

Harm to Self-Identity: Reading Goffman to Reassess the Use of Surreptitious Recordings as Evidence

R O B E R T D I A B *

ABSTRACT

For decades in Canada, surreptitious recordings made by civilians have been admissible in criminal and family trials and labour and employment cases. Courts and tribunals have applied a similar test for admissibility that asks whether a recording is more probative than prejudicial. Recordings are readily seen to be invasive, but the concept of prejudice applied in most cases concerns the fairness and accuracy of what is captured in a recording and not its social or psychological impact on the person affected. This article draws on privacy theory and on Erving Goffman's *The Presentation of Self in Everyday Life* to argue that jurisprudence to date has failed to recognize the nature and degree of prejudice surreptitious recordings cause an affected person. A better understanding of this supports a revised test for admission. A recording that captures a private conversation should not be admitted, except in the last resort, which would include where the prosecution has no other means of proving a material fact in issue, where innocence is at stake, or in a civil case where it is necessary to rectify a significant power imbalance affecting credibility.

I. INTRODUCTION

Surreptitious recording is an invasive but long-standing practice, made more common today by the ubiquity of small recording devices. Recognizing the severity of this form of intrusion, the *Criminal Code* makes it a crime to record a conversation to which one is not a party.¹ Police or police

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¹ *Criminal Code*, RSC 1985, c C-46, s 184(1) [*Criminal Code*].

informants, and civilians who are party to a conversation, may make a recording without committing an offence under the *Code*,² but it may be tortious for civilians to do so under provincial privacy law.³ Yet, despite a surreptitious recording being criminal, possibly tortious, or at the very least morally questionable, for decades, courts in criminal, family, and employment cases and tribunals in labour cases have routinely admitted them into evidence.⁴

People make secret recordings to capture an admission. Most of the jurisprudence dealing with civilian-made recordings involves audio recordings made surreptitiously by a party to the conversation. Yet, whatever the form or scenario in which recordings are made, courts and tribunals are concerned not with their legality but with their admissibility. The precise test for admission differs across the four areas of law noted, but they commonly involve a balancing of probative value and prejudice.⁵ Where a recording has strong probative value, it stands a good chance of being admitted. By admitting, courts and tribunals implicitly condone the practice of secret recording, enabling, if not abetting, its further use.

While the use of a balancing test makes admission likely where probative value is high, recordings are admitted with some frequency due also to a limited understanding of their prejudicial effect. In most cases, courts and tribunals consider prejudice primarily in terms of the fairness or accuracy of the conversation a recording depicts—which is to say, the concern about prejudice relates primarily to the impact a recording may have on the fact-finding process rather than on the individual him or herself. The inquiry into prejudice, therefore, often duplicates or extends the assessment of probative value. Family and labour cases present a partial exception to this in commonly expressing a policy concern that admitting secret recordings will encourage the practice, making family separations more acrimonious or complicating power relations between management and labour.⁶ Yet courts and tribunals, along with earlier scholarship on the topic, have tended to say little more about prejudice beyond noting the invasiveness of the practice or the notion that, as one author put it, “[t]here is something inherently devious in surreptitiously recording conversations...

² *Ibid.*, s 184(2); police and police informants need a warrant in order for recordings they make to comply with the guarantee to be “secure against unreasonable search or seizure” in section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]; *R v Duarte*, [1990] 1 SCR 30, 65 DLR (4th) 240 [*Duarte*].

³ Legislation is discussed in Part II below.

⁴ The cases are surveyed below.

⁵ The test in each context is explored in Part II below.

⁶ Cases are cited in Part II below.

[a] malodorous hallmark of dishonesty.”⁷ Case law and commentary have tended not to inquire into the social or psychological impact that admitting a recording may have on a person.

This article draws on privacy theory and Erving Goffman’s dramaturgical theory of self-presentation to advance the argument that courts and tribunals have failed to recognize the nature and degree of harm that surreptitious recordings may cause. A better understanding of this supports a more nuanced and restrictive test for admission.

Privacy theory illuminates the impact of surreptitious recording by shedding light on the connection between a person’s ability to control information or observations about themselves and their ability to maintain personal and professional identity, relationships, and mental health. A number of canonical privacy theorists point to Goffman’s *The Presentation of Self in Everyday Life*⁸ to explain the nature of these connections. Goffman develops a theory of self-identity and personhood premised on the idea of “impression management” and of the self as the performance of a character before a specific audience. For Goffman, the self is the product of a performance of character, not the cause. Carrying out the performance depends on an effective separation between a “front” and “backstage” region, engaging in “defensive practices” that preserve the integrity of a performance, and maintaining “audience segregation” in performing different roles. As Goffman and other theorists have suggested, a disrupted performance, an image or impression of oneself meant to be presented to one audience involuntarily exposed to another, can lead to deep humiliation or embarrassment. More broadly, as other theorists note, involuntary exposure of information or observation about oneself can result in a profound degree of anxiety, a nervous breakdown, or in some cases, suicide.⁹ While many, if not most, surreptitious recordings will likely cause harm falling short of this, the theory drawn upon here helps to explain why many recordings, when brought to light, will deeply undermine personal autonomy, security, and well-being.

⁷ Stephen Thiele, “To Record or Not To Record: The Implications of Secret Recordings” (2019) 50 Adv Q 235 at 237 [Thiele]; other scholarship includes Martha Shaffer, “Surreptitiously Obtained Electronic Evidence in Seven Simple Steps” (2019) 38 CFLQ 259; John Burchill, “Tale of the Tape: Policing Surreptitious Recordings in the Workplace” (2017) 40:3 Man LJ 247; Carol M Bast, “What’s Bugging You: Inconsistencies and Irrationalities of the Law of Eavesdropping” (1998) 47:4 DePaul L Rev 837; and Abraham Abramovsky, “Surreptitious Recording of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics” (1982-1983) 57:1 Tul L Rev 1.

⁸ Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Doubleday Anchor Books, 1959) [*Presentation of Self*].

⁹ Examples are canvassed below.

Current common law tests for admission should be revised to reflect this deeper sense of harm. This article proposes that where a secret recording captures a private or intimate conversation, rather than balancing probative value and prejudice, courts and tribunals should bar admissibility unless the recording is probative and necessary. A recording should be admitted in criminal cases only where the prosecution demonstrates that it contains the only evidence on a material fact in issue or where the accused shows it is the only means of raising a reasonable doubt. In civil cases, a secret recording should also be admitted only where necessary, such as where one party's credibility is at issue in light of a significant power imbalance, and they have no other means to support this. This revised approach would not preclude the admission of a surreptitious recording of a private conversation that captured the accused or the defendant making a crucial, "smoking gun" admission—but it would preclude admission where the recording would simply serve to corroborate other evidence. A more nuanced test would help minimize or avoid the court or tribunal's complicity in the injustice engendered by the recording and its dissemination.

Part II of this paper provides a brief overview of the test for admitting secret recordings in criminal and family trials and labour and employment law to provide context for how prejudice is currently approached in case law. Part III draws on seminal contributions to privacy theory, along with facets of Goffman's *Presentation of Self* noted above, to better comprehend the harmful effects of surreptitious recording. Part IV applies these insights to craft a more restrictive test for admission. It draws on recent decisions in criminal and employment law to demonstrate how a more nuanced test would lead to different outcomes that would more effectively address the harm at issue.

II. LEGAL CONTEXT

A. Legal Status of Secret Recordings

In 1974, Parliament added a framework to the *Criminal Code* for lawful wiretapping.¹⁰ A cornerstone of the framework is the offence of "intercepting" private communication with a device.¹¹ Among the exceptions carved out of the offence is one for persons who intercept a conversation with the consent of one party.¹² The Supreme Court in *R v Duarte* held that police could not circumvent the requirement to obtain a

¹⁰ *Criminal Code*, *supra* note 1, Part VI.

¹¹ *Ibid*, s 184(1).

¹² *Ibid*, s 184(2).

warrant by obtaining an informant's consent to record a conversation with a target.¹³ While the *Charter* does not protect us from the risk of speaking to a "tattletale," Justice La Forest reasoned, the risk of our interlocutor "making a permanent electronic record" is a risk of a "different order of magnitude."¹⁴ The Court's other cases dealing with surreptitious recordings—*Wong*,¹⁵ *Araujo*,¹⁶ *Fliss*,¹⁷ and *Proulx*¹⁸—concern whether police were authorized to make a recording or what use might be made of the fruit of a recording police have made unlawfully.¹⁹ None deal with the use of a recording by an independent civilian.

As noted earlier, while it may not be an offence to make a surreptitious recording to which one is a party, it may be a tort under provincial legislation or common law. Under the *Privacy Act* of three provinces, making a recording without consent is *prima facie* evidence of the tort of violating privacy and actionable *per se*.²⁰ British Columbia's *Privacy Act* contemplates the possibility that surreptitious recording can be an invasion of privacy.²¹ Excluding the recording from a civil proceeding is a possible remedy.²² In provinces without privacy tort legislation, depending on the facts, a case might be made that a surreptitious recording is actionable at common law under the recently recognized torts of "public disclosure of private facts" or "intrusion upon seclusion."²³ In these cases, however, the concern would be with the disclosure of private information rather than the creation of a recording itself.

¹³ *Duarte*, *supra* note 2.

¹⁴ *Ibid* at 48.

¹⁵ *R v Wong*, [1990] 3 SCR 36, 60 CCC (3d) 460.

¹⁶ *R v Araujo*, 2000 SCC 65.

¹⁷ *R v Fliss*, 2002 SCC 16.

¹⁸ *Proulx v Quebec (Attorney General)*, 2001 SCC 66.

¹⁹ Surreptitious recordings also arise in other Supreme Court cases, but not ones in which the admissibility of a recording is central. These include *R v Hart*, 2014 SCC 52 [*Hart*] and *R v Mack*, 2014 SCC 58 (dealing with the admissibility of Mr. Big confessions); *R v Bradshaw*, 2017 SCC 35 (considering the use of a recording as corroborative evidence when assessing the admissibility of other hearsay evidence) and *R v Jarvis*, 2019 SCC 10 (considering whether making a surreptitious video recording constituted the *Criminal Code* offence of voyeurism).

²⁰ *Privacy Act*, RSS 1978, c P-24 (Saskatchewan); *The Privacy Act*, CCSM, c P125 (Manitoba); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador).

²¹ *Privacy Act*, RSBC 1996, c 373, s 1(4), stating that "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

²² Section 7 of *The Privacy Act* of Manitoba, *supra* note 20, makes this explicit; see also Section 7 of Saskatchewan's *Privacy Act*, *supra* note 20; s 6 of Newfoundland and Labrador's *Privacy Act*, *supra* note 20.

²³ *ES v Shillington*, 2021 ABQB 739 and *Jones v Tsige*, 2012 ONCA 32.

In addition to possibly being an offence or a tort, making a surreptitious recording might also violate rules of professional conduct in certain contexts. Lawyers are prohibited from recording conversations with clients or others, potentially leading to disciplinary action.²⁴ Doctors as well are barred from making secret recordings of their meetings with patients, and doing so can result in discipline for unprofessional conduct.²⁵

B. Tests for Admission into Evidence

While criminal, tort, and regulatory law recognize the moral turpitude of surreptitious recording, courts and tribunals have approached the issue from a different angle. In most cases where a civilian-made secret recording is at issue, the question is not whether it was made lawfully but whether it should be admitted into evidence in the proceedings. The tests vary in different areas of law, but they commonly involve a balancing of probative value and prejudice. Yet prejudice here tends to be assessed, for the most part, in terms of the accuracy of a recording and thus merely extends or duplicates the inquiry into probative value.²⁶

In criminal law, when the Crown seeks to rely on a civilian recording, courts commonly cite the Alberta Court of Appeal's decision in *R v Bulldog* for the test of whether to admit a surreptitious audio or video recording.²⁷ Surveying case law from across Canada, the court in this case holds that a recording may be admitted where it is a "substantially accurate and fair representation of what it purports to show," it is relevant, and its probative value outweighs its prejudicial effect.²⁸ A recording may be admitted where it is distorted or not completely accurate, so long as the deficiency is neither material nor substantial enough to mislead.²⁹ The standard for assessing accuracy and fairness is a balance of probabilities.³⁰ Courts considering admission in criminal law have tended to frame the prejudice a recording

²⁴ See e.g., Rule 7.2-3 of the Law Society of Ontario's Rules of Professional Conduct and *Law Society of Upper Canada v Birman*, 2005 ONLSHP 6 considering this rule in a case involving a surreptitious recording. For further discussion, see Thiele, *supra* note 7 at 239-40.

²⁵ See, e.g., *College of Physicians and Surgeons of Ontario v Dombrowski*, 2016 ONCPSD 2, cited in Thiele, *ibid* at 241.

²⁶ Where surreptitious recordings are more probative than prejudicial, admitting them might entail the use of hearsay evidence. This use is permitted under the categorical exception for party admissions: *R v Schneider*, 2022 SCC 34 at para 52 [*Schneider*]; *R v Couture*, 2007 SCC 28 at para 75; *R v SGT*, 2010 SCC 20 at para 20 [*SGT*].

²⁷ *R v Bulldog*, 2015 ABCA 251 at paras 31-33 [*Bulldog*].

²⁸ *Ibid* at para 33; the court at para 31 cites *R v Crawford*, 2013 BCSC 2402 at para 48 for the point about accuracy.

²⁹ *Bulldog*, *supra* note 27 at para 31.

³⁰ *Ibid* at para 38.

causes the accused in terms of its potential to be misleading or inaccurate.³¹ Judges simply assume that admission would further violate the accused's privacy or briefly acknowledge this and move on.³²

Family law cases also weigh probative value and prejudice, but the balancing is typically framed in a way that marginalizes consideration of the prejudice caused to the affected party. An often-cited case is *Mathews v Mathews*,³³ in which the court recognized a "limited discretion to exclude relevant evidence in this context" depending on a balancing of "the probative value of the evidence as against its prejudicial effect."³⁴ In that case, assessing the probative value of the recording involved consideration of whether it may have been "manipulate[d]... so as to cast the other party in an artificial light."³⁵ Prejudice may arise in relation to the party opposing admission, the trial process, or the reputation of the administration of justice.³⁶ By prejudice to the opposing party, Justice Barrow meant "[t]o the extent evidence is of uncertain provenance, is incomplete or capable of manipulation, it will operate prejudicially."³⁷ Courts across Canada in family cases have adopted a similar test,³⁸ conceiving prejudice to the affected person in terms of fair or accurate representation³⁹ though in some cases, concerns are centered on how relations between a parent and child may be affected.⁴⁰ More commonly, the concern with admitting a recording is grounded in policy, relying on *dicta* in *Hameed v Hameed*.⁴¹ In that case, Justice Sheer suggested that secret recordings by family law litigants "should be strongly discouraged" on the basis that:

There is already enough conflict and mistrust in family law cases, without the parties' worrying about whether the other is secretly taping them. In a constructive family law case, the professionals and the courts work with the family to rebuild

³¹ Discussed further in Part IV below are *R v GJ*, 2012 ONSC 5413 [GJ]; *R v Iyer*, 2015 ABQB 577 [Iyer] and *R v Parsons*, 2017 CanLII 82901 (NL SC) [Parsons]; and *R v Vey*, 2019 SKQB 135 [Vey].

³² This is true of *GJ*, *Iyer*, and *Parsons*, *ibid*; in ways explored further below, *Vey* (dealing with a couple who were surreptitiously recorded by a third person) contains more analysis of the impact that creating a recording has had and admitting it would have on the two accused's privacy.

³³ *Mathews v Mathews*, 2007 BCSC 1825.

³⁴ *Ibid* at para 43.

³⁵ *Ibid* at para 44.

³⁶ *Ibid* at para 53.

³⁷ *Ibid*.

³⁸ See, e.g., *Sordi v Sordi*, 2011 ONCA 665; *Ostrowski v Ostrowski*, 2021 MBQB 160, *FS v TWS*, 2019 YKSC 25; and *AJU v GSU*, 2015 ABQB 6.

³⁹ See, e.g., *LN v DEN*, 2006 CanLII 42602 (ON SC), *Tillger v Tillger*, 2019 ONSC 1463.

⁴⁰ *JCP v JB*, 2013 BCPC 297.

⁴¹ *Hameed v Hameed*, 2006 ONCJ 274.

trust so that the parties can learn to act together in the best interests of the child. Condoning the secret taping of the other would be destructive to this process.⁴²

The test in this case was to “weigh these policy considerations against [the recording’s] probative value.”⁴³

In the labour context, arbitrators have also been wary of admitting secret recordings on the basis of broader policy concerns about their effects on labour relations. “In British Columbia, the prevailing opinion,” wrote arbitrator Dorsey, “is that the evidentiary probative value of surreptitious recordings of workplace conversations is outweighed by the possible deleterious and chilling effect admissibility of such recordings will have on workplace cooperation.”⁴⁴ Arbitrators elsewhere in Canada have also excluded for policy reasons.⁴⁵ In some cases, however, arbitrators have admitted secret recordings on the basis that they were made to “deal with a relationship power imbalance in order to objectively establish their credibility in the face of being accused of being a perpetrator or liar, rather than a victim.”⁴⁶ But arbitrators in other cases have not been so restrictive, admitting recordings primarily based on their relevance and probative value.⁴⁷

Finally, in employment cases, courts perceive surreptitious recording as a threat to the trust relationship central to the contract of employment. In actions for wrongful dismissal, courts refer to employees making secret

⁴² *Ibid* at para 11.

⁴³ *Ibid* at para 13. Other family law cases refusing admission to discourage others from making such recordings include *St Croix v St Croix*, 2017 ABQB 490 and *Shaw v Shaw*, 2008 ONCJ 130.

⁴⁴ *British Columbia Government and Service Employees’ Union v British Columbia Public Service Agency*, 2016 CanLII 77600 (BC LA) at para 13 [BC Government].

⁴⁵ See, e.g., *United Steelworkers, Local 9074 v HCN-Revera Lessee (Waverley/rosewood)LP*, 2016 CanLII 36270 (MB LB) (noting at para 10 that admission would have “a chilling effect on the conduct of labour relations and, in addition, would [...] sanction an unwarranted invasion of the privacy rights of individuals in the workplace”); *Jazz Aviation LP v Canadian Airline Dispatchers’ Association*, 2014 CanLII 39814 (CA LA) (refusing admission, at 15, on the basis that it would “seriously undermine the relationship between these parties” and condone it among “the labour relations community at large”); and *Greater Niagara General Hospital and OPSEU, Loc 215, Re*, 1989 CanLII 9272 (ON LA) [Greater Niagara] [finding at 301-2 that admission would “destroy or deteriorate the longer-term relationship between the parties... [or] cause the parties of other relationships to frisk each other before a meeting would commence.”].

⁴⁶ *BC Government*, *supra* note 44 at para 14; see also the discussion in *Greater Niagara*, *ibid* at 300-01.

⁴⁷ See, e.g., *Direct Energy Marketing Limited v Unifor, Local 975*, 2013 CanLII 89953 (ON LA); *General Electric Canada and CEP Local 544*, [2007] 89 CLAS 28; *Greater Toronto Airports Authority v PSAC* (2007), 158 LAC (4th) 97; *Ready Bake Foods Inc v UFCW, Local 175*, [2009] OLAA No 208.

recordings of meetings or other communication as a breach of loyalty or confidentiality, possibly amounting to just cause.⁴⁸ But courts have admitted recordings where their probative value is compelling in light of a power imbalance or the difficulty of proving something by other means.⁴⁹ However, as in the labour relations context, the focus tends not to be on the impact of a recording on an individual personally.

The balancing test applied in these cases forms part of a broader rule at common law for the admission of evidence. Before exploring the question of prejudice further, an important consideration is whether a more expansive concept of prejudice would be consistent with this rule. The rule holds that evidence is to be admitted if it is relevant, not subject to a rule of exclusion, and the court finds it more probative than prejudicial.⁵⁰ Supreme Court jurisprudence on the scope of what constitutes prejudice points to a concern not to avoid evidence that is adversarial to one party but, more precisely, evidence that is “unfair” to them—or unfair in a broader sense. The Court has held that evidence can be unfair where it is likely to give rise to “moral” or “reasoning” prejudice; for example, by distracting a jury with evidence of a party’s involvement in other crimes, especially violent crimes, and giving rise to general propensity reasoning.⁵¹ But the Court has also held that evidence can be excluded as prejudicial where there was “a significant unfairness associated with obtaining it.”⁵²

In different contexts, this concern with unfairness in a broader sense is addressed in different ways. In Mr. Big cases, the Court has imposed an additional “abuse of process” test alongside the balancing test noted here to address concerns of police conduct arising in that context.⁵³ The “abuse” test serves an analogous role to the component of the confessions rule that allows exclusion on the basis of police trickery that would “shock the community.”⁵⁴ In the context of sexual offences, the Court has held that to

⁴⁸ See, e.g., *Hart v Parrish & Heimbecker Ltd*, 2017 MBQB 68 at para 59; *Schaer v Yukon (Government of)*, 2018 YKSC 46 at para 61; *Sankrecha v Cameron J and Beach Sales Ltd*, 2018 ONSC 7216 at para 155.

⁴⁹ See, e.g., *Rooney v GSL Chevrolet Cadillac Ltd*, 2022 ABKB 813 (employee recording to prove he was being constructively dismissed) [*Rooney v GSL Chevrolet*]; and *Hanni v Western Road Rail Systems (1991) Inc*, 2002 BCSC 402 (employee recording to prove she was dismissed and did not quit—though the court does not discuss reasons for or apply a test for admission) [*Hanni v Western Road Rail*].

⁵⁰ *Schneider*, *supra* note 26 at paras 36, 59; *R v Khelawon*, 2006 SCC 57 at paras 2-3.

⁵¹ *Hart*, *supra* note 19 at para 106; *R v Handy*, 2002 SCC 56 at paras 137-47.

⁵² *Schneider*, *supra* note 26 at para 59.

⁵³ *R v Hart*, *supra* note 19 at paras 84-89.

⁵⁴ *R v Oickle*, 2000 SCC 38 at paras 65-67, Justice Iacobucci, for the majority, noting at para 67: “There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness *per se*, is so appalling as to shock the

be fair to complainants, the right of cross-examination is limited by barring counsel from “resorting to harassment, misrepresentation [and] repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value.”⁵⁵ Parliament has codified a requirement on the part of courts to weigh the effect of admission of sexual history evidence on a complainant’s “dignity, privacy and equality interests”⁵⁶ and also to advance “important societal objectives, including encouraging the reporting of sexual assault offences.”⁵⁷ These examples point to a more expansive concept of prejudice than one relating to faulty inferences or reasoning processes alone.

In turning next to privacy theory and the work of Erwin Goffman, I argue that the balancing tests employed in the four contexts surveyed above fail to recognize the nature and extent of the impact—the unfairness—that admitting surreptitious recording may entail. This will serve as a basis for a test more consistent with the Supreme Court’s more expansive concept of prejudice.

III. A THEORETICAL INQUIRY INTO PREJUDICE

When a person secretly records a private conversation, they deprive one or more of its participants of a fundamental assumption that shapes their conduct. Believing they will be speaking in private inclines the person to make choices about who to speak to and what to say, but also, more generally, how they present themselves in the course of the exchange. When a recording of a private conversation is played to another audience, it reveals utterances a person did not choose to make in that other context, but also—more crucially—it presents the person in a guise they did not choose to assume in any other place or exposes them conducting themselves in a way they would not have chosen to do otherwise. I draw on privacy theory in this part and on Goffman’s more specific theory of self-presentation to help illuminate how and why the violation that a recording brings about may have a more profound social or psychological impact than mere embarrassment or a feeling of betrayal—rendering the balancing tests surveyed earlier inappropriate to the harm at issue.

community. I therefore believe that the test enunciated by Justice Lamer in *Rothman*, and adopted by the Court in *Collins*, is still an important part of the confessions rule.” (Citing *Rothman v The Queen*, [1981] 1 SCR 640, 121 DLR (3d) 578 and *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508.)

⁵⁵ *R v Lytle*, 2004 SCC 5 at para 44.

⁵⁶ *R v RV*, 2019 SCC 41 at para 40.

⁵⁷ *Ibid*, discussing the factors in s 276(3) of the *Criminal Code*, *supra* note 1.

A. Privacy Theory, Control, and Personhood

Most of the salient contributions to privacy theory date to the 1960s and 70s, a period in which tools for surreptitious audio recording were first becoming pervasive in Western culture. The prospect of secret surveillance and recording—primarily by the state—provoked considerable reflection and debate on the nature of privacy in general and law reform to better protect it in an evolving technological landscape.⁵⁸ A key theme in many theoretical works on privacy of the period is the link between privacy, control, and self or personhood. Ideas about the fundamental nature of privacy varied, yet scholars formed a consensus on the point that privacy involves control over access to information about oneself or observations of one's behaviors—and that without this control, a person's relationships, identity, and sense of self would be significantly harmed or impeded.

For Sidney Jourard, privacy is closely linked to the “act of concealment.”⁵⁹ It is the “outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action.”⁶⁰ The desire for privacy is, for Jourard, essentially a “desire to control others' perceptions and beliefs vis-à-vis the self-concealing person.”⁶¹ Similarly, Charles Fried asserts that privacy is “related to the concept of secrecy, to limiting knowledge of others about oneself.”⁶² But rather than involving “an absence of information about us in the minds of others,” privacy involves “the control we have over information about ourselves.”⁶³ For James Rachels, there is a “close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people.”⁶⁴

⁵⁸ This included debate and passage in the US Congress of a general framework for obtaining a wiretap warrant in what would become Title III to the *Omnibus Crime Control and Safe Streets Act of 1968*, Pub L 90-351. In 1967, the US Supreme Court in *Katz v United States*, 389 US 347 extended the guarantee against unreasonable search and seizure in the Fourth Amendment of the US Constitution from property to persons, or more precisely, matters over which a person has a “reasonable expectation of privacy.” (See also Peter Winn, “Katz and the Origins of the Reasonable Expectation of Privacy Test” (2016) 40 McGeorge L Rev 1 at 2-3 and 9; and Brian Hockman, *The Listeners: A History of Wiretapping in the United States* (Cambridge: Harvard University Press, 2022) chapter 7.) In 1974, Canada would include what is now Part VI of the *Criminal Code*, *supra* note 1, setting out the offence of surreptitious recording and a framework for “authorized intercepts” or wiretap warrants.

⁵⁹ Sidney Jourard, “Some Psychological Aspects of Privacy” (1966) 31:2 Law & Contemp Probs 307 at 307 [Jourard].

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Charles Fried, “Privacy” (1968) 77:3 Yale LJ 475 at 482 [Fried].

⁶³ *Ibid* [emphasis added].

⁶⁴ James Rachels, “Why Privacy is Important” (1975) 4:4 Philos & Public Aff 323 at 326

Complementing these approaches, Ruth Gavison asserts that “[o]ur interest in privacy... is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention.”⁶⁵

Privacy theorists also draw a close link between privacy and personhood. For Stanley Benn, privacy engages a “more general principle of respect for persons.”⁶⁶ This relates to control through the concept of choice. As Benn writes, “[t]o conceive someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors.”⁶⁷ “Covert observation” or “spying” is, in his view, “objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice.”⁶⁸ Developing Benn’s theory, Jeffrey Reiman conceives privacy as “an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own.”⁶⁹ “To be a person,” he argues, depends on an individual’s ability to “recognize that he has an exclusive moral right to shape his destiny.”⁷⁰ Privacy is “necessary to the creation of selves out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his own.”⁷¹ When others respect our privacy, they condition and confirm a sense of separateness, agency, and identity we associate with personhood.

Theorists have offered similar views of the consequences of losing control over perceptions of oneself—for identity, relationships, and mental health. As noted, for Rachels, different relationships are “defined” by “different patterns of behavior,” and changes in perception of those patterns can disrupt the relationships.⁷² On discovering that a person one assumes to be a friend has behaved more informally with others, made more intimate disclosures to others, or seen them socially more often, one might reassess

[Rachels].

⁶⁵ Ruth Gavison, “Privacy and the Limits of Law” (1980) 89:3 Yale LJ 421 at 423.

⁶⁶ Stanley Benn, “Privacy, Freedom, and Respect for Persons” in Ferdinand David Schoeman, ed, *Philosophical Dimensions of Privacy: An Anthology*, (London: Cambridge University Press, 1984) 223 at 228 [Benn].

⁶⁷ *Ibid* at 229 [emphasis added].

⁶⁸ *Ibid* at 230.

⁶⁹ Jeffrey Reiman, “Privacy, Intimacy, and Personhood” (1976) 6:1 Philos & Public Aff 26 at 39 [Reiman].

⁷⁰ *Ibid*.

⁷¹ *Ibid* [emphasis added].

⁷² Rachels, *supra* note 64 at 326.

the nature of the friendship.⁷³ This extends to professional relationships and identity, in the sense that one's relations with another in the capacity of employer and employee, doctor and patient, etc., "involves a conception of how it is appropriate for [the persons] to behave with each other" and more broadly, "a conception of the kind and degree of knowledge concerning one another which it is appropriate for them to have."⁷⁴ To maintain these conceptions—and the relationships themselves—we need to "separate our associations."⁷⁵ This allows us to "behave with certain people in the way that is appropriate to the sort of relationship we have with them, without at the same time, violating our sense of how it is appropriate to behave with, and in the presence of, others with whom we have a different kind of relationship."⁷⁶ And to be able to control our relationships, we must have "control over who has access to us."⁷⁷ Similarly, Benn asserts that "[p]ersonal relations... are, in their nature, private. They could not exist if it were not possible to create excluding conditions."⁷⁸

At a further extreme, depriving a person of control over access to information about themselves or their conduct can profoundly damage one's sense of self. Reiman and other theorists have turned to Erwin Goffman's work to make this point, including the latter's essay "On the Characteristics of Total Institutions."⁷⁹ In that study, Goffman examined the effects on self-identity of the complete loss of privacy to which authorities force a person to submit in mental hospitals, prisons, and concentration camps—including a loss of control over information about past conduct, social associations, and ethnicity. Persons are also stripped here of physical privacy, forced to submit to a strict regime of movement in space and time, and at no point left completely alone, resulting in what Goffman terms the "mortification of the self."⁸⁰

In Fried's terms, to be deprived of control over "what we do but [also] who we are" constitutes "the ultimate assault on liberty, personality, and self-respect."⁸¹ Alan Westin, writing in a similar context, asserts that where

⁷³ *Ibid* at 328.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 330.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 331.

⁷⁸ Benn, *supra* note 66 at 236.

⁷⁹ Reiman, *supra* note 69 at 40, citing Erving Goffman, "On the Characteristics of Total Institutions" contained in *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Anchor Books, 1961) [Goffman, "Characteristics"]; see also Alan Westin, *Privacy and Freedom* (New York: IG Publishing, 2002), citing Goffman's essay in chapter 2, fn 32 [Westin].

⁸⁰ Goffman, "Characteristics," *ibid* at 21.

⁸¹ Fried, *supra* note 62 at 485.

a person loses control over information about him or herself, they can be “seared by the hot light of selective, forced exposure,” resulting in “numerous instances of suicides and nervous breakdowns.”⁸² Ample evidence of this can be found in the common recent phenomenon of suicides that follow in the wake of online exposures of sexual or other compromising images.⁸³

B. Goffman’s Presentation of Self

Privacy theorists also pointed to Goffman’s *The Presentation of Self in Everyday Life* (1959) to illuminate the link between privacy, control, and self or personhood.⁸⁴ Goffman’s dramaturgical theory conceives personal identity to be the product of conduct and context rather than an expression of a stable or persisting quality of persons. For Goffman, the self is the product of a performance of character, not the cause. We perform a character—a self—effectively by conducting ourselves differently in “front” and “back” regions, engaging in “defensive practices” to sustain the integrity of a performance, and maintaining what he calls audience segregation. A failure or lapse on any of these fronts results in a failed performance, an appearance out of character, or the inability to present oneself in the manner of one’s choosing, which may cause significant anxiety and distress. In ways to be seen, surreptitious recording subverts all three fundamental dimensions of a performance of self, harming a person’s sense of identity and autonomy.

Goffman’s focus in this work is the study of interpersonal dynamics in a workplace or other “social establishment” where there are “fixed barriers to perception” as a group of people engage in a routine, specific undertaking.⁸⁵ A concept at the core of his analysis is “impression management.” Individuals present an identity to others by sustaining a performance “in character,” which gives rise to “some kind of image, usually creditable,” one seeks “to induce others to hold in regard to him.”⁸⁶ A “self

⁸² Westin, *supra* note 79.

⁸³ See Andrea Slane, “Sexting and the Law in Canada” (2013) 22:3 CJHS 117, noting 117 cases that include the suicides of Amanda Todd and Jessica Logan following the exposure of sexual images; see also the cases noted in Jane Bailey & Mouna Hanna, “The Gendered Dimensions of Sexting: Assessing the Applicability of Canada’s Child Pornography Provision” (2011) 23 CJWL 405 at 407.

⁸⁴ *Presentation of Self*, *supra* note 8. Privacy theorists citing *The Presentation of Self* include Westin, *supra* note 79, chapter 2, fn 29 and 30; Jourard, *supra* note 59 at 307; and numerous contributors to the Schoeman anthology *Philosophical Dimensions of Privacy*, *supra* note 66.

⁸⁵ *Presentation of Self*, *supra*, note 8 at 238.

⁸⁶ *Ibid* at 252.

is imputed to him” on the basis of this image, but as Goffman asserts, “this self itself does not derive from its possessor, but from the whole scene of his action.”⁸⁷ More specifically,

[a] correctly staged and performed scene leads the audience to impute a self to a performed character, but this imputation — this self — is a product of a seeing that comes off, and is not a cause of it. The self, then, as a performed character, is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature, and to die; it is a dramatic effect arising diffusely from a scene that is presented, and the characteristic issue, the crucial concern, is whether it will be credited or discredited.⁸⁸

Individuals carry out a performance of self alone or work in conscious but not overt coordination with a “team of performers” to “present to an audience a given definition of [a] situation.”⁸⁹

Goffman posits a distinction between spaces in which performances of self unfold. In a “back region,” an individual or team prepares for a performance to be presented to an audience in a “front region”—for example, a kitchen separate from a dining room in a restaurant.⁹⁰ “Access to these regions,” Goffman writes, “is controlled in order to prevent the audience from seeing backstage, and to prevent outsiders from coming into a performance that is not addressed to them.”⁹¹ Backstage, a performer can “reliably expect that no member of the audience will intrude.”⁹² “Vital secrets” are visible here, and “performers behave out of character.”⁹³ A “familiarity prevails,” “solidarity is likely to develop,” and “secrets that could give the show away are shared and kept.”⁹⁴ Frontstage, a person aims to “foster the impression that the routine they are presently performing is their only routine or at least their most essential one.”⁹⁵ The audience, in turn, often assumes the character performed “is all there is to the individual.”⁹⁶ This both assumes and enables “audience segregation,” or a commitment a person makes to “ensur[ing] that those before whom he plays one of his parts will not be the same individuals before whom he plays a different part in another setting.”⁹⁷

⁸⁷ *Ibid.*

⁸⁸ *Ibid* at 252-53 [emphasis added].

⁸⁹ *Ibid* at 9, 238

⁹⁰ *Ibid* at 238.

⁹¹ *Ibid.*

⁹² *Ibid* at 113.

⁹³ *Ibid.*

⁹⁴ *Ibid* at 238.

⁹⁵ *Ibid* at 48.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 49.

In the course of a performance, an individual or team might be confronted with events that “contradict, discredit, or otherwise throw doubt upon” the role or image they seek to maintain. This can lead to shame, embarrassment, hostility, or a “kind of anomy that is generated when the minute social system of face-to-face interaction breaks down.”⁹⁸ Persons will engage in “defensive practices” to avoid or “save the definition of the situation” or the impression they were seeking to project.⁹⁹ Among these practices are “dramaturgical loyalty,” or not “betray[ing] the secrets of the team,”¹⁰⁰ “controlling access to back regions and front regions,”¹⁰¹ and relying on the “tact” of others to “stay away from regions into which they have not been invited.”¹⁰²

As noted earlier, “disruptive events” such as the interruption of a performance, a breach into the backstage region, or a failure to keep audiences segregated can leave a person “ill at ease,” “ashamed,” or “deeply humiliated.”¹⁰³ But more than shame or embarrassment, the disruption engenders a profound sense of disorientation. “Assumptions upon which the responses of the participants have been predicated become untenable,” Goffman writes, “and the participants find themselves lodged in an interaction for which the situation has been wrongly defined and is now no longer defined.”¹⁰⁴ A person in these moments loses control over a performance of self but also has no clear means to repair or “save the situation.” What is at stake in these moments, Goffman suggests, is the recognition that we have relinquished a moral claim on others. When a person maintains an image of self or “makes an implicit or explicit claim to be a person of a particular kind,” they exert a “moral demand” on others, “obliging them to value and treat him in the manner that persons of his kind have a right to expect.”¹⁰⁵ When a person fails to maintain an appearance, he “foregoes all claims to be things he does not appear to be.”¹⁰⁶ The anxiety and distress experienced in disruptive moments reflect a fear of this deeper loss.

⁹⁸ *Ibid* at 12.

⁹⁹ *Ibid* at 13-14.

¹⁰⁰ *Ibid* at 212.

¹⁰¹ *Ibid* at 229.

¹⁰² *Ibid*. As Goffman notes, “when outsiders find they are about to enter such a region, they often give those already present some warning, in the form of a message, or a knock, or a cough, so that the intrusion can be put off if necessary or the setting hurriedly put an order in proper expressions fixed on the faces of those present.”

¹⁰³ *Ibid* at 12,244.

¹⁰⁴ *Ibid* at 12.

¹⁰⁵ *Ibid* at 13.

¹⁰⁶ *Ibid*.

Goffman wrote *The Presentation of Self* at a time when audio recording technology had yet to become pervasive and surreptitious recording a common cultural practice. Had this been the case, it would have furnished Goffman with a signal instance of a disruptive event—one that violates all the necessary conditions for the effective performance of self. A conversation secretly captured, either by a party to the conversation or a third party, which is then played to uninvited others effects a transgression of front and back regions. It suspends audience segregation. It also makes defensive practices all but impossible to “save the situation” or permit an affected person to maintain an image of self or identity before contaminated audiences. A recording might, in this way, foreclose or preclude the possibility of maintaining a certain impression of self, which in some cases may render it difficult, if not impossible, for the person to sustain a relationship, a professional identity, or an institutional position.

A surreptitious recording forecloses possibilities and deprives a person of choice or control over how they present themselves because it links them with a certain impression of self in contexts beyond their control. The most notorious historical example of this may be the surreptitious recording that surfaced in the British press in 1993 of a phone conversation then-Prince Charles had in 1989 with Camilla Parker Bowles in which the two engaged in a form of phone sex.¹⁰⁷ At one point, Charles suggested that if he returned in another life, “I’ll just live inside your trousers or something.”¹⁰⁸ She suggested he might return “as a pair of knickers.” He added, “God forbid, a Tampax.”¹⁰⁹ The disclosure of the conversation violated his privacy in the sense of revealing information about his intimate desires, but it also permanently associated Charles with this peculiar, salacious image. Regardless of how formal or stately an impression of self the King may attempt to present, he will forever be associated on some level with a far more intimate and compromising impression. “Camillagate” illustrates *in extremis* the violence to personal identity, autonomy, and self or personhood that surreptitious recording is capable of affecting.

Secret recordings made by a person not party to a conversation are more invasive than those made by a person who is a party, which are more common in the litigation considered in this paper. One might question whether secret audio recordings made in the latter case—by a party to a conversation—result in significant harm or deprive an affected person of choice or control over the presentation of self. The person to whom one

¹⁰⁷ Sally Bedell Smith, *Prince Charles: The Passions and Paradoxes of an Improbable Life* (New York: Random House, 2017) at 244 describes the exchange in these terms.

¹⁰⁸ *Ibid* at 245, quoting the published exchange.

¹⁰⁹ *Ibid*.

makes a disclosure can always turn around and share this with other audiences. By choosing to present oneself in a certain way to certain people, are we not risking the disclosure of that self-impression to everyone our interlocutor might speak to? The purpose of drawing on Goffman's theory was to support the argument that there is a qualitative difference between a person revealing things another person has said to them in private and a person playing a recording of them doing so. In one case, we glean information about a person's opinions, beliefs, or knowledge. In the other case, we gain direct access to a performance of self—one that indelibly marks our impression of a person's character and identity.

Further examples involving recordings made by persons present or parties to a conversation do not prove this point. But they illustrate how the disclosure of a recording itself can be more damaging to a person's self-identity than a mere disclosure of statements a person has made. In 2014, a recording surfaced of Donald Sterling, then-owner of the NBA's Los Angeles Clippers, in which he could be heard making disparaging comments about black people. The recording stirred public outrage that could not be subdued by attempts to contextualize or deny the statements, resulting in his being banned from the NBA for life.¹¹⁰ In 2010, actor Mel Gibson's ex-girlfriend revealed recordings in which he had made racist and sexist comments to her in the course of a hyperbolic rant with which he has become notoriously associated. In 1972, a recording intended to remain private became public in which President Nixon discussed the Watergate break-in. The now infamous recordings made clear that he had ordered the cover-up of the scandal, but they also captured him speaking in dark, conspiratorial tones that would significantly contribute to a shift in public opinion and a loss of party support that would result in his resignation.¹¹¹ In each of these cases, an unintended audience gains more than new information about a person; they gain a direct glimpse at a presentation of self that is inconsistent with earlier impressions, beyond the control of the affected party, and one with which they become permanently associated.

The point is not that people with racist opinions or criminal ambitions should have their "true" selves sheltered from public exposure. The point is that a secret recording deprives a person of choice and control over the presentation of self, and the loss can significantly impair one's identity,

¹¹⁰ Jon Swaine, "NBA bans LA Clippers owner Donald Sterling for life over racist comments" (29 April 2014), online: *The Guardian* <www.theguardian.com/world/2014/apr/29/nba-la-clippers-donald-sterling-lifetime-ban-racist-comments [perma.cc/ZQ7H-L3BQ].

¹¹¹ Rick Perlstein, "Watergate Scandal" (last modified 16 June 2023) online: *Britannica* <www.britannica.com/event/Watergate-Scandal> [perma.cc/E9LZ-UQFK].

relationships, and career. The examples here involving celebrities are sensational and extreme in their consequences, given the scale of the reputations involved. One might suggest as a counter-argument that the secret recordings in everyday litigation may result in some degree of embarrassment, but the harm could never be on the same scale since the reputations and the stakes are far more limited.

In many cases, this may be true. A recording that exposes a non-celebrity's private performance of self to an unintended audience may not lead to significant harm. It may not foreclose—in any meaningful way—possibilities and choices for self-presentation elsewhere. The point, however, is that this could happen and is more likely to happen when a person presents him or herself in an intimate setting. The greater likelihood of harm resulting from the fact that a private conversation would be exposed by its use in court supports a rule that such recordings be presumptively inadmissible, with limited exceptions.

IV. A MORE NUANCED TEST FOR ADMISSION

A. Elements of the Test

As noted in Part II, courts and tribunals acknowledge the moral turpitude of surreptitious recording, but they do not generally consider this to be sufficiently serious to warrant a blanket exclusion on admission. There is a good reason for not doing so. Not all surreptitious recordings capture private conversations, and when they do, not all private conversations will lead to harm when a recording of them is exposed. A test that considers recordings case by case is appropriate.

The principal concern highlighted here is the capture of an intimate or private conversation that takes place in a space analogous to Goffman's backstage region or where a person presents an impression of self they would not have chosen to present to any other audience. This may or may not be captured in a recording made in a workplace; it may or may not involve the intimacy of only two people. The question is whether a person had a reasonable expectation of privacy in the situation—or whether they would have had no reason to assume they were being recorded.¹¹² The test and case law dealing with when a person has a reasonable expectation of privacy for

¹¹² A relevant consideration here—beyond the scope of this paper—is what effect now ubiquitous listening devices in intimate settings, such as Amazon's Alexa, Google's Nest Hub, or Apple's HomePod, would have on such expectations. One would assume these might diminish but not preclude an expectation that entire conversations will not be recorded or disseminated.

the purposes of a search under section 8 of the *Charter* is extensive.¹¹³ When deciding on the admission of a surreptitious recording, courts, and tribunals need not engage in an inquiry of that depth. A simpler question about the nature of the communication might be whether making a recording vitiates a person's choice about who to speak to, what to say, or how to conduct themselves. Had they known they were being recorded, would the person still have chosen to act in the way they did?

The discussion in Part I was meant to show that when a secret recording vitiates this choice, it can profoundly affect a person's autonomy, identity, relationships, and well-being. Current tests for admission of recordings in criminal, family, employment, and labour law fail to address this concern effectively. As noted in Part II, the test in each area involves a balancing of prejudice and probative value, but the inquiry into prejudice is mostly limited to assessing the fairness or accuracy of the conversation depicted or general policy concerns. Recordings tend to be admitted where their probative value is strong.

A revised test would set aside balancing and place equal weight on prejudice, probative value, and necessity. It would ask, first, whether a recording contains a fair and reasonably accurate depiction of the conversation it captures and whether making and disseminating the recording vitiates a person's choice over who to speak to and how to conduct themselves in a given context. Where the recording is either inaccurate or violates a person's expectation of privacy in the sense noted, it should be inadmissible except in limited circumstances. Criminal courts confronted with a recording the Crown seeks to tender should follow the approach that Parliament took in Part VI of the *Criminal Code* for a standard wiretap warrant—one where no party to a conversation has consented to being recorded. This requires police to demonstrate “investigative necessity,” or show that other investigative procedures have failed, are unlikely to succeed, or are impracticable.¹¹⁴ The Crown seeking to tender a recording the complainant made about her conversation with the accused should be required to demonstrate an analogous form of necessity: i.e., that no other evidence on a material fact in issue is available. Where the recording would simply corroborate the complainant's testimony, it should not be

¹¹³ An overview of the Supreme Court of Canada's jurisprudence on point can be found in Robert Diab & Chris DL Hunt, *Search and Seizure* (Toronto: Irwin Law, 2023), Chapter 4 [Diab & Hunt].

¹¹⁴ *Criminal Code*, *supra* note 1, s 186(1). The Supreme Court in *R v Araujo*, 2000 SCC 65 at paras 29, 39, cautioned that the test with respect to “other investigative procedures” is not which measures are “most efficacious,” as some lower courts had held, but which are left when there is “practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.”

admitted.¹¹⁵ Similarly, the accused should be permitted to adduce a secret recording only where it is the only means by which he or she may establish innocence—a rule that would function in an analogous manner to which criminal courts approach the waiver of informer or solicitor-client privilege.¹¹⁶ In a civil case, a claimant's recording of a private conversation should be admitted only where the claimant suffers a significant power imbalance casting their credibility into question—such as a case involving an employee alleged to have committed acts against her employer amounting to wrongful dismissal.¹¹⁷

I canvas examples below but make two points here. This revised test is premised upon a different conception of prejudice operative in the current common law test. There, the court is concerned primarily with “the prejudicial effect of the evidence on the trier of fact, which is its propensity to distort or undermine the fact-finding process.”¹¹⁸ Here, the court is concerned with both prejudice to the fact-finding process and a broader unfairness in the acquisition or use of the evidence. The revised test would bear a similarity in this way to the Supreme Court of Canada's approach to

¹¹⁵ Under s 184.2 of the *Criminal Code*, police may obtain a warrant to record a conversation where they have one party's consent without having to establish investigative necessity. In this case, a secret recording could be admitted in a criminal case on the basis of police having only demonstrated reasonable and probable grounds to believe the conversation would yield evidence of an offence. This would entail invasive recordings being admitted where the evidence may not be necessary to the prosecution (in the sense of being the only evidence of a matter in issue). The argument in this paper supports a case for amending the *Criminal Code* to include an investigative necessity component as a requirement for obtaining a consent wiretap warrant in s 184.2. An analogous component to necessity is implied in the *Criminal Code*'s third category of wiretap authorizations—emergency interceptions—which limit these to cases involving exigent circumstances: see the overview in Diab & Hunt, *supra* note 113, Chapter 6.

¹¹⁶ The general framework for waiving informer privilege where innocence is at stake can be found in *R v Leipert*, [1997] 1 SCR 281 at para 21, which requires “a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused.” The test for waiving solicitor-client privilege where innocence is at stake is found in *R v McClure*, 2001 SCC 14. Justice Major, writing for the Court, held at para 48 that “[b]efore the test is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way.” At para 50, in the first stage of the test, the accused establishes that a privileged communication “could raise a reasonable doubt about his guilt.” At para 51, in the second stage, the judge reviews the communication to decide “whether, in fact,... it is likely to raise a reasonable doubt.”

¹¹⁷ As noted in Part III, this has been a component of the assessment of whether to admit in some but not all labour and employment cases.

¹¹⁸ *Rooney v GSL Chevrolet*, *supra* note 49 at para 18.

assessing privilege over therapeutic records in the hands of a third party in *M(A) v Ryan*,¹¹⁹ *R v O'Connor*,¹²⁰ and *R v Mills*,¹²¹ and the admissibility of documents engaging a complainant's privacy in the hands of the accused, under section 278.92 of the *Criminal Code*, in *R v JJ*.¹²² The Court, in these cases, crafts a framework for admission or guidance for applying a statutory framework, which calls on a judge to assess the impact of admission on the complainant's privacy—its potential impact on her personally—and also its impact on future complainants. The test proposed here brings a sensitivity to individual harm found in these contexts to the case of surreptitious recording.

The second point is that the revised test would not preclude admitting into evidence recordings of a highly private conversation in which a person makes a “smoking gun” admission—but it would restrict their admission to cases where they are probative and necessary, rather than being more probative than prejudicial. Necessity would function here in an analogous but distinct sense from the way it does in the case law on the principled exception to hearsay. In that context, evidence is necessary where the declarant or the hearsay testimony is not available and no adequate substitutes can be found.¹²³ Here, necessity would be established only after persons with knowledge of the content of a recording have testified and the content remains in issue. For example, if a plaintiff testified to something they heard a defendant say in a conversation the plaintiff surreptitiously recorded, necessity would be made out only once the plaintiff is cross-examined and it remains uncertain precisely what the defendant said (e.g., where the defendant disputes the plaintiff's evidence). The rule is meant to protect the defendant from the invasiveness of having the recording played in open court; it is not meant to shield them from the truth.

In ways to be explored below, this revised test would lead to different results in many cases and would better reflect the injustice courts and tribunals should seek to minimize or avoid. On a practical point, the change proposed here might be adopted by modifying the common law rule or by amending legislation, including the *Canada Evidence Act*.¹²⁴ The quicker and more practical path to reform would be to change the common law, given the variety of statutes on point and the slower pace of legislative change.

¹¹⁹ *M(A) v Ryan*, [1997] 1 SCR 157, 143 DLR (4th) 1.

¹²⁰ *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

¹²¹ *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1.

¹²² *R v JJ*, 2022 SCC 28.

¹²³ *R v Khelawon*, 2006 SCC 57 at paras 76-78.

¹²⁴ *Canada Evidence Act*, RSC 1985, c C-5.

B. Examples of the Test Applied

Here, I briefly canvas three cases to illustrate how a revised test would apply to situations involving differing degrees of prejudice, probative value, and necessity.

In *R v Iyer*,¹²⁵ a property developer made fraudulent misrepresentations at meetings with investors caught on surreptitious recordings made by the boyfriend of one of the investors. The court found the recordings were substantially accurate depictions of what they captured. The accused had made statements relevant to and probative of elements of the 33 counts of fraud he was charged with, and the court found that this outweighed any prejudice that admission might cause.¹²⁶ The decision is unclear as to whether the meetings were open to the public, but they involved potential investors presumably comprised of members of the public. The recordings would not meet the necessity portion of the revised test proposed here because they merely corroborated the testimony of the complainant and her boyfriend. But the court would not reach that stage of the test. The recordings would be admissible by virtue of not being significantly prejudicial. The accused had a low—if any—expectation of privacy in his remarks at the meetings. Had he known he was being recorded, he would likely have still chosen to speak and conduct himself in substantially the same way—apart from making fraudulent assertions.

But had the investors in *Iyer* consisted of a small group of friends in an intimate setting—a dinner party—on the revised test proposed, a recording of it may not have been admissible. In this case, admitting the recording could entail a significant violation of the accused's privacy while only corroborating the testimony of defrauded investors. To be clear, the recording would be excluded in recognition of the court placing a higher value on disassociating from the invasive conduct at issue rather than making use of evidence that would merely corroborate other evidence on point.

The facts in *R v Vey* provide a more dramatic example of the concerns at issue.¹²⁷ A wife, Brigitte, suspected her husband, Curtis, was having an affair and hid an iPod under the dining room table of the family home. It captured a discussion Curtis had with another woman, Angela, when no one else was home—about killing Angela's spouse. Brigitte brought the device to the police station, gave a statement, and handed an officer the

¹²⁵ *Iyer*, *supra* note 31.

¹²⁶ *Ibid* at paras 57-60, Justice Moen does not discuss how admitting the recording might cause prejudice here, but simply asserts that “the recordings are more probative than prejudicial.”

¹²⁷ *Vey*, *supra* note 31, discussed in more detail below.

iPod.¹²⁸ She testified to wanting to hand over the device to police but also that the officer had said to her, “I’m going to have to take this from you.”¹²⁹ Three days later, Curtis and Angela were arrested and charged with conspiracy to commit murder. The accused sought to exclude the recording on the basis that the officer had unlawfully seized it and then listened to it without a warrant in violation of section 8 of the *Charter*.¹³⁰ The court agreed and excluded the recording under section 24(2), given the finding that police ought to have known the conversation on the iPod was private and required a warrant and that it was created illegally.¹³¹

The decision in *Vey* is not clear on the content of the conversation captured on the recording. But one might infer from the fact that the couple was charged with conspiracy to commit murder that it captured, with reasonable accuracy, the *actus reus* of the charge: an agreement among two or more persons to commit murder—*i.e.*, rather than merely a discussion about the possibility of killing Angela’s spouse.¹³² Assuming this was the case, the recording in *Vey* would likely satisfy the current common law test for admission, surveyed in Part II, on the basis of being more probative than prejudicial. But it would be excluded under the revised test proposed here, on the basis of being probative but not necessary.

The Crown could still call Brigitte, the wife who made the surreptitious recording, along with any other person who heard the recording (in this case, her son and two police officers), to testify as to their recollection of its content—and that evidence would be permitted under the party admission exception to the rule against hearsay.¹³³ The Supreme Court of Canada held

¹²⁸ *Ibid* at para 36.

¹²⁹ *Ibid* at paras 37,39.

¹³⁰ One can surmise that under the common law test for admission, which asks only whether the recording is more probative than prejudicial, it likely would have been admitted. For further discussion of this case and its finding that police receipt and review of the recording constituted a violation of section 8, see Robert Diab, “Surreptitious Recordings by Civilians in Criminal Trials: Challenging Their Admissibility at Common Law and Under the Charter,” forthcoming in the Canadian Criminal Law Review.

¹³¹ *Vey*, *supra* note 31 at para 152.

¹³² *United States of America v Dynar*, [1997] 2 SCR 462, holding at para 86 that conspiracy consists of “an intention to agree, the completion of an agreement, and a common design” and citing the Court’s earlier decision in *Papalia v The Queen*, [1979] 2 SCR 256 at 276, for the proposition that “[t]he *actus reus* is the fact of agreement.”

¹³³ In *SGT*, *supra* note 26 at para 20, Charron J for the majority holding “statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents.” Justice Charron distinguishes statements made to “ordinary persons, such as friends or family members,” which are presumptively admissible, from those made to a “person in authority,” which require the Crown to prove voluntariness beyond a reasonable doubt.

in *R v Fliss* that a police informant who makes what turns out to be an unlawful secret recording of a conversation (which is excluded) may testify to the content of the conversation and refresh his memory by consulting the recording.¹³⁴ A similar logic would apply here. The recording would be excluded in recognition that admitting it at trial would permit the Crown to rely on a highly invasive and unlawful act but not hinder the Crown from relying on information gleaned from it.

Hanni v Western Road Rail Systems offers an example of how the revised test proposed here might apply in the civil context.¹³⁵ In this case, the plaintiff worked as an office manager for 12 years for a company that loaded lumber onto railway cars. She had a reputation among employees and customers for being “gruff” and abrasive.¹³⁶ Her employer urged her to address this, to no avail. The employer then imposed a series of changes to her employment while issuing an ultimatum that she could accept the changes or receive two months’ pay in lieu of notice and be dismissed. The plaintiff surreptitiously recorded a conversation she had with her supervisor to clarify the situation. The discussion captures the supervisor presenting her with the ultimatum, which the court found was tantamount to her dismissal.¹³⁷ The decision does not indicate whether the recording was admitted after a *voir dire* or what considerations were applied in admitting it.

However, on the revised test proposed here, the recording would be admissible on two grounds. First, it did not capture an intimate or highly private conversation. It does not compel the inference that had the supervisor been aware that he was being recorded, he would have conducted himself in a substantially different way. And second, even if it did, it was necessary in a way that related to the plaintiff’s credibility. The defendant presented plausible evidence that she was a difficult employee and marshalled various other evidence to support its version of events. The recording was the only means by which she could seek to rectify this power imbalance in support of her credibility.

In *Vey*, the wife was not prompted to make the recording by police and would not meet the test for being an agent in *R v Broyles*, [1991] 3 SCR 595 or for being a person in authority, in *R v Grandinetti*, 2005 SCC 5.

¹³⁴ *R v Fliss*, 2002 SCC 16.

¹³⁵ *Hanni v Western Road Rail*, *supra* note 49.

¹³⁶ *Ibid* at para 19.

¹³⁷ A transcript is excerpted at para 32 of the decision, *ibid*.

V. CONCLUSION

The law on surreptitious recording in Canada is inconsistent and in conflict. It criminalizes secret recording where a person is not a party to the conversation and makes it tortious to do so in some cases where a person is a party. But where a person has made a recording, and the recording is invasive and deceitful in nature, courts and tribunals will admit it so long as its probative value outweighs the prejudice it may cause. Yet the concern with prejudice is, in most cases, largely confined to a concern over the fairness and accuracy of a recording—which does little more than extend the inquiry into probative value. And while some judges and adjudicators have raised policy concerns about the effect of condoning the practice on future litigants, generally, they tend not to think about prejudice in terms of the effect of admitting a recording on the person whose privacy it would violate.

The survey of privacy theory and the work of Erving Goffman in this paper aimed to show that the impact on a person surreptitiously recorded can be profound. By exposing a person's private conversation to an audience they had not chosen to speak to, a recording can deprive a person of a significant measure of autonomy and control over how they present themselves. This can do more than invade privacy in the sense of exposing information or capturing an admission. It can deeply affect a person's identity, relationships, and well-being.

The common law test for admission in criminal, family, labour, and employment law should be revised to better reflect the nature and extent of the harm at issue. Rather than weighing probative value against prejudice in the limited sense noted above, courts and tribunals should admit secret recordings that capture intimate or private conversations only where probative and necessary. This would not hinder the use of such evidence where it is essential, yet it would also make its admission less routine, reflecting a recognition of the harm it may cause and a value placed on not condoning it.