a] person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time." KY. REV. STAT. ANN. § 526.020(1) (West, Westlaw through the end of the 2017 reg. sess.). "'[E]avesdrop' means to overhear, record, amplify or transmit any part of a[n] . . . oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device." *Id.* § 526.010.

Louisiana

The state statute provides that "it shall be unlawful for any person to . . . [w]illfully intercept . . . any . . . oral communication." LA. REV. STAT. ANN. § 15:1303.A (Westlaw through the 2017 First Extraordinary Sess.). That statute further provides:

> It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a[n] . . . oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

Id. § 15:1303.C.(4). "'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 . . . ." *Id.* § 15:1302.(15).

Maine

The state statute provides:

> A person is guilty of violation of privacy if, except in the execution of a public duty or as authorized by law, that person intentionally:
> . . . .
>
> **B.** Installs or uses in a private place without the consent of the person or persons entitled to privacy in that place, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place; [or]
>
> **C.** Installs or uses outside a private place without the consent of the person or persons entitled to privacy therein, any device for hearing, recording, amplifying or broadcasting sounds originating in that place that would not ordinarily be audible or comprehensible outside that place.

ME. REV. STAT. ANN. tit. 17-A, § 511.1 (Westlaw through emergency legis. through Chapter 309 of the 2017 First Reg. Sess. of the 128th Leg.). That statute provides: "'private place' means a place where one may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms and similar places." *Id.* § 511.2.

The Supreme Judicial Court of Maine interpreted "private place" to require that "a person's desire to keep private what transpires within that place must be a *justifiable expectation,* and, therefore, objectively reasonable." State v. Strong, 60 A.3d 1286, 1291 (Me. 2013). The court found that "it is objectively unreasonable for a person who knowingly enters a place of prostitution for the purpose of engaging a prostitute to expect that society recognizes a right to be safe from surveillance while inside." *Id.* Research failed to locate case law determining whether the statute has been interpreted to allow taping upon consent of one party to the conversation.

Minnesota

The state statute provides that "any person who . . . intentionally intercepts . . . any . . . oral communication . . . shall be fined not more than $20,000 or imprisoned not more than five years, or both." MINN. STAT. ANN. § 626A.02.1., 4. (West, Westlaw through laws of the 2017 Reg. and First Spec. Sess.). That statute provides:

> It is not unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state.

Id. § 626A.02.2.(d). "'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 . . . ." *Id.* § 626A.01.4.

Mississippi

MISS. CODE ANN. §§ 41-29-501 to 41-29-535 (West, Westlaw through the 2017 Reg. and First Extraordinary Sess.) appear to prohibit taping of a private conversation. Although the statutes provide exceptions from liability, research has not found any statute or case law interpretation of any statute affirmatively prohibiting such taping. In addition, it is unclear the activity to which the penalty provisions apply. The state statute provides:

> (1) Any person who knowingly and intentionally possesses, installs, operates or monitors an electronic, mechanical or other device in violation of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to not more than one (1) year in the county jail or fined not more than Ten Thousand Dollars ($10,000.00), or both.
>
> (2) Any person who violates the provisions of Section 41-29-511 shall be guilty of a felony and, upon conviction thereof, shall be sentenced to not more than five (5) years in the State Penitentiary and fined not more than Ten Thousand Dollars ($10,000.00).

§ 41-29-533. The state statute allows a private individual to disclose an intercepted oral communication if the interception was authorized:

> A person who receives, by any means authorized by this article, information concerning a[n] . . . oral . . . communication . . . intercepted in accordance with the provisions of this article may disclose the contents of such communication . . . while giving testimony under oath in any proceeding held under the authority of the United States, of this state, or of a political subdivision of this state.

Id. § 41-29-511(3).

The state statute excepts from liability:

> A person not acting under color of law who intercepts a[n] . . . oral . . . communication if the person is a party to the communication, or if one (1) of the parties to the communication has 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, or for the purpose of committing any other injurious act.

Id. § 41-29-531(e). "'Oral communication' means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. *Id.* § 41-29-501(j).

Missouri

The focus of MO. ANN. STAT. §§ 542.400-542.422 (West, Westlaw through the end of the 2017 First Reg. Sess. and First and Second Extraordinary Sess. of the 99th General Assembly) appears to be the prohibition against taping a telephone conversation, except as authorized pursuant to those statutes, or taping a face-to-face conversation using a microphone transmitting the conversation elsewhere. Thus, the statutes do not appear to prohibit a participant from taping a face-to-face conversation using a handheld tape recorder. The statutes contain a definition of "oral communication" and a few tangential references to oral communication; otherwise, most of the references are to "wire communication." Oral communication means "any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 542.400(8). A state statute provides that:

> 1. Except as otherwise specifically provided in sections 542.400 to 542.422, a person is guilty of a class D felony and upon conviction shall be punished as provided by law, if such person:
>
> (2) Knowingly 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 such device transmits communications by radio or interferes with the transmission of such communication; provided, however, that nothing in sections 542.400 to 542.422 shall be construed to prohibit the use by law enforcement officers of body microphones and transmitters in undercover investigations for the acquisition of evidence and the protection of

> law enforcement officers and others working under their direction in such investigations.
>
> . . . .
>
> 2. It is not unlawful under the provisions of sections 542.400 to 542.422:
> . . . .
>
> (2) For a person acting under law to intercept a wire or oral communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.
>
> (3) For a person not acting under law to intercept a wire communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act.

Id. § 542.402. Another statute provides:

> Any investigative officer or law enforcement officer who, by any means authorized by sections 542.400 to 542.422, has lawfully obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents to the extent such use is necessary to the proper performance of his official duties.

Id. § 542.406.2. Another statute contains a reference to oral communication in the context of the requirement of taping an authorized interception. *Id.* § 542.410.1.

Arguably, with the few slight references to oral communication discussed above, the criminal sanctions for taping in these statutes refer only to communication via the telephone and to one not a party to the conversation taping a face-to-face conversation. Research failed to discover other statutory or case law prohibitions against taping a face-to-face conversation.

Nebraska

The state statute provides that "it is unlawful to . . . [i]ntentionally intercept . . . any . . . oral communication." NEB. REV. STAT. § 86-290(1) (Westlaw through the end of the 1st Reg. Sess. of the 105th Leg. (2017)). That statute further provides:

> It is not unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state.

Id. § 86-290(2)(c). "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 . . . ." *Id.* § 86-283.

Nevada

The state statute provides:

> a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording . . . by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

NEV. REV. STAT. ANN. § 200.650 (West, Westlaw through the 79th Reg. Sess. (2017) of the Nevada Leg. with all legis. operative or effective up to and including September 1, 2017).

Certain Nevada state statutes govern the procedure for obtaining a court order to tape an oral communication. *Id.* §§ 179.410-179.515. Pursuant to those statutes, "'[o]ral communication' means any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation." *Id.* § 179.440.

New Jersey

The state statute provides: "any person who . . . [p]urposely intercepts . . . any . . . oral communication . . . shall be guilty of a crime of the third degree." N.J. STAT. ANN. §

2A:156A-3 (West, Westlaw through laws effective through L.2017, c. 130, 132 and J.R. No. 10). "'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 . . . ." *Id.* § 2A:156A-2.b. In Hornberger v. American Broadcasting Companies, Inc., 799 A.2d 566, 627 (N.J. Super. Ct. App. Div. 2002), the court found that the defendants did not violate the New Jersey statute by taping the officers searching a vehicle. "Although the officers did not consent to the recording, they did not have a reasonable expectation of privacy while in the targeted vehicle under the circumstances." *Id.* Another state statute provides an exception for:

> A person not acting under color of law to intercept a[n] . . . oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is intercepted or used for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

Id. § 2A:156A-4.

New Mexico

N.M. STAT. ANN. § 30-12-1 (West, Westlaw through the end of the First Reg. and Spec. Sess. of the 53rd Leg. (2017)) makes interference with communications a misdemeanor. That statute does not contain the term "oral communication" and has been interpreted to be inapplicable to a face-to-face conversation. State v. Hogervorst, 566 P.2d 828, 834 (N.M. Ct. App. 1977)(finding that the statute applies to "telephone conversations or telegraph messages" and not to "a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation"). Sections 30-12-2 to 30-12-10 contain the term "oral communication" and set the basis for obtaining a court order allowing interception of an oral communication. Section 30-12-11 provides a civil cause of action to someone whose oral communication has been wrongly intercepted. None of these statutes defines oral communication.

Research failed to discover other statutory or case law prohibitions against taping a face-to-face conversation. Arguably, the criminal sanction for interfering with communications in § 30-12-1 refers only to communication via the telephone or telegraph and not to face-to-face conversation.

New York

"A person is guilty of eavesdropping when he unlawfully engages in . . . mechanical overhearing of a conversation . . . ." N.Y. PENAL LAW § 250.05 (Westlaw through L.2017, chapters 1 to 172). "'Mechanical overhearing of a conversation' means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." *Id.* § 250.00.2. One court found that "absent a reasonable expectation of privacy, the recording of conversations, *per se,* is not illegal" and the defendant had no reasonable expectation of privacy in "conversations . . . heard through a hole in the floor, and tape recorded." People v. Kirsh, 575 N.Y.S.2d 306, 307, 308 (N.Y. App. Div. 1991).

North Carolina

The state statute provides that "a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person . . . [w]illfully intercepts . . . any . . . oral . . . communication." N.C. GEN. STAT. ANN. § 15A-287(a) (West, Westlaw through S.L 2017-56, 2017-58 to 2017-94 (with the exception of S.L. 2017-6, §§ 1 – 4(c)) of the 2017 Reg. Sess. of the General Assembly). "'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 . . . ." *Id.* § 15A-286(17).

North Dakota

The state statute provides that "[a] person is guilty of a class C felony if he . . . [i]ntentionally intercepts any . . . oral communication by use of any electronic, mechanical, or other device." N.D. CENT. CODE ANN. § 12.1-15-02.1. (West, Westlaw through laws from the 2017 Reg. Sess. of the 65th Legis. Assembly). That statute makes it a defense to criminal liability that "(1) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception, and (2) such communication was not intercepted for the purpose of committing a crime or other unlawful harm." *Id.* § 12.1-15-02.3. "'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." *Id.* § 12.1-15-04.5.

Ohio

The state statute provides: " No person purposely shall . . . [i]ntercept . . . a[n] . . . oral . . . communication." OHIO REV. CODE ANN. § 2933.52(A) (West, Westlaw through 2017 Files 1 to 13, 14 (immediately effective ORC sections), and 15 to 17 of the 132nd General Assembly (2017-2018)). That statute excepts from its application:

> A person who is not a law enforcement officer and who intercepts a[n] . . . oral . . . communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act.

Id. § 2933.52(B). "'Oral communication' means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." *Id.* § 2933.51(B).

Oklahoma

The state Security of Communications Act provides that:

> any person is guilty of a felony and upon conviction shall be punished by a fine of not less than Five Thousand Dollars ($5,000.00), or by imprisonment of not more than five (5) years, or by both who:
>
> 1. Willfully intercepts . . . any . . . oral . . . communication.

13 OKLA. STAT. ANN. § 176.3 (West, Westlaw through the First Reg. Sess. of the 56th Leg. (2017) effective through September 1, 2017).

> It is not unlawful pursuant to the Security of Communications Act for:
> . . . .
>
> 5. a person not acting under color of law to intercept a[n] . . . oral . . . communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless the communication is intercepted for the purpose of committing any criminal act.

Id. § 176.4. "Oral communication" means any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstance justifying such expectation." *Id.* § 176.2.12.

Rhode Island

The state statute provides: "any person . . . who willfully intercepts . . . any . . . oral communication . . . shall be imprisoned for not more than five (5) years." R.I. GEN. LAWS ANN. § 11-35-21(a) (West, Westlaw through Chapter 302 of the January 2017 sess.). That statute provides:

> It shall not be unlawful under this chapter for:
>
> . . . .
>
> (3) A person not acting under color of law to intercept a[n] . . . oral communication, where the person is a party to the communication, or one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in the violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Id. § 11-35-21(c). Although "oral communication" is not defined in that statute, a criminal procedure statute defines "[o]ral communications" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." *Id.* § 12-5.1-1(10).

South Carolina

Under the state statute, one who "intentionally intercepts . . . any . . . oral . . . communication" commits a felony. S.C. CODE ANN. § 17-30-20 (Westlaw through 2017 Act No. 86, 88 to 94, and 95 to 96). "It is lawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception." *Id.* § 17-30-30(C). "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation . . . ." *Id.* § 17-30-15(2).

South Dakota

The state statute provides that it is a class 5 felony if one "[n]ot present during a conversation or discussion, intentionally and by means of an eavesdropping device overhears or records such conversation or discussion . . . without the consent of a party to such conversation or discussion." S.D. CODIFIED LAWS § 23A-35A-20 (Westlaw

through 2017 Reg. and Spec. Sess. Laws, Executive Order 17-2, and Supreme Court Rule 17-11). "Eavesdropping device" means "any electronic, mechanical, or other apparatus which is intentionally used to intercept a wire or oral communication." *Id.* § 23A-35A-1(6). "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." *Id.* § 23A-35A-1(10).

Tennessee

The state statute provides that "a person commits an offense who . . . [i]ntentionally intercepts . . . any . . . oral . . . communication." Tenn. Code Ann. § 39-13-601(a)(1) (West, Westlaw through laws from the 2017 First Reg. Sess. of the 110th Tennessee General Assembly). That statute provides:

> It is lawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication, where the person is a party to the communication or where one of the parties to the communication has 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 state of Tennessee.

Id. § 39-13-601(b)(5).

Texas

The state statute provides that "[a] person commits an offense if the person . . . intentionally intercepts . . . a[n] . . . oral . . . communication." TEX. PENAL CODE ANN. § 16.02(b) (West, Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Leg.). That statute excepts from criminal liability:

> a person not acting under color of law intercepts a[n] . . . oral . . . communication, if:
>
> (A) the person is a party to the communication; or
>
> (B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

Id. § 16.02(c).
"'Oral communication' means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." TEX. CODE CRIM. PROC. ANN. art.

18.20.1(2) (West, Westlaw through the end of the 2017 Reg. and First Called Sess. of the 85th Leg.).

Utah

The state statute provides that "A person commits a violation of this subsection who . . . intentionally or knowingly intercepts . . . any . . . oral communication." UTAH CODE ANN. § 77-23a-4(1)(b) (West, Westlaw through the 2017 General Sess.). That statute provides that:

> A person not acting under color of law may intercept a[n] . . . oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.

Id. § 77-23a-4(7)(b). "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception, under circumstances justifying that expectation . . . ." *Id.* § 77-23a-3(13).

Vermont

This state has no statute prohibiting eavesdropping. However, the Vermont Supreme Court has interpreted the search and seizure provision of Chapter 1, Article 11 of the Vermont Constitution to prohibit a police officer from secretly taping a suspect's conversation where the suspect has a reasonable expectation of privacy. State v. Geraw, 795 A.2d 1219, 1221-22 (Vt. 2002)(stating that a suspect had a reasonable expectation of privacy in the home but not in a parking lot).

Virginia

The state statute provides that "any person who . . . [i]ntentionally intercepts . . . any . . . oral communication . . . shall be guilty of a Class 6 felony." VA. CODE ANN. § 19.2-62.A. (West, Westlaw through End of the 2017 Reg. Sess.). That statute provides: "It shall not be a criminal offense under this chapter for a person to intercept a[n] . . . oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.* § 19.2-62.B.2. "'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 expectations . . . ." *Id.* § 19.2-61.

West Virginia

The state statute provides that "it is unlawful for any person to . . . [i]ntentionally intercept . . . any . . . oral . . . communication." W.VA. CODE ANN. § 62-1D-3(a) (West, Westlaw through legis. of the 2017 First Extraordinary). That statute further provides:

> It is lawful under this article for a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has 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 the constitution or laws of this state.

Id. § 62-1D-3(e). "'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 . . . ." *Id.* § 62-1D-2(i).

Wisconsin

One who "[i]ntentionally intercepts . . . any . . . oral communication" commits a Class H felony. WIS. STAT. ANN. § 968.31(1) (West, Westlaw through 2017 Act 57, published August 10, 2017). That statute provides that:

> It is not unlawful . . . [f]or a person not acting under color of law to intercept a[n] . . . oral communication where the person is a party to the communication or where one of the parties to the communication has 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 any state or for the purpose of committing any other injurious act.

Id. § 968.31(2). "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation." *Id.* § 968.27(12).

Wyoming

The state statute provides that "no person shall intentionally . . . [i]ntercept . . . any . . . oral . . . communication." WYO. STAT. ANN. § 7-3-702(a) (West, Westlaw through the 2017 General Sess. of the Wyoming Leg.). That statute does not prohibit "[a]ny person from intercepting an oral . . . communication where the person is a party to the communication or where one (1) of the parties to the communication has given prior

consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act." *Id.* § 7-3-702(b). "'Oral communication' means any oral communication uttered by a person who reasonably expects and circumstances justify the expectation that the communication is not subject to interception . . . ." *Id.* § 7-3-701(a)(xi).