Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Entertainment Law Review

Volume 23 | Number 1 | Article 1

6-1-2002

Flanagan's Wake: Newsgatherers Navigate Uncertain Waters Following Flanagan v. Flanagan

Gary L. Bostwick

Jean-Paul Jassy

Follow this and additional works at: https://digitalcommons.lmu.edu/elr

Part of the Law Commons

Recommended Citation

Gary L. Bostwick and Jean-Paul Jassy, *Flanagan's Wake: Newsgatherers Navigate Uncertain Waters Following Flanagan v. Flanagan*, 23 Loy. L.A. Ent. L. Rev. 1 (2002).
Available at: https://digitalcommons.lmu.edu/elr/vol23/iss1/1

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

FLANAGAN'S WAKE: NEWSGATHERERS NAVIGATE UNCERTAIN WATERS FOLLOWING *FLANAGAN V. FLANAGAN*

Gary L. Bostwick and Jean-Paul Jassy***

I. INTRODUCTION

It is possible to keep things quiet. By choosing to speak or act, one is choosing to expose his or her thoughts, beliefs, and emotions. Recordings of such activities can capture words— good or bad—and preserve them in time. Recordings offer truth in a way that minimizes ambiguity and settles dispute. Recordings bring life to dialogues, movements, and moments in a way that interpretation, recollection, and hearsay never could. Recordings can root out terrorist plans, shine light on corruption among politicians, and expose unhealthy food preparation techniques at a supermarket. Recordings, however, make people uncomfortable.

A few months ago, the California Supreme Court handed down *Flanagan v. Flanagan*,[1] a much-anticipated decision evaluating California Penal Code section 632,[2] California's anti-eavesdropping and anti-recording statute. The decision settled a split in the intermediate appellate courts about the meaning of the term "confidential communication." The decision did not, however, involve a matter of public interest, and did not involve media-related activities. Accordingly, *Flanagan* had no occasion to weigh competing principles: namely, the developing recognition of privacy rights against the well-established right of the press to obtain and report newsworthy information.

---

*Gary L. Bostwick is a partner of Davis Wright Tremaine LLP and a Fellow of the American College of Trial Lawyers. Specializing in general litigation with a focus on media defense, he was granted a Master's of Public Policy in 1976 from the University of California Berkeley and a J.D. from the University of California/Boalt Hall in 1977. He has litigated many leading defamation and privacy cases in the past two decades.

**Jean-Paul Jassy is an associate of Davis Wright Tremaine LLP. He focuses his practice on First Amendment and media litigation and has litigated several cases involving hidden cameras and California Penal Code section 632.

1. 41 P.3d 575 (Cal. 2002).

2. CAL. PENAL CODE § 632 (West 1999).

Flanagan, and the statute that it addressed, are recent additions to a long line of constitutional, common law, and statutory concerns over privacy. This Article provides the background and limitations on eavesdropping and recording laws, and their relationship to the jurisprudence of privacy. The *Flanagan* decision is then dissected from an historical, linguistic, and analytical perspective. The flaws in *Flanagan*'s reasoning and conclusions are abundant, and the importance of narrowly interpreting that decision cannot be overstated.

Since *Flanagan* did not force the court to weigh competing constitutional concerns, its wake has left choppy waters. However, if and when another court is faced with principles that directly conflict with the notions of privacy embedded in anti-recording statutes, then judges will need to make a choice. Either the inherent value in recordings and their ability to offer truth- shedding light on important issues will be recognized, or vague notions of "privacy" for privacy's sake will harm the best interests of society in the dissemination of truthful, important, and potentially vital information. Let us hope that the courts chose wisely.

II. BACKGROUND

A. Why Are There Legal Restrictions on Eavesdropping?

In thinking about privacy, its separate strands must not be intermixed. The right of privacy is not a monolithic concept. Anyone who seeks to thoughtfully analyze the urge to erect and maintain laws governing eavesdropping by the press must discriminate between and among other rights of privacy that serve other purposes. The policy debate about eavesdropping is not derivative of urges that have found expression in the Fourth Amendment,[3] the Fifth Amendment,[4] the constitutional bans upon incursions into fundamental personal autonomy and intimate choices,[5] the

---

3. *See* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY 152 (1995).

> The idea of man in control of his own private sphere has always been a basic organizing principle of American society. At America's birth, we adopted from our English ancestors the belief that a man's home is his castle and that man is king of that domain and, by extension, the whole of his private life. The Bill of Rights was drafted to limit government interference in people's lives.

Id.

4. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.").

5. *See id.* at 486–87 (Goldberg, J., concurring).

> [T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the

right of publicity,[6] the restrictions on collection and publication of data about a person,[7] the California Constitution's guarantee of a right of privacy,[8] or the tort of false light invasion of privacy.[9] Behavior that our

---

> concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment.

Id. (footnote omitted). In another landmark case, the Court said:

> In a line of decisions, however, going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [D]ecisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. . . . This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Roe v. Wade, 410 U.S. 113, 152, 153 (1973) (citations omitted).

6. *See, e.g.*, CAL. CIV. CODE § 3344(a) (West 1997) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, . . . for purposes of advertising or selling, . . . without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."); Wendt v. Host Int'l, Inc., 971 F.2d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting from the order rejecting the petition for rehearing en banc in a matter in which the actors who played the parts of Norm and Cliff in the popular television series *Cheers* objected to being depicted as robots in airport bars) ("Robots again. In *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1999 (9th Cir. 1992), we held that the right of publicity extends not just to the name, likeness, voice and signature of a famous person, but to anything at all that evokes that person's identity.").

7. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (2000) (governing the collection, storing, and sharing of personal data by federal agencies); Privacy Protection for Rape Victims Act of 1978, 28 U.S.C. app. § 412 (2000) (modifying Federal Rule of Evidence 412 in 1994 to safeguard the alleged victim against the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details, and also against the infusion of sexual innuendo into the fact-finding process); Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000) (requiring that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other dealings with fairness, impartiality, and a respect for the consumer's right to privacy).

8. *See* Cal. Const. art. I, § 1; Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994) (holding that intercollegiate athletic association's drug testing policy involving monitoring of urination, testing of urine samples, and inquiry concerning medication did not violate constitutional right to privacy under the California Constitution). The court cited language in favor of Proposition 11, a privacy measure to amend the California Constitution:

> The right of privacy . . . prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us. [¶] . . . The proliferation of government and business records over which we have no control limits our ability to control our personal lives. . . . [¶] Even more dangerous is the loss of control over the accuracy of government and business records on individuals. . . .

Id. at 642 (citing BALLOT PAMPHLET, PROPOSED AMENDMENTS TO THE CALIFORNIA CONSTITUTION WITH ARGUMENTS TO VOTERS, GENERAL ELECTION (NOVEMBER 7, 1972) 26–27 (1972)).

society seeks to protect by restrictions and proscriptions in those areas differs so much from behavior regulated by laws relating to private eavesdropping and recording that it is not only useless to invoke those doctrines to help regulate the latter, but doing so could even be labeled misguided.

Rules against eavesdropping do seek to control and restrict some of the same behavior as the common law torts of intrusion and publication of private facts, torts most clearly delineated in California in the Supreme Court's opinions in *Shulman v. Group W Productions, Inc.*,[10] and *Sanders v. ABC, Inc.*[11] There, microphones, recordings, unsuspecting speakers, and broadcasts of recorded matter were at issue just as plainly as in a case brought against news gatherers for a violation of Penal Code section 632.

Professor Robert C. Post, in a law review article, argues that the common law tort of invasion of privacy safeguards social norms, which he calls "rules of civility that in significant measure constitute both individual and community" identity .[12] The tort, he says, is predicated upon an "interdependence between persons and social life . . . that . . . makes possible a certain kind of human dignity and autonomy which can exist only within the embrace of community norms."[13] Violation of these norms, then, injures both personality and human dignity.[14] Professor Post seeks to illuminate the tort, which regulates unreasonable intrusion, by considering an early case where a landlord installed an eavesdropping device in a couple's bedroom.[15] The plaintiff husband there alleged that, as a result of

---

9. *See* M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504 (Ct. App. 2001) (affirming trial court's refusal to dismiss suit by players and assistant coaches on youth baseball team whose manager had pled guilty to charges of child molestation asserting invasion of privacy claims against defendants Sports Illustrated and HBO, who had shown a picture of the team to illustrate stories about adult coaches who molest youths playing team sports).

> A 'false light' claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such. In the article and the program, defendants communicated the clear message that Watson had continuously molested the members of his Little League team until he was unmasked in September 1997. Although Watson's victims, except for one young man who volunteered to be interviewed for the program, cannot be identified specifically, the article and the program could reasonably be interpreted as reporting that some or all the players in the photograph had been molested by Watson. Plaintiffs, therefore, have stated a 'false light' claim."

Id. at 514–15.

10. 955 P.2d 469 (Cal. 1998).

11. 978 P.2d 67 (Cal. 1999).

12. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 959 (1989).

13. *Id.*

14. *See id.*

15. *Id.* (discussing Hamburger v. Eastman, 206 A.2d 239 (N.H. 1964)).

the discovery of the eavesdropping device, he was "greatly distressed, humiliated, and embarrassed," and "ha[d] sustained . . . intense and severe mental suffering and distress, and ha[d] been rendered extremely nervous and upset[.]"[16] The wife's suit was identical.[17] The New Hampshire Supreme Court held that that type of intrusion "would be offensive to any person of ordinary sensibilities."[18]

Post makes an attempt to distinguish between two kinds of plaintiff interests that are relevant to eavesdropping cases:

> The first arises because of contingent psychological injuries that plaintiffs may suffer as a result of the violation of civility rules. Mental anguish and humiliation are examples of such injuries that are common and routine. . . . The second kind of interest arises from the dignitary harm which plaintiffs suffer as a result of having been treated disrespectfully. Violations of civility rules are intrinsically demeaning, even if not experienced as such by a particular plaintiff. This is because dignitary harm does not depend on the psychological condition of an individual plaintiff, but rather on the forms of respect that a plaintiff is entitled to received from others.[19]

Some authors and thinkers call eavesdropping wrong for the most simple of reasons: It is wrong because it is wrong. "It is prima facie wrong to observe a person against his will at any time, because it violates his autonomous right to decide whether he will be observed or not."[20] This view appears to have found currency in the California Supreme Court's opinion in *Flanagan v. Flanagan*.[21]

It also may be said that the proscriptions upon eavesdropping arise out of the natural sense that there is a right "to be let alone."[22] Although frequently and mistakenly credited for coining the term, Warren and Brandeis popularized the phrase in their much-cited law review article,[23] complaining of a state of affairs that was known to them in a different time using different devices: "Instantaneous photographs and newspaper

16. *Hamburger*, 206 A.2d at 240.

17. *Id.*

18. *Id.* at 242.

19. Post, *supra* note 12, at 966–67 (footnotes omitted).

20. *See, e.g.*, Robert S. Gerstein, *Intimacy and Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 267 (Ferdinand David Schoeman ed. 1984).

21. *See Flanagan*, 41 P.3d at 580–82.

22. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS § 18, at 34 (4th ed. 1932).

23. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'"[24] The Article goes on, in words echoed in ever-increasing numbers of articles, comments, treatises, and opinions: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."[25] Pertinent to the eavesdropping debate, Warren and Brandeis went on to say that "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[26]

One professor of philosophy has distilled the concept of privacy down to an elemental idea that, in its simplicity and common sense, is perhaps more helpful than any other in the debate about secret recording by news gatherers.[27] He posits that certain things about each of our lives are "*nobody else's business*."[28] Continuing, he writes:

> This, I think, is an extremely important point. We have a 'sense of privacy' which is violated in such affairs, and this sense of

24. *Id.* at 195.

25. *Id.* at 196.

26. *Id.* at 198. Not all reviewers have found the article so impressive. In 1979, the Director and Counsel of the Massachusetts Special Legislative Commission on Privacy, James H. Barron, published a law review article critically analyzing the traditional views of the origin of Warren and Brandeis' article, finding them exaggerated, tenuously related to fact, even apocryphal. James H. Barron, *Warren and Brandeis,* The Right to Privacy, *4 HARV. L. REV. 193 (1890): Demystifying a Landmark Citation*, 13 SUFF. U. L. REV. 875 (1979). He suggests instead that the hypersensitivity of Warren and ambivalent views of Brandeis toward the concept of privacy and the function of the press distorted their perceptions of press treatment of the Boston upper classes. *See id.* at 907–14. Barron takes delight in debunking earlier statements by Harry Kalven and Dean Prosser to the affect that the impetus for the article came from Warren's irritation over the way the press covered the wedding of his daughter in 1890. *See id.* at 891–94. According to Barron's genealogical study, newspaper accounts of the time and other sources, Warren was married only once and his first daughter was born in 1884. *See id.* at 893. "[T]he girl would have been no more than seven-years old when Warren and Brandeis wrote the article." *Id.* Barron goes on to point out that both Warren and Brandeis were associated with the Mugwump movement of the 1880s, and the message and the tone of their article is similar to the self-righteous moralism expressed by contemporary Mugwumps, sharing in some degree a conviction common to the educated mind of their day: a certainty of moral as well as intellectual superiority over the surrounding populace. *Id.* at 915. Professor Kalven earlier weighed in against the article, finding the tort proposed both petty and anachronistic. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 329 & n.22 (1966).

27. James Rachels, *Why Privacy Is Important*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 290 (Ferdinand David Schoeman ed., 1984).

28. *Id.* at 292 (*e.g.*, a woman's sex life).

privacy cannot adequately be explained merely in terms of our fear of being embarrassed or disadvantaged in . . . obvious ways. An adequate account of privacy should help us to understand what makes something 'someone's business' and why intrusions into things that are 'none of your business' are, as such, offensive."[29]

B. The Nub of the Debate: How to Recognize What Is My Business and What Is Strictly Yours

This observation gives clear voice to something we all know to be true, *viz*, a person may want to keep some things from us and by labeling them "confidential" or "private" to buttress their right to keep them from us. Still, they may be very much "our business." Conduct that is harmful to our societal interests is "our business" and no conscionable theory of privacy can ignore taking that potential into account. Someone committing a crime or planning to kill or physically harm someone or to seriously damage their interests is something we would all seek to prevent, even at the cost of that potential perpetrator's "privacy."

This is not a new concept in governance and law. Laws dealing with other areas of secrecy and confidentiality carve out clear exceptions to important rules guarding confidentiality in order to protect others in society. For instance, the psychotherapist-patient privilege not only can be breached by the therapist,[30] it must be breached in certain circumstances:

> There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.[31]

The California Supreme Court has held that the psychotherapist-patient privilege is "an aspect of the patient's constitutional right to privacy."[32] In spite of that exalted rank, "the right to privacy is not absolute, but may yield in the furtherance of compelling state interests."[33] In *Tarasoff v. Regents of University of California*,[34] the California Supreme Court, dealing with a therapist's duties with respect to a dangerous patient,

29. *Id.*
30. CAL. EVID. CODE § 1024 (West 1995).
31. *Id.*
32. People v. Stritzinger, 668 P.2d 738, 742 (Cal. 1983).
33. *Id.*
34. 551 P.2d 334 (Cal. 1976).

held that the heirs of a murder victim could bring a wrongful death action against the therapists who failed to warn the victim.[35] In reaching this result, it described the Evidence Code provisions as "balancing the countervailing concerns" by establishing a "broad rule of privilege to protect confidential communications between patient and psychotherapist" in section 1014 and a "specific and limited exception" in section 1024.[36]

The Court found that a violation of the confidentiality that the patient relied upon had to take a back seat in certain circumstances, difficult as they might be to gauge:

> The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.[37]

Similarly, therapists also are <u>compelled</u> to violate the privilege by reporting known or suspected incidents of child abuse under the Child Abuse and Neglect Reporting Act.[38]

Likewise, all attorneys are—or should be—familiar with the crime-fraud exception to the attorney-client privilege. Balancing of contrary interests is once again at work in that rule: ""There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.""[39]

Balancing never can be accomplished by the use of inflexible proclamations of what is "confidential," particularly when the standard fails to take into account that a great many things that are being said should indeed be our business. Using a strict rule, no balancing whatsoever takes place. One of the foremost writers on privacy in the United States puts the case for clear criteria in the following way:

> If privacy is to receive its proper weight on the scales in any process of balancing competing values, what is needed is a structured and rational weighing process with definite criteria that public and private authorities can apply in comparing the claims for disclosure or surveillance through new devices with

---

35. *Id.* at 353.
36. *See id.* at 346–47.
37. *Id.* at 346.
38. CAL. PENAL CODE §§ 11164–11173.3 (West 2000 & Supp. 2002).
39. CAL. EVID. CODE § 956 (West 1995).

the claims to privacy.[40]

In *Flanagan*, at least in the context of private persons who are not members of the press, no weighing is contemplated or allowed.[41] "Confidentiality" does not receive its proper weight on the scales, taking into account the semiotic variations of that term in a modern society.[42] There is no weighing of important policy interests. The scales have been destroyed. The only determination to be made is whether a person reasonably and unilaterally believed someone was listening.[43] If not, society's interests, are ignored, an evaluative technique that is in stark contrast to what the same court recently used so deftly in both the *Shulman* and *Sanders* decisions.

C. The Right to Privacy in Other Jurisdictions

A federal statute provides penalties for recording conversations without the permission of at least one party.[44] The law has a specific provision prohibiting the recording of an "oral communication," or an utterance by one "exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[45] The powerful exception in the federal law, from the perspective of news gatherers, is the "one party" consent system, where any party (or person with prior consent of a party) to a conversation can record the conversation.[46] The caveat to the exception, which has created a fair amount of controversy, is that even the one-party recording may not be done with a criminal or tortious purpose.[47] Fortunately, the interpretation of this caveat is not entirely circular—for example, the mere fact of taping is not sufficient to show a criminal or tortious purpose.[48]

The federal statute is designed as a statutory minimum and does not

---

40. ALAN F. WESTIN, PRIVACY AND FREEDOM 370 (1967).

41. *See Flanagan*, 41 P.3d at 580 (explaining different standards that courts employ in addressing issues of confidentiality).

42. *See id.*

43. *See id.*

44. 18 U.S.C. § 2510 (2000).

45. *Id.* § 2510(2).

46. *Id.* § 2511(2)(d).

47. *Id.* The statute also contained an "injurious purpose" qualifier, but the Sixth Circuit ruled that phrase unconstitutionally ambiguous. Boddie v. ABC, Inc., 881 F.2d 267 (6th Cir. 1989). Some states that modeled their laws after the federal statute, however, still contain the injurious purpose language. *See, e.g.*, NEB. REV. STAT. §§ 86-702(2)(b)–(c) (Michie 1999).

48. *See, e.g.*, Deteresa v. ABC, Inc., 121 F.3d 460, 467 n.4 (stating that plaintiff failed to show conversation was taped for the purpose of violating section 632, for the purpose of invading her privacy, or for the purpose of committing unfair business practices).

preempt or discourage states from developing stricter laws.[49] In fact, about a dozen states, including California, do have stricter laws, requiring two-party or all-party consent to the recording of conversations.[50] Most states, however, follow the federal model, and permit recordings under a one-party consent system (often with caveats or qualifying language for recordings done for the purpose of committing a criminal, tortious, or injurious act).[51]

California courts recognize that "one who imparts private information risks the betrayal of his confidence by the other party,"[52] but, under its two-party consent system, concludes that there is "a substantial distinction . . . between the secondhand repetition of the contents of a

---

49. *See* S. REP. NO. 1097, at 2181, 2187, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187. Before 1986, the federal wiretapping law required all parties' consent to record a phone conversation. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(b), 100 Stat. 1848 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571. Similarly, in 1999, Delaware switched from an all-party consent system to a one-party consent system. *Compare* DEL. CODE ANN. tit. 11, § 1336 (Michie 2001) *with* DEL. CODE ANN. tit. 11, § 2402(c)(4) (Michie 2001); *see also* Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Undercover*, 33 U. Rich. L. Rev. 1185, 1217 (2000).

50. *See, e.g.*, CAL. PENAL CODE §§ 632 *et seq.* (West 1999); CONN. GEN. STAT. § 52-570d (2001); FLA. STAT. ch. 934.03 (2001); 702 ILL. COMP. STAT. ANN. 5/14–1 *et seq.* (West 2001); MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 *et seq.* (Michie 1998); MASS. GEN. LAWS ANN., ch. 272 § 99 (West 2000); MONT. CODE ANN. § 45-8-213 (2000); N.H. REV. STAT. ANN. § 570-A:2 (Supp. 2001); OR. REV. STAT. § 165.540 (1999) (one-party consent for phone conversations, two-party consent for any other conversation); 18 PA. CONS. STAT. ANN. §§ 5701 *et seq.* (West 2000); WASH. REV. CODE §§ 9.73.030 *et seq.* (West 1998).

51. *See, e.g.*, ALA. CODE § 13A-11-30 (1994); ALASKA STAT. § 42.20.310 (Michie 1962); ARIZ. REV. STAT. ANN. § 13-3005 (West 2001); ARK. CODE ANN. §§ 23-17-107, 5-60-120 (Michie 2002); COLO. REV. STAT. §§ 18-9-303–18-9-305 (2001); DEL. CODE ANN. tit. 11, §§ 2401 *et seq.* (Michie 2001); D.C. CODE ANN. §§ 23-541 *et seq.* (1981); GA. CODE ANN. §§ 16-11-60 *et seq.* (1998); HAW. REV. STAT. §§ 803-41 *et seq.* (1993); IDAHO CODE §§ 18-6702 *et seq.* (Michie 1997); IND. CODE § 35-33.5-1 *et seq.* (1998); IOWA CODE § 727.8 (2001); KAN. STAT. ANN. §§ 21-4001 *et seq.* (1995); State v. Roudybush, 686 P.2d 100 (Kan. 1984); KY. REV. STAT. ANN. § 526.010 (Michie 1999); LA. REV. STAT. ANN. § 15:1303 (West 1992); ME. REV. STAT. ANN. tit. 14, §§ 709-713 *et seq.* (West 1980); MICH. COMP. LAWS § 750,539 (2001); Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982); MINN. STAT. ANN. § 626A.01 *et seq.* (West 1983); MISS. CODE ANN. §§ 41-29-501 *et seq.* (1972); MO. REV. STAT. ANN. §§ 542.400 *et seq.* (1987); NEB. REV. STAT. § 86-702 (2000); N.J. STAT. ANN. §§ 2A:156A-1 *et seq.* (West 1985); N.M. STAT. ANN. § 30-12-1 (Michie 2002); N.Y. PENAL LAW §§ 250 *et seq.* (McKinney 2000); People v. Lasher, 58 N.Y.2d 962 (1983); N.C. GEN. STAT. § 15A-287 (2002); N.D. CENT. CODE §§ 12.1-15-02 *et seq.* (1997); OHIO REV. CODE ANN. §§ 2933.51 *et seq.* (Anderson 1999); OKLA. STAT. ANN. tit. 13, §§ 176.1 *et seq.* (West 2002); R.I. GEN. LAWS § 11-35-21 (2000); TENN. CODE ANN. §§ 39-13-601 *et seq.* (1997); TEX. CIV. PRAC. & REM. CODE ANN. §§ 123.001 *et seq.* (Vernon 1997); TEX. PENAL CODE ANN. § 16.02 (Vernon 1994); UTAH CODE ANN. §§ 76-9-401 *et seq.* (1999); VA. CODE ANN. §§ 19.2-61 *et seq.* (2000); W. VA. CODE §§ 62-1D-1 *et seq.* (2000); WIS. STAT. ANN. § 968.31 (West 1998); WYO. STAT. ANN. § 7-3-602 (Michie 2001).

52. Frio v. Sup. Ct., 250 Cal. Rptr. 819, 822 (Ct. App. 1988) (citing Ribas v. Clark, 696 P.2d 637, 640 (Cal. 1985)).

conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or mechanical device."[53] States operating under a one-party consent system focus more on the speaker's choice to reveal certain matters to certain people and less on any purported distinction between whether the contents of a conversation are revealed to one person or to many.

Various courts explain that speakers must advance at their own peril and, therefore, should not simply assume that their words are uttered ephemerally. An appellate court in Michigan was asked to resolve an ambiguity in Michigan's eavesdropping and wiretapping statute to determine whether that state operated under a one-party or two-party consent system.[54] The court concluded that Michigan was a one-party consent state and carefully explained the difference between recording by a party and recording by a third person that was not a party to the conversation at all:

> A recording made by a participant is nothing more than a more accurate record of what was said. Whether an individual should reasonably expect that an ostensibly private conversation will be related by a participant to third parties depends on that individual's relation to the other participant. The individual may gauge his expectations according to his own evaluation of the person to whom he speaks. He has the ability to limit what he says based upon that expectation. When a third party is unilaterally given permission to listen in upon a conversation, unknown to other participants, those other participants are no longer able to evaluate and form accurate expectations since they are without knowledge of the third party. Therefore, it is not inconsistent to permit a person to record and utilize conversations he participates in yet deny him the right to unilaterally grant that ability to third parties.[55]

The United States Supreme Court, interpreting federal law, explained that "one party may not force the other to secrecy merely by using a telephone."[56] A holding to the contrary, the Court explained, would mean that "every secretary who listens to a business conversation at her employer's direction in order to record it would be marked as a potential

---

53. *Id.*

54. Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982).

55. *Id.* at 60–61.

56. Rathbun v. United States, 355 U.S. 107, 110 (1957).

federal criminal."[57] Other courts have followed this lead, explaining that "[o]ne party to a telephone communication has no right to force the other to secrecy, and, in fact, takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation."[58] Another court declared that "[a]ny expectation of privacy in a telephone conversation is not objectively reasonable, because a person is not reasonably entitled to assume that no one is listening in on an extension telephone."[59] These cases all fall within the context of telephone communications, and so too did *Flanagan*, where the California Supreme Court, coming to the opposite conclusion, held that the allegedly aggrieved party had a reasonable expectation that he was not being overheard or recorded.[60]

III. FRAMING THE ISSUE OF SECRET RECORDING BEFORE *FLANAGAN*

Framing a legal question is all-important. Semiotics is the study of signs and symbols of all kinds, what they denote, and how they relate to the tangible objects or ideas to which they refer. The question in this Article is, What do we all mean, or better said, what do we want to mean, when we write or speak the words "privacy" and "confidential" in the context of secret recording of communications. Privacy—the right or expectation to be able to draw a cloak around ourselves—takes many shapes and forms.[61] As new technology emerges making it more technically feasible for outsiders to lift that cloak, the definitions in the law change to reflect changes in policy.

A. Fourth Amendment Privacy as Against the Government

United States courts began to deal with the new technology that enabled the interception of communications as early as 1928. In *Olmstead v. United States*,[62] the Supreme Court held that the Fourth Amendment was inapplicable to wiretapping because government officials had not physically invaded the defendant's premises.[63] The "seizure" of words had

---

57. *Id.* at 111.

58. Coates v. United States, 307 F. Supp. 677, 679 (E.D. Mo. 1970).

59. Commonwealth v. Eason, 694 N.E.2d 1264, 1268 (Mass. 1998).

60. *Flanagan*, 41 P.3d at 576.

61. *See* Gary L. Bostwick, Comment, A *Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976).

62. 277 U.S. 438 (1928), *overruled in part by* Berger v. New York, 388 U.S. 41 (1967) *and by* Katz v. United States, 389 U.S. 347 (1967).

63. *See id.* at 466.

occurred outside the premises.[64] The Court, applying the most simple and clear-cut test it could find, relied upon a physical structure and traditions of the Fourth Amendment's ban against "the king's men" in order to frame its definition of eavesdropping.[65]

Congress, apparently not satisfied with that simplicity, responded. In 1934, it enacted the Federal Communications Act of 1934,[66] framing the issue such that "no person not being authorized by the sender shall intercept any communication and divulge or publish [any aspect of the communication]."[67] This language was an expansion of the communications privacy concept. Whereas the *Olmstead* Court found itself strictly confined within the four walls of a physical space, the Communications Act recognized for the first time that because someone's words now could carry beyond the confines of his own home, some concept of a privacy zone that spread out along telephone wires was appropriate.

Three years later in *Nardone v. United States*,[68] the Supreme Court faced a new question: Even considering that the law bans interception generally, should law enforcement personnel be exempt? The answer was, "No."[69] Petitioners there were tried and convicted for smuggling, possession, and concealment of alcohol on the basis of wiretapping evidence.[70] The Court stated:

> It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and

---

64. *See id.* at 464.

65. *See id.* at 465.

66. 47 U.S.C § 605 (1994). The language of the Act forbids anyone, unless authorized by the sender, to intercept a telephone message and it further directs that "no person" shall divulge or publish the message or its substance to "any person." *See also* 18 U.S.C. § 2511 (2000).

67. *Id.* § 605(a).

68. Nardone v. United State, 302 U.S. 379 (1937).

69. *Id.* at 382.

70. *Id.* at 380.

Fifth Amendments of the Constitution.[71]

The wiretap incident in *Nardone* had yet more to teach. Whereas the first *Nardone* matter overruled convictions that were based upon admission into evidence of incriminating conversations, the Supreme Court faced a slightly different question when Nardone was convicted a second time.[72] The follow-up question was: Can evidence that has been gleaned only as a result of the wiretapping be admissible to convict?[73] Again, the answer was, "No."[74] The Supreme Court returned to the well known assayer's device common in constitutional analysis, balancing competing interests in establishing public policy:

> Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: On the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by the Constitution and laws but capable of infringement either through zeal or design.[75]

Both *Nardone* opinions use the word "privacy" and draw strength for definition of the concept out of the United States Constitution. The Court in one opinion makes specific reference to the Fourth Amendment (homes free from search and seizure) and Fifth Amendment (no compelled self-incrimination).[76] The constitutional concepts all relate to the tense relationship between citizens and their government, reflecting the prevailing aims of the Bill of Rights, that acts of the sovereign shall be curtailed in areas of vital personal liberty.

Of course, some things have changed since the early days of the Republic. Tapping wires now is a relatively simply proposition from a mechanical point of view. Listening devices represent a more sophisticated technology, and advances in that area forced new questions before the United States Supreme Court in a progression of cases. The Court first focused on where the listening device was placed, that is, whether the device was within a physical volume that historically was considered

---

71. *Id.* at 383.

72. Nardone v. United States, 308 U.S. 338 (1939).

73. *Id.* at 339.

74. *Id.*

75. *Id.* at 340.

76. *Nardone*, 302 U.S. at 383.

protected against intrusion by the government.[77] The Supreme Court, in three different cases,[78] set rules regulating how far into a party wall a listening device could be inserted before triggering Fourth Amendment protections. The outcome: pressing a listening device against the wall adjoining an office was no physical trespass and therefore constituted no search,[79] but driving a microphone into a party wall of a suspect's house is a search,[80] even when the microphone was driven only thumbtack-deep.[81] All of the holdings regarding penetration of a wall find genesis in the physical concepts of the Fourth Amendment and the libertarian concepts of the Bill of Rights.

By the mid-1960s, technology and the debate had moved to whether a search occurred if there was no physical intrusion into a so-called "constitutionally protected area." In *Katz v. United States*,[82] FBI agents had placed a bug on the outside of a phone booth.[83] There was no home; there was no penetration of walls. The agents heard and recorded half of the telephone conversations in which Katz exchanged wagering information while in a telephone booth.[84] Given the law's rather strict reliance upon physical zones, it is not surprising that the litigants briefed and argued the issue of whether a telephone booth was a "constitutionally protected area." The Court "decline[d] to adopt this formulation of the issues"[85] and the law progressed.

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[86]

This formulation changed at once the denotative properties of the word "privacy." What the Court said, in essence, was that if you knowingly expose information to the "public," even if you are in the most hallowed sanctuaries of the law—the home—the Fourth Amendment will

---

77. *See Olmstead*, 277 U.S. at 466.

78. Goldman v. United States, 316 U.S. 129 (1942); Silverman v. United States, 365 U.S. 505 (1961); Clinton v. Virginia, 377 U.S. 158 (1964).

79. *Goldman*, 316 U.S. at 134.

80. *Silverman*, 365 U.S. at 505, 506.

81. *Clinton*, 377 U.S. at 158.

82. 389 U.S. 347 (1967).

83. *Id.* at 348.

84. *See id.* at 354 n.14.

85. *Id.* at 350.

86. *Id.* at 351 (citations omitted).

not protect you. However, even if you are in a public place and plainly visible in a phone booth like Katz, "what he sought to exclude when he entered the booth was not the intruding eye —it was the uninvited ear."[87] For the first time, privacy in the eavesdropping sense stepped outside the home/office.

In charting the thinking on privacy rights that leads to *Flanagan v. Flanagan*, two statements in the *Katz* opinion are of major importance. First, Justice Stewart wrote that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"[88] Second, Justice Harlan, in a concurring opinion, read the Court's holding to conclude that in a telephone booth, as in a home, a person had a constitutionally protected reasonable expectation of privacy, and that electronic, and not just physical, intrusion may constitute a violation of the Fourth Amendment.[89] But there was even more hidden in the *Katz* opinion of value than its profound holding. Writing on the philosophical, or even commonsensical, parameters of privacy, Justice Harlan said:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, *but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.* On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[90]

For the first time, the law moved within the mind of the person being recorded to draw dispositive lines. The touchstone was "reasonable expectations of privacy." After *Katz*, if a person had the subjective expectation of privacy and if that expectation were reasonable, government agencies could not eavesdrop upon him and use the information against him. The case held more than that subjective analytical litmus. It was also enlightening that at least one justice in the majority believed that if a person exposed statements to outsiders—no matter where he was—he exhibited no

87. *Id.* at 352.

88. *Katz, 389 U.S.* at 350.

89. *Id.* at 360–61 (Harlan, J., concurring) (citations omitted).

90. *Id.* at 361 (emphasis added) (citing to Hester v. United States, 265 U.S. 57 (1924), on the issue of privacy in an open field).

expectation of privacy because it was apparent he did not intend to keep those statements to himself.

Still, analysis in the area suffered from what might be called "semiotic noise," that is, some disturbances around the clear signal we as audience members would hope to understand as the meaning of "privacy." The majority opinion talked of "what a person *knowingly* exposes to the public,"[91] and Justice Harlan spoke of matter exposed "to the single 'plain view' of outsiders" as not being protected because no intention to keep things private has been exhibited.[92] Furthermore, it was clear that that personal expectation of privacy could not be idiosyncratic. The expectation had to "be one that society is prepared to recognize as 'reasonable.'"[93] Thus, if you chose to expose something, it could not be private. If you chose not to expose anything, the government could not reach in and rip it from your possession, unless, of course, your expectation that it would not be exposed to the government was simply not in tune with social norms.

The result was that if a person talked to strangers in their own home, the United States Constitution would not protect him under the Fourth Amendment, that is, against the government. But what if the eavesdropping were conducted by private persons and the person eavesdropped upon then repaired to the common law for his remedy? The outcome was uncertain. Just a few years later, one answer was forthcoming.

B. Secret Recording by Private Parties, Including Newsgatherers

1. The Reasonable Expectation of Privacy

Generally, the case of *Dietemann v. Time, Inc.*,[94] is considered the first of its species. It focused on the concept of the "restricted area," in this instance Dietemann's den.[95] He used the den as a home office, practicing, as the court called it, "simple quackery" by the practice of healing with clay, minerals and herbs.[96] Two reporters went to the home and told Dietemann that they had been sent there by a friend.[97] The woman reporter

---

91. *Id.* at 351.
92. *See id.* at 361(Harlan, J., concurring).
93. *Id.* at 361.
94. 449 F.2d 245 (9th Cir. 1971).
95. *Id.* at 246.
96. *Id.*
97. *Id.*

told Dietemann that she had a lump in her breast.[98] The other reporter had a hidden camera which he used to photograph Dietemann without Dietemann's knowledge.[99] While Dietemann concluded that the cause of the trouble was that the woman reporter had eaten some rancid butter eleven years, nine months, and seven days prior to that date, their conversation was transmitted by a hidden radio transmitter in her purse to a tape recorder in a parked automobile nearby.[100]

The Ninth Circuit, diverging from the intimations and holdings of the United States Supreme Court in *Katz* four years earlier, held that choosing to talk to strangers in your home did not necessarily mean you had waived your right not to be secretly recorded.[101] One must be alert to the distinctions in analyzing cases based on whether or not the persons doing the eavesdropping are private individuals acting on their own, on behalf of the government or on behalf of the public. Here, the persons doing the eavesdropping were not government agents:

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g., in the case of

---

98. *Id.*

99. *Id.*

100. *Dietemann*, 449 F.2d at 249. The court in *Dietemann* cited *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971), a California Supreme Court case decided shortly before its own decision. *Dietemann*, 449 F.2d at 248. The court in *Briscoe* had passionately held forth on a growing acceptance of the right of privacy which, the court remarked, paralleled the increasing capability of electronic devices. *Briscoe*, 483 P.2d at 37. The devices, the California court had said, had the ""capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze."" *Id.*

> The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy— to choose who shall seek beneath the quotidian mask. Loss of control over which 'face' one puts on may result in literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.

Id. (citations omitted). "Quotidian" is defined as (1) occurring every day; or (2) belonging to each day, every day, common place, ordinary. MERRIAM-WEBSTER'S TENTH NEW COLLEGIATE DICTIONARY 961 (1999).

101. *Dietemann*, 449 F.2d at 249.

doctors and lawyers.[102]

Dietemann was a journeyman plumber who claimed to be a scientist.[103] Whether his home was a private place depended on many factors, according to the court's reasoning: he had no listings; his home bore no sign of any kind; he did not advertise; and he did not charge for his diagnosis or prescriptions, accepting only contributions.[104] These and other facts implied that Dietemann reasonably expected privacy, and, as a result, the Court found that Dietemann was entitled to damages for the emotional distress caused by the intrusion and the publication by *Life Magazine.*[105]

The *Dietemann* case inserted a completely new consideration into the analytical flow chart used to determine whether or not something overheard was private. Three "properties" of the situation can be identified: (1) the office was within a home, (2) the recording was made by a private person, and (3) the recording was published to a large audience.[106] The question is, Were each of the three properties an indispensable element of the compound called liability, or were two of them, or perhaps one alone, enough to reach the conclusion that the broadcasters were liable to Dietemann for the emotional distress caused by the broadcast? In the thirty years since *Dietemann*, no clear answer has been forthcoming.

A few years before, in 1967, the California Legislature passed the Invasion of Privacy Act[107] (Privacy Act), establishing criminal and civil penalties for various forms of wiretapping and eavesdropping and vesting in the person whose words were overheard or intercepted a civil cause of action for damages. Once the Privacy Act went into effect in California, three separate types of limitation upon audio recording of conversations existed: constitutional, common law, and statutory. At the time, it was impossible to predict precisely what new amalgam of circumstances would lead to liability in instances where audio recording occurred.

California Penal Code section 631 focuses entirely upon telegraph or telephone wire, line, cable, or instruments.[108] In addition, section 632

102. *Id.*

103. *Id.* at 246.

104. *Id.*

105. *Id.* at 249.

106. *Id.* at 247.

107. CAL. PENAL CODE, §§ 630–637.5 (West 1999).

108. Section 631(a) imposes liability as follows:

> Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and

expands the scope of restrictions on audio recording.[109] Section 632 is not, however, restricted to the telephone or telegraph. But it is restricted to "confidential communications" and to eavesdropping or recording using electronic amplifying or recording devices. This section applies whether the communication is carried on among the parties in the presence of one another or by means of telegraph, telephone or other device (with the exception of radio).[110]

2. The Right of Dissemination

In *Ribas v. Clark*,[111] the Court referred to section 632 in dicta while discussing section 631 upon which the holding was based.[112] There, Clark used an extension to listen to a telephone conversation between a recently divorced couple at the ex-wife's request.[113] The husband sued. Clark claimed that section 631 only applied to wiretaps.[114] The California Supreme Court disagreed and published an opinion that sounded a note later heard multiple times in the eavesdropping context:

> While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the content of the conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.[115]

> without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state . . .

109. Section 632(a) states:

> Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio . . .

110. In 1985 the Cellular Radio Telephone Privacy Act of 1985 was enacted by the California Legislature "to provide a legal recourse to those persons whose private cellular radio telephone communications were *maliciously* invaded by persons not intended to receive such communication." 1985 Cal. Stat. 909 § 2 (emphasis added). The word "maliciously" was added to avoid liability for persons who, all too frequently, may be on their own cellular telephone or other device and suddenly find themselves auditing a private conversation between complete strangers. It did little to change the terrain of analysis. *See id.*

111. 696 P.2d 637 (Cal. 1985).

112. *Id.* at 641.

113. *Id.* at 637.

114. *Id.* at 640.

115. *Id.*

Ribas obviously presented a new mode of thinking about privacy. It was not related to physical space and did not matter that the conversation was something that the ex-wife would have been able to relate to defendant Clark immediately after hanging up the telephone. In other words, it did not matter at all to the court that the content of the conversation could not be conceived of as "private" by any person on the street, because Ribas knew that the antagonistic wife was likely to describe the conversation to anyone she chose. The concept of a reasonable expectation of privacy in what was being said was missing from *Ribas*. What was new in this non-media case was the idea that a person had the right to control the *extent* of the first-hand dissemination of his statements. *Ribas* held that section 631 gave a speaker the right to control who was listening to him on the telephone even if there was no reasonable expectation of privacy in the content of the conversation.

3. The Highly Offensive Standard

The conflict in California regarding privacy in eavesdropping situations was faced again in *Shulman v. Group W Productions, Inc.*[116] The case did not involve Penal Code section 632, but did involve behavior that might have triggered it. Because the case proceeded to the Supreme Court on a summary judgment ruling by the trial court, many issues were left undecided. But some things were made clear about the common law tort of intrusion and the parameters of "privacy" and "confidentiality." In that case, a television cameraman, working for a production company on a series of programs about emergency workers, had equipped the flight nurse on a rescue helicopter with a microphone.[117] The crew flew to the scene of an accident with an overturned vehicle and a woman pinned inside it.[118] The cameraman recorded the accident victim's statements to the flight nurse crawling under the vehicle during the rescue operation.[119]

The Court held summary judgment was inappropriate on whether the woman expected her conversations with her rescuers to remain private, and whether the expectations claimed were reasonable.[120] Too many facts were in dispute. Plaintiffs had sued for intrusion, but had not brought a claim under Penal Code section 632. Nevertheless, the Court engaged in

116. 955 P.2d 469 (Cal. 1998). *Shulman* is not strictly a "hidden" recording case. The microphone was visible on the flight nurse's suit, but plaintiffs alleged they could not see it. *See id.* at 475–76.

117. *Id.* at 475.

118. *Id.* at 474.

119. *Id.* at 474–75.

120. *Id.* at 491.

considerable discussion regarding that section, on the theory that it might provide a basis for understanding the reasonable expectation of privacy of the plaintiff. In its discussions, the Court explicitly declined to resolve the conflict between cases relating to what expectation of "confidentiality" triggered section 632.[121] Under any interpretation of section 632, the court felt that triable issues existed where the plaintiffs had a "reasonable expectation of privacy in their communications to medical personnel.[122] " Even though the case was not about Penal Code section 632, it shed much light upon the California Supreme Court's thinking with respect to confidentiality, privacy, and what reasonable expectations of each were.

The *Shulman* Court introduced in its holding yet another new factor into California eavesdropping analysis.[123] The physical situation in the *Shulman* case was an accident site attended by many rescue personnel.[124] The conversations took place while the plaintiff was trapped inside the car by the side of the road, which is not a place commonly recognized as an area of protected privacy.[125] The court found that there was no constitutional principle that ""gives a reporter general license to intrude in an objectively offensive manner into private places, conversations, or matters."'[126] However, even if plaintiffs proved they had a reasonable expectation of privacy, the journalists had a complete defense if they showed that the behavior had not been "highly offensive."[127] That determination depended upon "the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news."[128] In fact, conduct that might be highly offensive in some contexts "may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story."[129]

4. Circumstantial Effects on the Right of Privacy

The last major California case prior to *Flanagan v. Flanagan* that spreads the framing of eavesdropping privacy analysis wider still is

121. *Id.* at 492 n.15.

122. *Shulman*, 955 P.2d at 492 n.15.

123. *Id.* at 497.

124. *Id.* at 491 n.13.

125. *Id.* at 490.

126. *Id.* at 497.

127. *See id.* at 490.

128. *Shulman*, 955 P.2d at 493.

129. *Id.* Ultimate resolution of the issues discussed here was never decided. The parties settled the matter before trial.

Sanders v. ABC, Inc.[130] There, an ABC reporter got a job as a "telepsychic" with a company that also employed the plaintiff, Mark Sanders, in the same capacity.[131] While the reporter worked, she ""wore a small video camera in her hat [and] covertly videotaped her conversations with several co-workers, including Sanders.""[132] The California Supreme Court granted review to determine whether the fact that employees knew that interactions they had were open and likely to be witnessed by other employees (in addition to the reporter) necessarily defeated any reasonable expectation of privacy against covert videotaping.[133] The Court concluded that, although Sanders knew he was talking to co-workers in a non-public area, he still had an expectation that he was not being tape recorded:

> In an office or other work place to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants' co-workers.[134]

The jury in that case had found that there was no violation of Penal Code section 632.[135] Thus, the holding did not directly affect the jurisprudence relating to that section.

The *Sanders* opinion left open many questions regarding audiotaped eavesdropping under the common law tort of intrusion:

> We hold only that, where the other elements of the intrusion tort are proven, the cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears.[136]

Nevertheless, the Supreme Court made it clear that businesses could be surreptitiously recorded by journalists, stating:

> [W]e do not hold or imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores or other work places. Whether a

130. 978 P.2d 67 (Cal. 1999).
131. *Id.* at 69.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Sanders*, 978 P.2d at 70.
136. *Id.* at 69.

> reasonable expectation of privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances. In addition, liability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors the motive of the alleged intruder.[137]

The California Supreme Court had chosen a rather measured approach to the issue of privacy, at least with respect to the intrusion tort in cases involving surreptitious recording by the media. The Court stated that a reasonable expectation of privacy depended upon the exact nature of the conduct and all of the surrounding circumstances; that it had to be highly offensive to a reasonable person; and that the motive of the alleged intruder had to be taken into account.[138] The holdings radiated the classic methods and frame of mind employed in case-by-case analyses, taking into account multiple unique factors, and thereby shaping privacy law in California. These holdings set the stage for the California Supreme Court's decision in *Flanagan v. Flanagan.*

IV. *FLANAGAN V. FLANAGAN*

A. The California Supreme Court's Decision

Flanagan v. Flanagan[139] came to the California Supreme Court laden with the history of the developments discussed above.[140] The developments had been carefully charted and were intellectually provocative at every leg of the trip. *Flanagan* was, by comparison, a soap opera. A husband was rich and had been diagnosed with prostate cancer. His son and others were part of his estate planning. His doctors prescribed medication to slow the spread of the cancer. His wife allegedly told her manicurist that she was injecting her husband with water instead of the medicine. The manicurist testified that she thereafter began taping telephone conversations with the wife and ultimately played one of the tape recordings for the husband's son. The son then played the tape for the husband. The husband moved out and doctors allegedly determined that he had not been receiving the prescribed medication during the months before

137. *Id.* at 69 (citing *Shulman*, 955 P.2d at 490).

138. *See id.* at 77 (weighing all surrounding circumstances in deciding whether there was a reasonable expectation of privacy).

139. 41 P.3d 575 (Cal. 2002).

140. *Id.* at 579.

his arrival at the clinic. The opinion reflects that the husband changed his will and filed for divorce. Then the husband and wife reconciled and the husband moved back in. The wife began taping all of the telephone conversations between the son and the husband after that time, leading to the petition to the California Supreme Court.[141]

Faced with these facts, the court focused only on the circumstances of the telephone calls, and purposely ignored their contents, determining that because the son "did not know his calls were being recorded," he was entitled to relief on all of the recorded calls that the jury determined were "confidential."[142] In an effort billed as an attempt to establish a "coherent statutory scheme," protecting "confidential" communications, the court held that the law must protect "against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved."[143] Thus, at least within the context of intentionally recorded telephone calls between a father and his son, *Flanagan* held that a conversation is confidential if a party to that conversation has "an objectively reasonable expectation that the conversation is not being overheard or recorded."[144]

Flanagan resolved a troublesome split in California's Courts of Appeal over the meaning of the phrase "confidential communication" in California Penal Code section 632. Put simply, section 632 punishes a person who records "confidential communications" without the consent of all parties to the communication.[145] Section 632(c) defines the phrase "confidential communication" as follows:

> The term "confidential communication" includes 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 proceedings open to the public, or in any other circumstances in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.[146]

The split in California's appellate courts developed because there are different views about what "confidential communications" means. One

141. *See id.* at 577–79 (factual and procedural background of the case).

142. *Id.* at 578.

143. *Id.* at 581–82.

144. *Id.*

145. *Flanagan*, 41 P.3d. at 580.

146. CAL. PENAL CODE § 632(c) (West 1999).

line of cases took a narrow, and more media-friendly, view of the phrase while the other line expanded the meaning of "confidential." In *Flanagan*, the California Supreme Court ultimately endorsed the more expanded view.[147]

The schism in the intermediate appellate courts began with *Frio v. Superior Court.*[148] Richard Frio recorded telephone conversations on business matters with individuals that later would be his litigation adversaries.[149] Frio took notes from these recordings, recorded over the tapes, and read his notes in preparation for his deposition.[150] Later, Frio offered his notes into evidence, but the trial court refused, citing Penal Code section 632(d), which, "[e]xcept as proof in an action or prosecution for violation of" section 632, precludes the admission of "evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of" Section 632.[151] Frio argued that there was no violation of section 632 in recording the conversations because the communications related to business matters and pending litigation, and therefore could not be considered "confidential."[152] The Court rejected Frio's arguments, finding that "the recorded parties reasonably expected their communications would not be simultaneously disseminated to an unannounced second auditor," and concluding that "under section 632 'confidentiality' appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation."[153] Thus, an expectation of "confidentiality" was defined as an expectation that no one unknown to the speaker was listening and no one was recording.

O'Laskey v. Sortino was the next decision to tackle the term "confidential communication," and it departed from *Frio*'s analysis.[154] Phillip O'Laskey, suing on a personal injury claim, sought to oppose defendants' summary judgment motion brought on statute of limitations grounds.[155] O'Laskey needed to demonstrate that defendant Michael Sortino had been out of the state for more than eight days in the previous year, thus tolling the statute. If successful in so showing, O'Laskey's

147. *Flanagan*, 41 P.3d at 577.
148. 250 Cal. Rptr. 819 (Ct. App. 1988).
149. *Id.* at 821.
150. *Id.* at 820.
151. *Id.* at 824.
152. *Id.* at 823.
153. *Id.* at 823, 824.
154. O'Laskey v. Sortino, 273 Cal. Rptr. 674 (Ct. App. 1990).
155. *Id.* at 676.

complaint would be deemed timely filed.[156] In order to make his argument, O'Laskey hired a private investigator who, "using a ruse," called Sortino and told Sortino that he was the producer of a television show and that Sortino was eligible to win $100,000 if he had traveled in the past year and was willing to answer questions about his trip.[157] Sortino eagerly obliged and told the investigator, who was secretly recording Sortino, that he had been to Las Vegas for two weeks in the previous year.[158] The secretly recorded conversation clearly contradicted Sortino's sworn deposition testimony.[159]

The trial court in *O'Laskey* refused to admit a transcript of the tape on the ground that the tape was recorded in violation of section 632 and therefore was inadmissible under subsection (d).[160] The California Court of Appeal disagreed with the trial court's section 632 analysis, determining that admissibility of the tape revolved around whether the tape was "confidential."[161] The court surveyed law enforcement cases and gave several examples of taped conversations that were not confidential.[162] The court also discussed cases, including *Frio*, in which the person being recorded had a reasonable expectation of privacy.[163] Ultimately, the Court determined that "the statute means what it says," and the question is whether Sortino "reasonably expected, under the circumstances surrounding the investigator's call, that the conversation would not be divulged to any one else."[164] The *O'Laskey* Court's conclusion was that the call was not "confidential" because Sortino had to expect that the content of the call would be revealed to other persons.[165]

Later, another California Court of Appeal returned to *Frio*'s reasoning

---

156. *Id.*

157. *Id.* at 675.

158. *Id.*

159. *Id.* at 675–76.

160. *O'Laskey*, 273 Cal. Rptr. at 676..

161. *Id.* at 677.

162. *Id.*; *e.g.*, People v. Blair, 82 Cal. Rptr. 673, 676–77 (Ct. App. 1969).(suspect's recorded jailhouse confession to his brother had no reasonable expectation of privacy, notwithstanding suspect's belief that they were in an "attorney's room" where conversations would not be recorded); People v. Newton, 116 Cal. Rptr. 690, 693 (Ct. App. 1974) (suspect in back of police car had no reasonable expectation of privacy in comments to fellow suspect).

163. *Id.*; *e.g.*, People v. Wyrick, 144 Cal. Rptr. 38, 42 (Ct. App. 1978) (reasonable expectation of privacy between an attorney and a doctor who had previously refused to assist the attorney in a personal injury case); Warden v. Kahn, 160 Cal. Rptr. 471, 477 (Ct. App. 1979) (conversation between blind client and attorney where client thought reasonable attorney would believe conversations were being recorded).

164. *O'Laskey*, 273 Cal. Rptr. at 678.

165. *Id.*

in *Coulter v. Bank of America*.[166] Christopher Coulter, a bank employee, secretly recorded several conversations with co-workers and superiors in anticipation of employment litigation he would later file.[167] "Each of the employees submitted affidavits stating the conversations were in private, they intended them to be confidential, and they did not consent to their being recorded."[168] Coulter contended that the recorded conversations were not "confidential" under Section 632 because "it was expected that the subject matter of the conversations would be repeated to other bank employees[.]"[169] The trial court granted summary judgment in favor of the bank employees, and the appellate court affirmed, finding, "that the subject matter might be later discussed has no bearing on whether section 632 has been violated."[170]

In 1997, the United States Court of Appeals for the Ninth Circuit weighed in on the split when applying California law in *Deteresa v. ABC, Inc.*[171] Beverly Deteresa was an attendant on the flight from Los Angeles to Chicago that O.J. Simpson took shortly after the murders of his ex-wife and Ronald Goldman. One week after the flight, an ABC producer came to the door of Deteresa's condominium, told her that he worked for ABC, and that he wanted to speak with her about appearing on a television show that would discuss the flight. At first, Deteresa told the producer that she was not interested in appearing on the show; however, she proceeded to reveal several details that she remembered about the flight. She then told him that she would "think about" appearing on his show.

The next day, the producer called Deteresa and, when she declined to appear on his show, told her that he had audiotaped their entire conversation the previous day. He told her also that he had directed a camera person to videotape them from a public street adjacent to Deteresa's home. ABC broadcast a five-second clip of the videotape and repeated one of the things that Deteresa had told the producer about Simpson wrapping his hand in a bag of ice. ABC did not broadcast any portion of the audiotape.[172]

The court was called upon to interpret Penal Code section 632. ABC admitted that the recording had been made intentionally and without the consent of one party to the communication. What was left to decide before

166. 33 Cal. Rptr. 2d 766 (Ct. App. 1994).
167. *Id.* at 768.
168. *Id.*
169. *Id.* at 770.
170. *Id.* at 771.
171. 121 F.2d 460 (9th Cir. 1997).
172. *Id.* at 462–63.

liability could be imposed was whether the communication was "confidential" as required by the statute.[173]

The Ninth Circuit observed that California state appellate courts had, up to that time, stated two competing formulations of what a party must reasonably expect for a communication to be confidential.[174] Because the California Supreme Court "ha[d] not visited these conflicting lines of cases," the Ninth Circuit was required to use its best judgment to predict how the California Supreme Court would decide the question.[175] The Court ruled against Deteresa, finding that she did not reasonably expect the conversation to be confined to the parties. Elaborating on Deteresa's reasonable expectations, the Court stated in pertinent part that:

> Radziwill immediately revealed that he worked for ABC and wanted Deteresa to appear on television to discuss the flight; Deteresa did not tell Radziwill that her statements were in confidence; Deteresa did not tell Radziwill that the conversation was just between them; and Deteresa did not request that Radziwill not share the information with anyone else. Radziwill, for his part, did not promise to keep what Deteresa told him in confidence. We agree, from these undisputed facts, that no one in Deteresa's shoes could reasonably expect that a reporter would not divulge her account of where Simpson had sat on the flight and where he had or had not kept his hand.[176]

Frio and *O'Laskey* agree that any expectations must be objectively reasonable, but beyond that the opinions diverged on the meaning behind section 632's language. The *Frio* decision, later reinforced by *Coulter*, determined that "confidential communications" were those communications that one would not reasonably expect to be overheard or recorded.[177] The *O'Laskey* opinion (supported by *Deteresa*), on the other hand, held that a communication only was confidential if neither party to the communication reasonably expected "that the content of the call would be revealed to other persons."[178]

The Ninth Circuit cogently articulated the split with a "simple example":

> A simple example demonstrates how differently *Frio/Coulter* and *O'Laskey* each construe section 632(a). Suppose X and Y

173. *Id.* at 463. ; CAL. PENAL CODE § 632(a) (West 1999).

174. *Deteresa*, 121 F.3d at 463–64.

175. *Id.* at 465.

176. *Id.*

177. *Frio*, 250 Cal. Rptr. at 824.

178. *O'Laskey*, 273 Cal. Rptr. at 677.

are hiking in the woods. Y offers to pay X the $5.00 that Y owes X. X tells Y to pay the money to Z, because X owes Z $5.00. When X finds out that Y had taped the conversation, he sues Y. Under *Frio*, X wins because in the wilderness he had a reasonable expectation that no one overheard their conversation. Under *O'Laskey*, Y wins, because X had a reasonable expectation that Y would divulge the conversation to Z.[179]

The Ninth Circuit's example is illustrative, but is perhaps too "simple" by portraying the schism between *Frio/Coulter* and *O'Laskey* as if it were merely a puddle that could be crossed in one leap. Other examples, however, reveal that the split in the holdings runs much deeper and wider. For instance, consider the following conversations between X and Y as they are hiking in the woods:

- X to Y: "I'm very shy. Would you please call Z and ask her if she would like to have coffee with me tomorrow afternoon?"
- X to Y: "I have a few ideas for your big speech to the Rotary Club next week."
- X to Y: "Please tell Z that the milk in the refrigerator is bad and that she should not drink it."
- X to Y, shortly after discovering a fire in the woods: "I'm getting very tired. You run ahead and tell the park ranger that the fire is 2 miles northeast of the bend in Pike's Road."

Now suppose that, in each of the foregoing cases, Y secretly taped the remarks, and when X found out, he sued Y under section 632. According to *Frio/Coulter*, and *Flanagan*, X theoretically would be liable in each case (and could be criminally prosecuted), but under *O'Laskey* and *Deteresa*, X would not be liable. That is the ocean of difference between the *Frio/Coulter/Flanagan* line and the *O'Laskey/Deteresa* line.

B. Legislative History Surrounding the Debate

The Legislature repealed Penal Code section 653j in 1967, and replaced it with Section 632.[180] Its purpose was to change California from a "one-party-consent" state to a "two-party-consent" state.[181] Thus, instead

179. *Deteresa*, 121 F.2d at 464 n.1.

180. *See* A.B. 860, 1967 Leg., Reg. Sess. (Cal. 1967) [hereinafter A.B. 860]; *see also Frio*, 250 Cal. Rptr. at 822.

181. *See* A.B. 860, at 2; *see* CAL. PENAL CODE § 632(a).

of permitting one party to a confidential communication to record surreptitiously, the new law prohibited recordings without the consent of all parties to a conversation. In enacting section 632, however, the Legislature chose not to change the limiting language and definition of "confidential communication," but instead adopted verbatim the language and definition from the predecessor statute, section 653j(c).[182]

Section 653j permitted one party to a confidential communication to record her conversation without liability.[183] Thus, an individual never could reasonably expect that his communication with others was not being recorded because any other party to the conversation was free to record it without permission at any time. For the qualification "confidential communication" to have any meaning under former section 653j, it had to mean more than a communication that one simply did not expect would be *recorded.* In other words, a "confidential communication" must mean more than an expectation that one is being recorded since, under former section 653j's one-party consent system, such an expectation would always have been unreasonable. An interpretation to the contrary would have rendered the language of section 653j self-contradictory and in violation of basic principles of statutory construction.[184] Since section 632 uses the same definition of "confidential communication" as was used in section 653j, section 632's definition also should not be limited only to situations where there was a reasonable expectation that a communication would not be recorded.

Flanagan holds that liability does not attach if the person being recorded should have a reasonable expectation that he or she is being recorded *or* overheard.[185] After justifying this broad interpretation of "confidential" based on what the Court calls the "plain language" of section 632 and the court's previous holdings protecting privacy interests, the *Flanagan* decision offers some legislative history to support its opinion.[186] Oddly, however, the Court does not rely on the legislative history for section 632. Instead, the Court turns to the legislative history of statutes

---

182. The legislative history materials make clear that the Legislature did not intend to disturb the meaning of "confidential communication" found in former Section 653j. *See* A.B. 860 (explaining that section 632(c) "is adapted without change from the existing section 653j(c)").

183. CAL. PENAL CODE § 653j(a), *repealed by* CAL. PENAL CODE § 632 (1967).

184. *See, e.g.*, Hartford Fire Ins. Co. v. Macri, 842 P.2d 112, 116 (Cal. 1992) (stating that statute must be interpreted in manner that avoids internal inconsistency); Moyer v. Workmen's Comp. Appeals Bd., 514 P.2d 1224, 1229 (Cal. 1973) ("[V]arious parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.").

185. *Flanagan*, 41 P.3d at 580.

186. *Id.* at 580–81.

enacted many years after the passage of Section 632.[187]

In the years since its enactment in 1967, the Invasion of Privacy Act has been amended to prohibit the interception and recording of cellular radio, cordless telephone and cellular telephone conversations.[188] These statutes prohibit the interception and recording of *any communication* over those modalities; they do not require that the communication be "confidential" before liability can be imposed. Instead, one participating in a cellular or wireless communication need only demonstrate that he or she did not consent to its recording or interception. Although these statutes clearly contemplate a different—and stricter—standard barring recordings, *Flanagan* reasons that "it would be anomalous to interpret the Privacy Act as protecting all cellular or cordless phone conversations, but only those landline conversations that the parties intended to keep secret[.]"[189] The court supposedly constructs a "coherent statutory scheme" that "protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved."[190] In other words, the court seems to acknowledge the difference in language between section 632 and its sister statutes, but—disregarding the "confidential communication" limitation in section 632 and failing to cite any legislative history for section 632—determines that section 632 should be interpreted in the same manner as sections 632.5, 632.6, and 632.7.

Flanagan's citation to the legislative history of other laws appears contradictory. If the Legislature meant for a "confidential communication" under section 632 to include *any* communication that the parties did not believe was being recorded, that law would apply generally to *all* communications that were recorded or intercepted using any modality. Under this rationale, there was *no reason* for the Legislature to enact later statutes such as Sections 632.5, 632.6, and 632.7.[191] Knowing full well the language of section 632, the Legislature decided not to include the "confidential communication" requirement in cases of cellular and wireless communications. This allows the inference that the critical language in section 632 must mean that the Legislature intended "confidential" to mean *more than* a bare threshold requirement that the participants simply not

187. *Id.* at 581–82.

188. *See* CAL. PENAL CODE §§ 632.5–632.7.

189. *Flanagan*, 41 P.3d at 581.

190. *Id.* at 581–82.

191. *See* Lambert v. Conrad, 8 Cal. Rptr. 56, 62 (Ct. App. 1960) (stating "'[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed'" [citations omitted]).

expect to be recorded.

The legislative history that is actually helpful in interpreting the phrase "confidential communication" is surprisingly sparse, but one document indicates that *Flanagan*'s interpretation was wrong. On July 31, 1967, Jesse M. Unruh, the Speaker of the California Assembly and the author of Assembly Bill 860 (which later became section 632), wrote a letter to Governor Ronald Reagan urging him to sign Assembly Bill 860.[192] Unruh's letter explained: "This bill insures that anything said in a confidential conversation *which any one of the parties desires be kept between the parties* must be kept private."[193] Unruh's description of his proposed legislation comports with *O'Laskey*'s notion that a conversation is protected only if there is a reasonable expectation that the content will not later be divulged to third parties.[194] The letter shows that the Legislature wanted to protect only those communications where those talking could reasonably say they were "*entre nous*."

V. DECONSTRUCTION OF THE STATUTE'S LANGUAGE SHOWS *FLANAGAN* WAS INCORRECTLY DECIDED

For newsgatherers following *Flanagan*, section 632 comes down to three words: "confidential," "overhear," and "party."[195]

A. The Meaning of "Confidential"

Although a fair number of opinions, including the ones discussed above, address section 632, relatively few of those opinions parse the language of the statute itself. The two opinions that make the greatest effort to analyze the language in section 632, *Deteresa v. ABC, Inc.*,[196] and *Flanagan v. Flanagan*,[197] came to opposite conclusions on the term "confidential communications." *Flanagan* was meant to resolve the ambiguity in the term "confidential communication," and, although it supposedly resolved a split in the California Courts of Appeal, it left doubt that the word "confidential" means anything at all post-*Flanagan*, or that

---

192. *See* Letter from Jesse M. Unruh, Speaker, California Assembly, to Ronald Reagan, Governor, State of California, (July 31, 1967) (original on file with the California State Archives).

193. *Id.* (emphasis added).

194. *O'Laskey*, 273 Cal. Rptr. at 678.

195. Other terms have been given interesting, and somewhat dubious, interpretations through the years. For example, one court held that sexual acts can constitute "communication" under section 632. People v. Gibbons, 263 Cal. Rptr. 905, 908 (Ct. App. 1989).

196. 121 F.3d 460 (9th Cir. 1997).

197. 41 P.3d 575 (Cal. 2002).

its interpretation should apply in the media context.

In *Deteresa*, the Ninth Circuit emphasized the plain meaning of the statute, noting that "'courts will not interpret away clear language in favor of an ambiguity that does not exist.'"[198] To the Ninth Circuit there was little room for debate—the clear language of the statute meant that "if . . . neither party reasonably expects the communication to be confined to the parties, it is not confidential."[199] Interestingly, this is almost a direct quote from *Frio*, which held that "[a] communication must be protected if either party reasonably expects the communication to be confined to the parties."[200] *Frio*, however, went a step further, "impl[ying] . . . that unless someone reasonably expects that the communication will be overheard, the communication is confidential."[201] The Ninth Circuit's opinion is logically persuasive when it says "that [*Frio*'s] interpretation renders the first clause of section 632 surplusage."[202] In discussing the first clause of section 632(c), the court stated:

> The problem with *Frio* is that it transforms a specific exclusion to the definition of "confidential communication" into the definition itself. The first clause of section 632(c) explains that "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined thereto. . . [203]

Continuing, the court concluded:

> The second clause of section 632(c) goes on specifically to exclude communications "made in a public gathering . . . or in any other circumstances in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." *Frio*, in effect, reads the first clause of section 632 out of the statute.[204]

In other words, the Ninth Circuit rejected *Frio*'s suggestion that the Legislature said anything that is "confidential" may not be recorded. "Confidential" includes certain things and excludes that which one reasonably believes is being overheard or recorded, but is *anything* that

198. *Deteresa*, 121 F.2d at 464 (quoting People v. Coronado, 906 P.2d 1232, 1234 (Cal. 1995) (citations omitted)).
199. *Id.*
200. Frio v. Coulter, 250 Cal. Rptr. 819, 823 (Ct. App. 1988).
201. *Deteresa*, 121 F.2d at 464.
202. *Id.*
203. *Id.* (citation omitted).
204. *Id.* at 464–65.

someone does not reasonably believe is being recorded or overheard. The Ninth Circuit presumed that the Legislature did not engage in such redundant and superfluous drafting, concluding that "if someone does not reasonably expect the conversation to be confined to the parties, it makes no difference under the statute whether the person reasonably expects that another is listening in or not. The communication is not confidential."[205]

In *Flanagan*, the California Supreme Court, after evaluating the "inclusions" and "exclusion" language in section 632(c), came to the opposite conclusion.[206] Like the Ninth Circuit, the Supreme Court noted that section 632(c)'s definition of "confidential communication" has two clauses.[207] Unlike the Ninth Circuit's attack on *Frio*, however, the Court in *Flanagan* focused its energy on discounting the reasoning in *O'Laskey*, stating that *"O'Laskey*'s conclusion that a conversation is confidential only if a party has an objectively reasonable expectation that its content will not be disseminated to others does not conform with the import of the first clause [in Section 632(c)]."[208]

According to the California Supreme Court, *O'Laskey* was transforming the inclusionary language in section 632 into the definition itself.[209] *Flanagan* sailed a tack precisely opposite of the Ninth Circuit (which found that *Frio* had transformed an exclusion into the rule).

Flanagan reasons that the term "includes" enlarges the definition of "confidential communication."[210] Thus, according to the court:

> [T]he *O'Laskey* standard, under which the phrase "confidential communication" not only *includes* but is *limited to* conversations whose content is to be kept secret does not conform to the inclusive language in section 632, subdivision (c). This incompatibility disappears, however, if the phrase "confined to the parties" in the first clause of subdivision (c) is interpreted to refer to the actual conversation, not its content.[211]

And beginning with that remark, the Court proceeded to render the word "confidential" dependent only on the physical circumstances of the conversation, and entirely independent of the content of the conversation. If the phrase "confined to the parties" refers to the "actual conversation, not its content," then, according to the court, that phrase "includes within the

205. *Id.*
206. *See Flanagan*, 41 P.3d at 581–82.
207. *Id.* at 580.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*

statutory protection any conversation under circumstances showing that a party desires it not to be overheard or recorded[,]" and the second clause of section 632(c) then "excludes a conversation under circumstances where the party reasonably believes it will be overheard or recorded."[212] To the *Flanagan* Court, this analysis resolved an ambiguity in the statute about the definition of "confidential communication:"

> Under this construction, the two clauses of section 632 do not conflict nor leave any uncertainty: they act together in harmony to prohibit unconsented-to-eavesdropping or recording of conversations of whether the party expects that the *content of the conversation* may later be conveyed to a third party.[213]

In other words, in a non-media context, *Flanagan* suggests that secretly recording even the most mundane or inane conversation can lead to criminal and civil liability.[214]

Neither the Ninth Circuit nor the California Supreme Court made any real effort to assess the true "plain meaning" of the terms "confidential" or "confidential communication," which, under almost any formulation, relates to something secret or privileged.[215] Although neither Court paid much attention to the common notion of the word "confidential," only *Flanagan* renders that adjective virtually meaningless. And only the Ninth Circuit's interpretation is consistent with a common definition of confidential. By completely divorcing content from a section 632 analysis, *Flanagan* invites anomalous results in the law—protecting the recording of completely meaningless conversations that no one would consider "confidential." Of course, *Flanagan* was not a matter where investigative

---

212. *Flanagan*, 41 P.3d at 580.

213. *Id.* at 580–81.

214. Of the twenty-seven calls recorded in *Flanagan*, only three of the calls were introduced into evidence in the trial court. *Id.* at 578. Despite the sparse hard evidence of the content of the calls, the jury determined that twenty-four of the twenty-seven calls were "confidential." *Id.* The California Court of Appeal, employing the *O'Laskey* standard, reasoned that there was no evidence twenty-five of the twenty-seven calls were "confidential." *Id.* at 578–79. The Supreme Court, rejecting the *O'Laskey* standard, remanded the case to the Court of Appeal and effectively commanded that court to ignore the content of the calls. *Id.* at 582.

215. *See* BLACK'S LAW DICTIONARY 297 (6th ed. 1990) (defining "confidential" as "[i]ntrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence." Further, "confidential communications" are defined as follows:

> privileged communications such as those between spouses, physician-patient, attorney-client, confessor-penitent, etc. . . . Confidential communication is statement made under circumstances showing that speaker intended statement only for ears of person addressed; thus if communication made in presence of third party whose presence is not reasonably necessary for the communication, it is not privileged.

Id. at 298.).

reporters revealed information of crucial public concern and implication competing constitutional principles in the process.

B. The Meaning of "Overhear"

Under *Flanagan*, there clearly is no liability for secret recordings if the person being recorded reasonably should have known that he or she would be recorded *or* overheard. Thus, the "or overheard" language provides a window of relief to secret recorders.

Whether someone reasonably believes, or should know, that they can be "overheard" depends on their physical circumstances. For example, a the California Court of Appeal in *Wilkins v. NBC*,[216] expressly applying the *O'Laskey* standard to a section 632 claim, also reasoned that waiters and others in an open restaurant clearly could overhear what the complaining plaintiffs said, even though the other persons within earshot obviously were not parties to the communications.[217] The plaintiffs in *Wilkins* apparently made no effort to speak quietly or in any way conceal their communications from others that obviously were present. Such an open setting should present the paradigmatic occasion for one to be "overheard."

Flanagan focuses on "simultaneous dissemination to an *unannounced* second auditor," suggesting that "announced second auditors" would eliminate liability.[218] Thus, if the term "confidential" is to have a shred of meaning, the potential for liability must be eliminated when at least one obvious auditor can overhear the parties to a communication.

C. Determining Who Is a "Party"

Like "confidential" and "overhear," the term "party" must be limited if it is to have any meaning. A limitation is implied in the facts of *Frio*, *Coulter v. Bank of America*,[219] and *Flanagan*. The court in *Frio* noted that all of the communications in that case were conducted by telephone "on a one-on-one basis."[220] In *Coulter*, the court found it significant that most of the conversations at issue were held "in private offices with no one else present," and that all of the forty conversations in that case either were one-on-one in person or on the telephone.[221] In *Flanagan*, all of the recorded

---

216. 84 Cal. Rptr. 329 (Ct. App. 1999).
217. *Id.* at 336.
218. *Flanagan*, 41 P.3d at 581 (emphasis added).
219. 33 Cal. Rptr. 766 (Ct. App. 1994).
220. *Frio*, 250 Cal. Rptr. at 823.
221. *Coulter*, 33 Cal. Rptr. 2d at 768, 771 (emphasis added).

telephone conversations were between two family members.[222]

To date, California courts have not determined who can be called a "party" to a communication under section 632. The issue is important because whether one is a "party" to a communication can impact whether one can "overhear" the communication for the purpose of avoiding liability. For example, consider the following:

- X and Y are co-workers and are riding in an elevator together. Z, a third co-worker, enters the elevator and begins speaking to Y about an invoice. X works in a different department and has no role in filling invoices. X is carrying a recording device under his coat. Y knows about the recording device, but Z does not.
- A is a broker holding a seminar on how to invest in the stock market. The seminar is open to anyone upon the payment of an entry fee. Dozens of people attend A's seminar. X is one of the people in attendance, and he is using a device in his briefcase to record A's seminar.
- X and Y are sitting together in a doctor's office. The doctor, Z, walks in, introduces himself to Y, and proceeds to examine Y. The doctor never speaks directly to X and X never speaks directly to Z, not even to introduce one another. X and Y are undercover reporters and X is carrying a secret recording device.

Can X reasonably be considered a "party" to the communications in any of the foregoing examples? If X is a party, then his secret recordings arguably are not consented to by all parties, and therefore are illegal under California law. If, on the other hand, X is not a party, then he is one who has "overheard" the communications and therefore cannot be held liable for his recordings. In each of the preceding examples, X was a passive, silent, obvious presence and was not the direct object of anyone's thoughts or communication. In such cases, as well as others, X cannot reasonably be considered a "party" to any communication. An interpretation to the contrary makes "party," "overheard" and "confidential" completely useless terms.

222. *Flanagan*, 41 P.3d at 578.

D. Society Is Served by Newsgatherers' Secret Taping When the Public Interest Is at Stake.

A balancing of interests requires a weighing of one right against another. The right of persons in California to be free from secret recordings is not absolute. For example, California Penal Code section 633.5 declares:

> Nothing in [the Privacy Act] 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 that communication of the crime of extortion, kidnapping, bribery, any felony involving violence against a person, or a violation of Section 653m.[223]

The statute is an explicit recognition that we, as a society, do not find it in our interests to prohibit all surreptitious recording of conversations. In more tangible terms, if a party reasonably believes that the communication will relate to the commission of specified crimes, she may wire herself in order to record the conversation.[224]

Since it may not reasonably be debated that the California Legislature has expressed that eavesdropping is, under some circumstances, not a bad act, the question is whether those limited circumstances set forth in Penal Code section 633.5 are the only circumstances under which secret audiotaping should be allowed. The answer—rooted in the powerful constitutional tradition and mandate that basic rights should be carefully balanced against one another on a case by case basis—is an emphatic "no."

News gatherers should be allowed to engage in secret audiotaping when exercising their special role as sources of information for the citizenry. Thomas Jefferson, in a letter to Edward Carrington dated January 16, 1787, declared his passionate faith in the press:

> The people are the only censors of their governors: and even their heirs will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give

---

223. CAL. PENAL CODE § 633.5. Section 653m proscribes annoying and obscene, threatening, or anonymous phone calls. *Id.* § 653m.

224. *See, e.g.*, People v. Montgomery, 132 Cal. Rptr. 558 (Ct. App.1976) (permitting a councilman who was subject of alleged bribe attempt by defendant to record their telephone conversation); *People v. Wojahn*, 337 P.2d 192 (Cal. Ct. App. 1959) (holding legal a rape victim's use of a concealed microphone on her person to secure incriminating evidence against the defendant doctor that had raped her on a prior office visit).

> them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. . . . [W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them."[225]

It is apparent that, if Jefferson had been able to foretell the advent of television, he would have applauded advances in the democratic process dramatically achieved by allowing every person to receive the news in an understandable fashion.

The "Fourth Estate" is the turn of phrase devised to reflect the notion that the press is equal to the branches that govern a truly democratic state, an estate equally responsible for contributing to wise policy and law-making as its three governmental counterparts.[226] It is frequently attributed to the nineteenth-century historian, Thomas Carlyle, though he himself seems to have attributed it to Edmund Burke:[227]

> Burke said there were "Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important than they all. It is not a figure of speech, or a witty saying; it is a literal fact . . . Printing, which comes necessarily out of Writing, I say often, is equivalent to Democracy: invent Writing, Democracy is inevitable. . . . Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what rank he has, what revenues or garnitures: the requisite thing is that he have a tongue which others will listen to; this and nothing more is requisite.[228]

The special role of the press using modern techniques has also been recognized. Justice Potter Stewart of the United States Supreme Court recognized the peculiar illuminating power of taped recordings and the role they play in the special democratic function of the press.[229] He also articulated that the press in certain circumstances must be allowed to record

225. 11 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd ed., Princeton Univ. Press 1955) (Jan. 1, 1787–Aug. 6, 1787).

226. *See* THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 164 (New York, Charles Scribner's Sons 1897) (Edinburgh, Univ. Press 1841).

227. The sobriquet is also alternatively thought to have been coined in France, adding it to the other three "estates": the aristocracy, the church and the bourgeoisie. *See id.*

228. *Id.* at 349–50.

229. Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring in the judgment).

and report by being allowed into areas that the general public cannot enter:

> When on assignment, a journalist does not [act] simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons. "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised." *Branzburg v. Hayes*, 408 U.S. 665, 726 (dissenting opinion). Our society depends heavily on the press for that enlightenment. Though not without its lapses, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ." *Estes v. Texas*, 381 U.S. 532, 539. See *Mills v. Alabama*, 384 U.S. 214, 219; *Grosjean v. American Press Co.*, 297 U.S. 233, 250.
>
> That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively. A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.[230]

In another concurring opinion, Justice Byron White expressed the rationale for why someone recording his own conversation should not be penalized:

> When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead

230. *Id.*

recording it or transmitting it to another."[231]

Another concept that cries out for recognition in the analysis of whether news gatherers can surreptitiously record is the recognition that the right of privacy should not stand above other rights of equal or greater dignity, such as freedom of speech or freedom of the press. Some thinkers even believe that privacy should be ignored altogether: "[A]n indifference to privacy . . . is . . . thought by some to be . . . desirable. . . . People who hold this view claim that institutions of privacy are conducive to social hypocrisy, interpersonal exploitation through deception, and even asocial or antisocial loyalties."[232]

The idea that "interpersonal exploitation through deception" may be the result of too much exulting of the right of privacy is a construct that cannot be ignored. "The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees. But this must be accommodated to the need for reasonable latitude for the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy. The courts are called upon here as elsewhere in the law, to harmonize individual rights and community interests."[233]

The balancing of the rights of privacy with the equally heavy right that the public has to know of potentially harmful information that affects it requires significant flexibility and case-by-case analyses. Some information simply cannot be classified as "nobody else's business." In dealing with credit agencies or banks, it is clear that much information is the business of other people. This is true for the private matters we relate to our doctors and lawyers as well. Persons holding themselves out to do business with the public, for example, those providing the populace with goods, services, and advice, cannot keep everything private, certainly not their malfeasance or shoddy goods. Anyone dealing with these purveyors has a legitimate concern as to matters affecting the joint business transactions and much more. A person is free to choose whether to enter

---

231. Katz v. United States, 389 U.S. 347, 363 n.* (1967) (White, J., concurring) (internal citation omitted); *see also* United States v. DeVore, 423 F.2d 1069, 1074 (4th Cir. 1970), *cert. denied*, 402 U.S. 950 (1970) (holding that, when a defendant has a conversation with another person, he relinquishes his right of privacy with respect to that person because "it necessarily must follow that a recording of what was said may either be used to corroborate the revelation, or simply as a more accut[sic] means of disclosure"").

232. *See* Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 6 (Ferdinand David Schoeman ed., 1984).

233. *Afro-American Pub'g Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966) (en banc) (footnote omitted).

into those types of transactions, but they cannot enter into them without expecting that a degree of privacy will have to be given up, sometimes on both sides.

It even can be said that there is a universal human tendency to invade the privacy of others and "of society to engage in surveillance to guard against anti-social conduct."[234] Although Warren and Brandeis in 1890,[235] and thousands of persons since, have expressed outrage at the public's insatiability to learn things about other people, the tendency to want to know should come as no surprise. Curiosity is a human trait that can in no way be arbitrarily or universally denominated immoral:

> Though the degree to which action will be taken to satisfy human curiosity varies according to cultural and personality factors, men and women in all primitive societies try to find out what has been happening to members of their own family, other villagers, other tribal members, and so forth. Gossip, which is only a particular way of obtaining private information to satisfy curiosity, seems to be found in all societies. People want to know what others are doing, especially the great and the powerful, partly as a means of gauging their own performances and desires and partly as a means of vicarious experience, for by satisfying curiosity the individual experiences a sense of pleasure from knowing about exciting or awesome behavior in others.[236]

In these days of terrorism, domestic bombings, anthrax scares, kidnappings, snipers, and corporate scandals, one cannot deny that the tendency or desire of some individuals to keep information from the rest of us is not a value that we may wish universally to admire and protect. If any one of these recent horrors had been exposed by secret audiotaping by a journalist, no one would be crying out about the "insatiable public" and a "pandering press."

Judge Posner of the Seventh Circuit is well-known to apply economic analysis to many areas of the law, including "to explore the dissemination and withholding of information in personal as well as business contexts, and thus to deal with such matters as prying, eavesdropping 'self-advertising,' and gossip."[237] He states that ""[p]eople invariably possess

234. ALAN F. WESTIN, *The Origins of Modern Claims to Privacy, in* PRIVACY AND FREEDOM 8, 19 (1967).

235. *See generally* Warren & Brandeis, *supra* note 23.

236. WESTIN, *supra* note 234, at 19.

237. Richard A. Posner, *An Economic Theory of Privacy, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 333 (Ferdinand David Schoeman ed., 1984). One does not have to

information, including the contents of communications and facts about themselves, that they will incur costs to conceal.'"[238] Continuing, he says that "'[s]ometimes such information is of value to other people—that is, other people will incur costs to discover it [and] [t]hus we have two economic goods, 'privacy' and 'prying.'"[239] Posner goes on to state:

> The strongest defenders of privacy usually define the individual's right to privacy as the right to control the flow of information about him. A seldom-remarked corollary to a right to misrepresent one's character is that others have a legitimate interest in unmasking the misrepresentation.
>
> Yet some of the demand for private information about other people seems mysteriously disinterested—for example, that of the readers of newspaper gossip columns, whose "idle curiosity" has been deplored, groundlessly in my opinion. Gossip columns recount the personal lives of wealthy and successful people whose tastes and habits offer models-that is, yield information – to the ordinary person in making consumption, career, and other decisions. The models are not always positive. The story of Howard Hughes, for example, is usually told as a morality play, warning of the pitfalls of success. That does not make it any less educational. The fascination with the notorious and the criminal – with John Profumo and with Nathan Leopold – has a similar basis. Gossip columns open people's eyes to opportunities and dangers; they are genuinely informative.
>
> . . . .
>
> . . . There is apparently very little privacy in poor societies, where, consequently, people can readily observe at first hand the intimate lives of others. Personal surveillance is costlier in wealthier societies, both because people live in conditions that give them greater privacy and because the value (and hence opportunity cost) of time is greater – too great, in fact, to make the expenditure of a lot of it in watching the neighbors a worthwhile pursuit. An alternative method of informing oneself about how others live was sought by the people and provided by the press. A legitimate and important function of the press is to

---

agree with the application of the economic theory nor Judge Posner's conclusions to admire the elegance and clarity of his thinking regarding the balancing of rights. He bemoans the lack of rigor in this area. "Discussions of the privacy questions have contained a high degree of cant, sloganeering, emotion, and loose thinking." *Id.* at 345.

238. *Id.* at 333.

239. *Id.* at 333–34.

> provide specialization in prying in societies where the costs of obtaining information have become too great for the Nosy Parker.
>
> . . . . It is no answer that, in Brandeis's phrase, people have "the right to be let alone." Few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves. Why should others be asked to take their self-serving claims at face value and prevented from obtaining the information necessary to verify or disprove these claims?[240]

The answer is obvious. We should not be forced to take self-serving claims at face value and be prevented from verifying or disproving claims that are important, even vital, to our lives. The press has a long history of being tenacious and motivated in bringing to light matters that some people wished that others would accept at face value.[241] One author has even asserted that the public likes the idea of crusading reporters who stand up for the community and go where they cannot go.[242]

The United States Senate recognized this need to permit procedures for attaining sufficient information and allowing the press to act as a proxy in doing so.[243] In amending the Electronic Communications and Privacy Act of 1986,[244] reacting to a case decided earlier, the Senate Committee report expressed the policy rationale for giving the press the leeway to record conversations.[245] The Act is a one-party statute, allowing one party to the conversation to consent to secret recording.[246] However, under certain circumstances, that consent is invalid. At the time of the earlier case, *Boddie v. ABC*,[247] one-party interception was allowable under the Act

240. *Id.* at 334–35, 335, 338.

241. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers case); Landmark Comm., Inc., v. Virginia, 435 U.S. 829 (1978) (sanctioning a newspaper and its sources for publishing charges of incompetence against a juvenile court judge even though they came from confidential judicial disciplinary proceeding); *Dateline: High Wire Acts* (NBC television broadcast, Oct. 27, 1995) (recording company executives instructing on high-pressure techniques, usually used on senior citizens, to donate to non-existent relief efforts, leading to indictments in United States v. Burr, No. 95-1876-B (S.D. Cal. 1995); *Dateline: Sweating It Out* (NBC television broadcasts on Sept. 24 and Oct. 20, 1996) (documenting disregard of safety, wage, and immigration laws in garment industry); *The Action News* (KCBS-TV, Los Angeles, May 19–23, 1991) (showing recruitment of the reporter to file a bogus workers' compensation).

242. Neil Hickey, *Where TV Has Teeth*, COLUM. JOUR. REV., May/June 2001, at 42.

243. *See* S. REP. NO. 99-541, at 17, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571 [hereinafter SENATE REPORT].

244. 18 U.S.C. § 2511 (2000).

245. *See* SENATE REPORT, *supra* note 243, at 17–18.

246. *See* discussion *supra* Part II.

247. 731 F.2d 333 (6th Cir. 1984).

"unless such communication is intercepted for the purpose of committing any criminal or tortiuous act in violation of the Constitution or laws of the United States or of any State for the purpose of committing any other injurious act."[248] In the *Boddie* matter, a broadcasting network had secretly recorded a person allegedly involved in a scandal based on allegations that a judge granted leniency to female defendants in return for sexual favors.[249] The plaintiff granted an interview but did not know he was being recorded.[250] This is what a Congressional committee said about it:

> While the appeals court decision in *Boddie* merely sent the case back for further factual development, it is clear from the facts of the case that the term "improper purpose" is overly broad and vague. The court's opinion suggests that if the network intended to cause "insult and injury" to plaintiff Boddie, she might be entitled to recover. This interpretation of the statute places a stumbling block in the path of even the most scrupulous journalist. *Many news stories have been brought to light by recording a conversation with the consent of any one of the parties involved – often the journalist himself. Many news stories are embarrassing to someone.* The present wording of section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under section 2511, *even if the interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort. Such a threat is inconsistent with the guarantees of the first amendment.*[251]

The Act was amended by deleting the words "for the purpose of committing any other injurious act," thus reducing the threat to legitimate newsgathering.

Although the Act is federal law and a state like California may impose limitations on its citizens' conduct on independent grounds, it may not do so if the limitations are unconstitutional. The Senate clearly felt that uncertain language in the Act in question threatened "responsible news-gathering activities," that is, the gathering of information about a highly newsworthy event.[252] This does not lead to the conclusion that all such restrictions are unconstitutional, but does recognize a strong policy

248. 18 U.S.C. § 2511(2)(d) (emphasis added).
249. *Boddie*, 731 F.2d at 335.
250. *Id.*
251. SENATE REPORT, *supra* note 243, at 17 (emphasis added).
252. *Id.*

preference for allowing responsible and scrupulous newsgathering.

In *Bartnicki v. Vopper*,[253] the United States Supreme Court decided the question of "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."[254] In *Bartnicki*, persons whose cellular telephone conversation had been intercepted and taped by some unknown third party sued media defendants who had obtained the tape without knowing the original source, but knowing that it had to have been intercepted illegally.[255] During contentious collective-bargaining negotiations between a union representing teachers at a Pennsylvania high school and the local school board, the unidentified person intercepted and recorded a cell phone conversation between the chief union negotiator and the union president.[256] The media defendants broadcast the tape[257] and the plaintiffs sued, asserting claims under Federal and Pennsylvania wiretapping acts.[258] Those acts made not only the interception of conversations illegal, but the publication of information so gained as well.

The Court refrained from deciding a broader question of whether the publication of the truth could *ever* be punished consistent with the First Amendment, stating: ""We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.[259]

This is the voice of moderation and modulation. It is not clear that a similar diffidence was in the California Supreme Court's mind when deciding *Flanagan*. As discussed throughout this Article, the Court gave no clear signal of whether it would decide a secret recording matter differently, if presented with a media case reporting on a matter of public interest.

Bartnicki held "that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern" and that the no-publication rules of the statutes were unconstitutional.[260] The outcome in *Bartnicki* is pertinent to the thesis of

253. 532 U.S. 514 (2001).

254. *Id.* at 528.

255. *Id.* at 517–18.

256. *Id.* at 518.

257. Thus, the case did not involve illegal reporting, but rather publication after obtaining a tape not illegally gathered by the publisher.

258. *Id.* at 520.

259. *Id.* at 529 (quoting Florida Star v. B.J.F., 491 U.S. 524, 533 (1989)).

260. *Bartnicki*, 532 U.S. at 535.

this Article urging balancing of societal interests on a case by case basis, taking into consideration that society is well-served on some occasions by breaches of otherwise protected confidentiality, particularly when the persons engaged in the breach are acting in a constitutional capacity in the public interest.

Justice Breyer, in a concurring opinion joined by Justice O'Connor, stated that the type of statements made by the participants to the conversation simply was not of the kind that could be considered private:

> [T]he speakers had little or no legitimate interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about "blow[ing] off . . . front porches" and "do[ing] some work on some of these guys," thereby raising a significant concern for the safety of others. Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety.[261]

The constant chord sounding throughout all of the cases and other sources quoted above supports the idea that *Flanagan* cannot possibly—and should not—be interpreted so narrowly as to halt all secret recording of conversations by newsgatherers.

A leading case relating to society's views on expectations of privacy occurred in *Desnick v. ABC, Inc.*[262] Although not a California case, the California Supreme Court referred to this Seventh Circuit decision in one major opinion on secret recording by the press.[263] In *Desnick*, a television network surreptitiously video and audiotaped patient consultations taking place inside an eye clinic.[264] The issue was whether the network and its employees had violated state wiretapping statutes.[265] Judge Posner, writing for the Seventh Circuit Court of Appeals, construed the Wisconsin and Illinois wiretapping statutes in such a way that the surreptitious taping by the network was outside the scope of those statutes.[266] Among other things, the statutes required that the recording be done with the purpose to commit a crime, or a tort or other injurious acts.[267] The Court found that the recording had not been done with the purpose to commit any of those proscribed acts, stating that "[t]elling the world the truth about a Medicare

261. *Id.* at 539 (citation omitted).
262. 44 F.3d 1345 (7th Cir. 1995).
263. Sanders v. ABC, Inc., 978 P.2d 67, 76–77 (Cal. 1999).
264. *Desnick*, 44 F.3d at 1348.
265. *Id.* at 1353.
266. *Id.* at 1353–1354.
267. *Id.* at 1353.

fraud is hardly what the framers of the statute had in mind in forbidding a person to record his own conversations if he was trying to commit an 'injurious act.'"[268]

The surreptitious taping occurred in a business setting—an eye clinic. There was no communication that included "intimate personal facts concerning the two individual plaintiffs." The only conversations were with the defendant's employees.[269] The purpose of the reporters was to see if the physicians would recommend unnecessary medical procedures.[270] In *Desnick*, two more elements that might make up the compound of privacy were put into the crucible: whether the taping took place on business premises and whether reporters did what they did to uncover fraud on the part of the business owners.[271] The case is an excellent example of how courts outside California have viewed secret audiotaping by news gatherers.

In a case recently decided, *Hornberger v. ABC, Inc.*,[272] the Appellate Division of the New Jersey Superior Court considered the New Jersey statute that makes it a crime to intercept any oral communication or disclose it, where "oral communication" is one uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[273] There, three African-American men or "testers," agreed to cruise in an expensive car to find out if the police would stop them. Plaintiff officers stopped the car for a minor traffic violation, ordered the three men from the car, and searched the car, all of which was surreptitiously recorded by the network and later broadcast under the title "Driving While Black."[274]

The three-judge court synthesized cases throughout the United States dealing precisely with the issue faced by the *Flanagan* court and came out strongly on the other side of the fence, finding that the police officers did not have a reasonable expectation of privacy during the search:

> [A] few courts have distinguished between a reasonable expectation of privacy and a reasonable expectation that one's conversation will not be recorded. *Boddie v. ABC*, 731 F.2d 333, 339 (6th Cir.1984) (defendant-journalist filmed a participant in a scandal, without her consent); *Walker v. Darby*, 911 F.2d 1573,

268. *Id.* at 1353–54.
269. *Id.* at 1345.
270. *Desnick*, 44 F.3d at 1355.
271. *See id.* at 1348.
272. 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002).
273. N.J. STAT. ANN. § 2A:156A–2(b) (West 1985).
274. 799 A.2d at 571–72.

1579 (11th Cir.1990) (a Post Office supervisor intercepted oral communications of a letter carrier); *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir.1993) (plaintiffs-police officers accused of using excessive force on a prisoner alleged that an audio recording of the incident violated the federal Act).

The standard set forth in these latter three cases seems unduly restrictive. Few conversations occur in which the participants expect that their speech will be intercepted. (Intercept is defined as "the aural or other acquisition of the contents of any . . . oral communication through the use of any electronic, mechanical or other device." N.J.S.A. 2A:156A–2(c).) *Under the more restrictive standard, almost every oral communication, including shouting in a crowded public place, would be protected against interception, disclosure of its contents, and use of its contents*. N.J.S.A. 2A:156A–3.

The majority of courts which have considered this issue, as well as the most recent decisions, have adopted the reasonable-expectation-of-privacy standard. Though the Eighth and Eleventh circuits applied the expectation-of-non- interception test in *Angel v. Williams* and *Walker v. Darby*, more recent decisions in both circuits have used the expectation-of-privacy test, without acknowledging or discussing the expectation-of-non-interception standard or any difference between the two. See *U.S. v. Peoples*, 250 F.3d 630 (8th Cir.2001), and *U.S. v. McKinnon*, 985 F.2d 525, 527 (11th Cir.1993).[275]

Following *Flanagan*, the Ninth Circuit Court of Appeals recently affirmed a district court's decision to grant summary judgment to a media entity accused of, among other things, tortiously invading the privacy of the owner of a medical laboratory that allegedly misread pap smears.[276] Because the federal court's subject matter jurisdiction rested on diversity jurisdiction, the intrusion upon seclusion claim was evaluated under Arizona law.[277] However, due to the paucity of Arizona law on privacy issues, the court extensively cited California decisions, including *Shulman v. Group W Productions, Inc.*,[278] and *Sanders*, but the court never mentioned *Flanagan*.[279] Although the court looked to California law, it also recognized that California law was more protective of privacy rights

275. *Id.* at 591–92 (emphasis added to text only).
276. Medical Lab. Mgmt. Consultants v. ABC, Inc., 306 F.3d 806 (9th Cir.2002).
277. *Id.* at 812.
278. 955 P.2d 469 (Cal. 1998).
279. *See Medical Lab.*, at 815–18.

than Arizona law.[280] Nevertheless, the court reasoned that even under California's treatment of privacy laws, the owner had no reasonable expectation of privacy:

> However, even if we assume that the Arizona Supreme Court would embrace an interest in limited privacy as broad as that articulated by the California Supreme Court, we still conclude that as a matter of law [the owner's] privacy expectation was not reasonable. The expectation of limited privacy in a communication—namely the expectation that communication shared with, or possibly overheard by, a limited group of persons will nonetheless remain relatively private and secluded from the public at large—is reasonable only to the extent that the communication conveys information private and personal to the declarant. [citations omitted] *Shulman* and *Sanders*, the two California Supreme Court opinions addressing the interest in limited privacy, are illustrative of this point. Both opinions recognized the limited privacy interest in the context of private and personal communications that were interpreted by the press.[281]

In evaluating whether the owner had a reasonable expectation of privacy, the Ninth Circuit examined the "location" of his conversations with undercover ABC reporters carrying hidden cameras and posing as a cytotechnologist and a computer expert.[282] The court determined that there was no reasonable expectation of privacy in the owner's decision to invite strangers to the administrative offices of his "semi-public place of business."[283] The court also noted that the conversations "did not involve [the owner's] private or personal affairs," and therefore that the owner "did not have an objectively reasonable expectation of privacy in the contents of the conversation."[284] Simply put, the court held that ABC's "covert videotaping of a business conversation among strangers in business offices does not rise to the level of an exceptional prying into another's private affairs."[285] It is also worth noting that the Ninth Circuit determined that ABC's broadcast was about "a subject of unquestionable concern—the frequency of testing errors by medical laboratories that analyze women's

280. *Id.* at 816; *see also id.* at 815–16 (noting the "significant difference between California and Arizona law in the area of electronic eavesdropping").

281. *Id.* at 816.

282. *Id.* 810, 813–14.

283. *Id.* at 813–14.

284. *Id.* at 814.

285. *Medical Lab.*, 306 F.3d at 819.

pap smear slides for cervical cancer."[286]

There unquestionably is a strong strain in the law governing secret recording that favors allowing news gatherers to disseminate important information in pursuit of First Amendment goals. When a conversation occurs that is a matter of high public concern, particularly when harm to others is present or on the horizon, a rule that mandates punishment of secret recording by news gatherers just because the person recorded thought he was speaking only to persons or people around him is contrary to First Amendment values, a large body of law, concepts of the need for balancing of competing values and a desire to protect society. One has only to consider whether we as a nation would have criminally prosecuted the press for unearthing in advance any of the destructive conduct, September 11 being only one example, occupying our minds and hearts over the past decade. A contrary rule like the one in *Flanagan* helps leaves us all at risk.

Still, one may conscionably ask, Why allow the press to secretly record? Or, Why not rely upon our law enforcement agencies? There are several answers to this query. First, law enforcement agencies are spread too thin and only deal with matters like *triage* in a French field hospital. Not enough money exists in any municipal, state or federal budget to ferret out all of the wrongdoing that harms people every day. Second, law enforcement and other agencies of the government are frequently the targets of the secret recording. In California, for instance, officers on a routine stop may now feel that they could not be recorded like the officers in New Jersey. Consider also the fortuitous recording of the Rodney King beating. If the tape had included sound, the cameraman might have been guilty of a crime under *Flanagan*. The social reward to encourage government observation of wrongdoing is not nearly sufficient to achieve the beneficial goals that are served by scrupulous investigative reporting. Finally, the press is a much safer secret recorder than any government agency. The power of the market keeps it largely under control in its investigative capacity.

The press has influence upon people and government only insofar as it can persuade listeners and readers. It lacks any coercive power whatsoever. It cannot cause any change in government or social policy without convincing the electorate that change is necessary. It has been said that the press is not elected by anybody. In fact, its conduct is subject to election by a gigantic jury. The press is elected by its viewers and readers. If secret recording by the press fails at its job because the public is

---

286. *Id.* at 821.

affronted by secret recording, the producers and the publishers will be the first to pull back. And, all importantly, the press cannot exercise police power over anyone, but rather can only publish information. Truth itself coerces no one, but responds to the demands of viewers and readers.

Further, if the rule regarding secret recording is that it may not be done by any private person if the party recorded has a reasonable expectation of privacy, there can and will be no wholesale rush for the press to secretly record. The limits imposed thereby are both rational and restrictive. Given those limits, we as citizens should be happy that investigators exist acting on our behalf with the resources, the training, and the impetus to help ferret out bad meat, drunken doctors, corrupt judges, abusive teachers, highway builders on the take, unabombers, racist cults, unrestrainable priests, and, yes, lying journalists. If there is a legitimate public interest in investigative reporting—and we doubt that any argument can be mounted against it—then *Flanagan*, if it applies to the press at all, has been wrongly decided.

The wrongheadedness of the *Flanagan* standard was best expressed by the same court that devised it, in its own earlier opinions about privacy where the media had recorded conversations:

> In deciding, therefore, whether a reporter's alleged intrusion into private matters (i.e., physical space, conversation or data) is "offensive" and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. Information collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.[287]
>
> [W]e do not hold or imply that investigative journalists necessarily commit a tort by secretly recording events and conversations in offices, stores or other work places. Whether a reasonable expectation or privacy is violated by such recording depends on the exact nature of the conduct and all the surrounding circumstances. In addition, liability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors the motive

287. *Shulman*, 955 P.2d at 493.

of the alleged intruder.[288]

No sound reason exists for finding that eavesdropping by a newsgatherer should be balanced upon the scale of justice against the right of privacy only if a journalist is sued at common law, but not if she is sued for violation of a statute for the identical acts. Courts, lawyers, parties, and the people are not served by such a discrepancy.

V. CONCLUSION

Looking back at *Flanagan v. Flanagan* in an attempt to navigate uncharted waters, the condition of that leaky vessel must be kept in mind. The Flanagan family was, in the popular parlance of the day, dysfunctional. A son and a mother each claimed they had been secretly recorded while on the telephone in a dispute about wills, money, and an alleged desire to kill a husband.

That domestic squabble formed the murk out of which the California Supreme Court attempted to forge a bright-line rule to guide court and counsel in approaching thousands of fact situations that differ so markedly from the recordings made there that the compass was certain to be flawed. One of the flaws that will continue to generate great uncertainty is that the rule conflicts with the very principles set forth in two earlier decisions by the same court, thus giving rise to anomalies that seem to impose disparate liability depending on the cause of action alleged in plaintiff's complaint.

The holding of *Flanagan,* if restricted to its peculiar facts as it should be, only applies to the recording of telephone conversations between private parties not engaging in and of the classically democratic and traditional functions of the press. However, the breadth of the language is alarming. The rule laid out in that case should not apply to news gatherers using hidden recording devices to report on matters of public interest in situations in which the parties have no reasonable expectation that the words they are speaking will not be repeated to others. Although news gatherers must proceed with caution, there are strong arguments that the Flanagan family spat should not be the occasion for establishing policy governing our society in attempting to uncover the truth about vital, even life-threatening, issues.

288. *Sanders*, 978 P.2d at 69.